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Introduction

It is a great pleasure to talk with you about writing constitutions for a democratic Burma. I just finished an eight month visit to Europe, where I spoke about you to many people. I found that everywhere I went, people knew about your movement, your courage, your resolution to live according to democracy and the rule of law. Your hope gives them hope that the world can be a better place, because there are people striving to make it so. Hope is one of the greatest gifts that people can give to each other, and so I bring you thanks from people that you have not even met.

Over the last couple of centuries, one of the things that has made the world better is the ideal of the rule of law. In politics, people are often selfish: they want their own way, to rule others. But now and then, a miracle occurs: people get together to proclaim that government should rule for the good of all, rather than just the good of the rulers. In this view, rulers are obligated to care for all, without favor, because they receive their power on trust and only so long as they govern well. One way to express this idea is that government should govern according to the rule of law (meaning a set of general impartial principles) not according to the mere wishes of the powerful. Of course, it is difficult to put the rule of law into effect, and no country has ever honored it perfectly. For that reason, many are cynical about the possibility that governments can ever govern well. But that view is a self-fulfilling prophecy: if you are convinced that governments will always be bad, then you will never do anything to make them good, and governments will stay bad.

I have said that living according to the rule of law requires living according to general principles for the good of all. But what are these general principles, and how do we discover them? Constitutionalism is one way that people have tried to discover these principles and put them into practice. A constitution is a set of political and legal ideals that is regarded as more fundamental than any other set of ideals. The citizens of the country and the government promise to pursue these ideals. In writing a constitution, then, we are trying to identify those principles that we hope will allow us to live according to the rule of law, rather than the mere whim of our rulers.

For many years, constitutional theorists imagined that you could develop one perfect constitution that would work equally well for everyone—all countries, peoples, and provinces. Constitutionalists strove to discover that one perfect constitution, the Holy Grail of constitutional theory. Once it was discovered, then constitution-writers the world over could just adopt it as their own. I am sad to say that the United States government has often insisted that the United States constitution is perfect for everyone. Sometimes the US government has tried to force other countries to use the US constitution as the model for their own constitution, without considering whether it was right for them.

But in more recent years, most constitutionalists have denied that you can discover a one-size-fits-all constitution. It is true that all around the world, people have much in common, so some constitutional principles may be important for everyone—such as liberty, equality, impartiality and the like. But every country will understand these principles in a somewhat different way, and each country will likely add some principles to this basic core, according to its own traditions. As a result, the world's constitutions are somewhat diverse. This diversity is quite a good thing. It is good for each country, because each governs itself in its own way, rather than trying to live under someone else's constitution. And it is good for the world, because countries can learn from each other's constitutions only if they are different; and they might even learn to respect each other across their differences.

Let me offer one illustration. The constitutions of the world have different arrangements for dividing power between the center and localities. Some constitutions are unitary: they give all power to the center. Local governments are servants of the center, which can give them power, take it away, or eliminate them altogether. Some constitutions, by contrast, are federal, which means that they divide power between the central government and the more local governments, such as those of provinces or states. In a federal constitution, the central government has some powers, and the states have other powers, and neither may invade the others'. Now neither system is right for everyone: unitary constitutions are right for some countries and federal constitutions are right for others. So what is right for India or Thailand may not be right for you.

Two countries offer good examples of this difference: the US and France. The United States is often seen as the paradigm of a federalist country, and federalism suits us well because we value our diversity at the local level. By contrast, France is often taken to be the paradigm of a unitary country, and this arrangement suits the French well, because national unity is deeply a part of their culture. Perhaps France sometimes over-emphasizes national unity, and perhaps the United States does not care enough about national unity, but by and large each has picked the right system for itself. Unfortunately, the people of each country, even the lawyers, have difficulty understanding the constitutional system of the other. And because they don't understand it, they tend to dislike it. Too many Americans imagine that the central French government is dominating and oppressive, and too many French people imagine that American federalism is chaotic and irrational. I wish that we could manage more respect.

In short, then, we must fit the constitution to the people: we must design a system of principles that will work for a particular country. When I think about Burma, one of the things that I first note is that Burma has a magnificently diverse range of local cultures: the Shan, Karen, Chin, Kachin, Arakanese, Karenni, Wa, Pa-O, the ethnic Burmans themselves, and all the others. Each has much to teach the others and the rest of the world. To live in its own way, each culture may need its own constitution and an appropriate degree of self-determination. With luck, the people of each constitution will love the people of the other constitutions—not despite their differences but because of them, as differences bring richness to our lives. Sadly, people in Burma have sometimes hated or feared people different from themselves. This problem afflicts the whole world, and no place is free of it. But hatred can destroy a country, and we need to find ways to reduce it. Constitutionalism has long struggled with this problem, and many believe that the right constitution

can help to lead a country away from internal division and toward the rule of law.

I. State-Building and Nation-Building

To understand the way that constitutionalism can help with task, let us begin by talking about two concepts: the nation and the state. As a quick summary, the state refers to a sovereign government—the legislature, the army and so on. The nation by contrast, refers to a group of people who believe themselves to share a common destiny, as members of the same people or culture or kin. A nation-state is a sovereign state whose citizenry is largely composed of people who share a nationality, so that the state is the alter ego of the nation. In this case, the purpose of the state is to promote the good of the nation, by allowing it to express its will through sovereignty.

In the past, many Europeans have claimed that all nations should have their own states, and all states should grow from a single nation. In other words, all states should be nation-states. But in fact, this common claim is false. A state need not contain just one nation. Indeed, most states are multinational: they contain a number of nations. The state may have one dominant nationality with a number of smaller ones, or it may have two nationalities of roughly equal numbers, or it may have many, many nationalities, all so small that none could ever dominate by force of numbers. In all these cases, we have not a nation-state but a multi-national state. And a multi-national state need not be—and usually should not be—the alter ego of one of its nationalities. Because the state governs all, it would be unfair for it to find its soul in the traditions of just one group. And so such states do not exist for the good of just one nation, nor do they express the sovereign will of just one nation.

States always face tensions and conflict. When that happens, we need to find some unity to help us stay together in peace. In nation-states, leaders often hope to find unity by nation-building: they hope to reinvigorate the national culture, so that everyone feels connected to it. In other words, they try to make everyone more the same, because more strongly identified with the nation. A constitution in this kind of state might try to express the national identity of the state, by establishing a national religion or one national language or the like.

But in a multi-national state, nation-building can spell oppression. If the state contains many cultures, but the state tries to impose just one national culture on all, then the minority groups will inevitably be forced to give up their national identity, which commonly they prize highly. For multi-national states, then, nation-building may not be the answer. Instead, the way to find unity may be state-building. What the citizens of a single state all share, despite their different cultures, is that they live under one scheme of law and governance. In such a state, unity can be found only in that very scheme of state organization. Citizens do not share a culture, religion, or language, but they are committed to the structure that allows them to live together in peace. The constitution creates that structure, and so constitutions are central to state-building in multi-national republics. A good constitution in a multi-national state therefore must ask for unity where it is essential for the groups to live together; but it must otherwise allow the different cultures to govern themselves in their own ways. In this kind of state, we are bound together in one framework of basic law, but one of the

main goals of that framework is to allow us to be different.

What goes into this common framework of basic law? This is a complicated question, and we will spend a great deal of time contemplating a possible answer for Burma. For now, the most important point is what it does not include: the constitution does not pledge the state to be the servant of its most powerful group. Indeed, the constitution may forbid the state from becoming the servant of its most powerful group. Instead, when it strives to create a common framework of law, the constitution may pursue one of two strategies: it may take pieces from each of its cultural groups, so that it is really a blend; or it may try to create a national law that does not come directly from any of its groups, so that it, so that it stands on its own feet. Now if the state's identity is not yoked to one of its groups, then it can allow all the individual nations to govern themselves, within the general framework of federal law. And because the nations together form the state, then the individual nations need not fear the central government. In other words, because the state is unified in a way that gives no group pre-eminence, then state unity need not involve the elimination of all difference. The state can find unity in the resolution of all its parts to accept each other's differences.

Here then is a quick summary: a state is a government; a nation is a people; in a nation-state (a mono-national state), the state represent only a single nation, and the leaders look to nation-building; but in a multi-national state, the state must not serve just one nation, and so it cannot look to nation-building; instead, it must build a state that allows all of its groups to live together and also to keep their differences.

So that's the point in a nutshell. Any constitutional system for Burma must address how you want the nationalities to relate to the state and vice-versa. Outside Burma, people have strong views about how state and nation should relate, and they will press their views on you. One French law professor, for example, told me that Burma needed to be unified around a single national identity, so that it won't disintegrate. My own view is different: I think that multi-national states must find unity in something other than a single national identity. Imposing one national identity will likely lead to real disunity, because the nationalities will fight to protect their identities. Paradoxically, to get unity, you must allow for diversity: if the nationalities feel that the state permits them their differences, then they will feel committed to it. They will support and protect the state that in turn supports and protects them.

So there you have two different views about the relationship between state and nation in the context of Burma. But in the long run, it matters not at all what some law professor thinks about your future. What matters is what you think, because this is your constitution: you must live under it, and it will work only if you feel attached to it. And because the relationship between state and nation is so controversial, I would like now to outline the controversy about states and nations. I hope that with this information, you will be better able to navigate the storms of opinion. That way, when people throw advice at you, you will know that even the experts disagree among themselves, so no-one's view is incontrovertible.

A. States

Let us start with the idea of the state, which refers to a sovereign government and its agencies. Concretely, the concept refers to the legislature, the executive, the judiciary, the regulatory agencies, the military, the public schools, the diplomatic corps, and so forth. At the level of theory, the state refers to a sovereign body. Sovereignty has two dimensions, internal and external. Internally, sovereignty refers to the ultimate authority to govern. In other words, the sovereign is the one who has the final say in decisions about how society shall be ruled. Many think that for this reason, the sovereign must have a monopoly on the legitimate use of force. This means that only the sovereign can rightfully decide how force shall be used in society. The sovereign may allow someone else to use force: for example, the state may authorize you to defend yourself. In practice, many people do use force without state permission. But in this theory, only the sovereign may rightfully decide how force shall be used.

Externally, sovereignty means that states have a right to govern themselves without outside interference. In other words, sovereign states may not intervene in each other's internal affairs. For this reason, many groups want to claim to be a sovereign. That way, they can insist that others leave them alone. Many people think that this principle began with the Treaty of Westphalia in Europe in 1648, and the background to that treaty gives a sense of why people think that states should not interfere with each other. Europe had been engaged in a great war, called the Thirty Years' War, which caused great misery. Eventually, the European nations decided that henceforth, they would leave each other alone to determine their own affairs, so that such a war would never recur. They agreed in the Treaty of Westphalia to respect each other's sovereignty, and that idea has been a cardinal principle of international law ever since. Of course, nations sometimes ignore this rule, so war occurs. But in truth, most states obey this rule most of the time, and in theory it binds always.

The principle of non-interference has limits. For one thing, it requires only that states stay out of each other's internal affairs: for example, you may not invade another nation because you don't like its ruler. But states may and do interfere with each other in their external affairs. For example, if a nation invades you or a third country, you may invade the aggressor so as to restrain it. In addition, international law has recently come to allow nations to interfere in each other's internal affairs, but only to a very limited extent. For example, there are now international conventions protecting certain human rights, so that governments are theoretically required to respect those rights, even in their internal affairs. But international law is struggling to find ways to enforce these provisions. Suppose that a sovereign state simply decides to ignore these requirements: can the United Nations or another country force it to comply? It is not entirely clear what can be done, either legally or practically.

Obviously, this idea of external sovereignty has implications for Burma. At present, many states regard Myanmar as a sovereign, which means that they feel required to keep out of its internal affairs, even if it is oppressing its people. Theoretically, it is illegal for Myanmar to violate the human rights of its people, but it is unclear how this rule could be enforced. On the other hand, whenever Burma becomes democratic, it will still be sovereign, so other nations may not interfere in its internal affairs. The ousted generals could not, for example, enlist the support of the Chinese

to overthrow the democratic government of Burma.

Defined in this way, the state is a relatively recent phenomenon of European origin. There have always been governments, but the state is a special kind: it claims ultimate authority over everything that happens in its territory, and no other polity may intervene. But if the state began only recently in Europe, it has since come to sweep the globe. We now live in a world of states, and because states recognize only other states, there is tremendous pressure to organize yourself that way. But that pressure has sometimes had bad effects for countries outside Europe. Many such countries were not traditionally states. First, they did not assert internal sovereignty: the ruler did not assert absolute control over everything that went on in the state; instead, there were multiple authorities, each with its own claim to power, such as local warlords or religious authorities or the like. Second, they did not enjoy external sovereignty, because the Westphalian states did not recognize an obligation to stay out of their affairs. Commonly, European states colonized countries like this for decades or even centuries. But eventually, they withdrew, generally after World War II, and they left the newly independent states in a problem

Imagine for a moment that we live in such a decolonized state, and you may not have to imagine very hard, as Burma fit this description in 1947. We have suddenly been plunged into international society, a world of states that expect us to behave as a state. To claim sovereignty—which we very much want—we must get organized. We have a lot of state-building to do and little time to do it. We must develop a legislature to make laws, a diplomatic corps to pursue our interests in the world, a military to defend our borders, schools to educate our children in the rights and duties of state citizenship, agencies to keep the environment and our workplaces clean, courts to apply state law in complicated cases, and so forth. It seems a daunting task, because it is all new. In the midst of all this pressure, the citizens of new states often fall to squabbling. In response, leaders look for ways to unify the people for the difficult time ahead. Remember that our task here is state-building, but to find the unity necessary for state-building, the leaders often look to nation-building. They try to pull the citizens together into a patriotic effort by encouraging them to sacrifice for the nation. If citizens are devoted to the nation, in this view, they will support the state, because it is the alter ego of the nation. In other words, in this program, we achieve state-building through nation-building. We become a powerful, healthy, affluent, harmonious state by becoming a nation-state.

B. Nations

And so we return to the second of our concepts, the nation. The exact meaning of the nation has been the subject of an enormous amount of recent writing. For a while, many thought that nations and nationalism might die out, but in the last two decades, nationalism has gained a new lease on life, especially in places where it seemed to have gone to sleep, such as the Soviet Union. Two decades ago, for example, Kazakhs mostly thought of themselves as part of the Soviet system. Now, with independence, many ethnic Kazakhs think of themselves as belonging to the Kazakh nation. Because non-Kazakh citizens of Kazakhstan identify with other nations (such as Russia), the state faces problems in getting these nations work together. Because of places like Kazakhstan, many more scholars have begun again to study nations and nationalism. But as always, they

disagree: on where nations come from, how they function, how long they have existed and will exist, what role they play in the lives of their members, and even what they are. As a result, no matter what I tell you, someone somewhere will disagree, and you need to know that. But I will try to outline the areas where people are mostly in agreement.

Fundamentally, a nation is a group of people who identify with each other. When I look at others of my nation, I see people that are like me in some way that is important to me, so that we belong together in a way that we don't belong with other people. The idea of a nation therefore has two parts: first, some people believes that they are similar; and second, because of this similarity, they believe that their fates are intertwined. We might call the first element a perception of common identity; we might call the second element a belief in a shared future through collective action.

As to the first element: students of nations and nationalism have struggled long and hard to determine exactly what nations have—or are supposed to have—in common. Many nations share a language or religion or ethnicity or common origin. Yet clearly you do not have to share any of these to be a nation; there are famous examples of nations with multiple religions, races, languages and so forth. After all, similarity is in the eyes of the beholder. What makes you a nation is that you think you share something so fundamental that your identity is bound up with others of your nation. But different nations may think that different characteristics are fundamental. Some nations may think that language ties them together, even when they have many religions: perhaps the French fit this description. Others may think that religion unifies them, though they have different languages: perhaps the Arab world fits this description. Arabs tend to be committed to the welfare of other Arabs, and French citizens to the welfare of other French citizens. But the two groups feel united on different characteristics. As another example, closer to home, some Chins regard the Chin people as a nation, but Chins are both Baptist and Buddhist, and they sometimes have trouble understanding each other's dialects: neither religion nor really language forms their national identity.

So the point in the first element is really to set up the second: because we think we have something in common, we believe that we share a future. We define ourselves collectively; I know who I am by seeing what I have in common with you. Membership in a nation tells me something about my identity. It gives me a home and people to whom I belong. And because my nation provides me with a home, I want to be able to make that home with my fellow nationals. By definition, then, members of a nation do not just perceive a commonality; they also want to act on it. Through common action, they want to create a common future, where they can live out their distinctive life-ways in freedom, safety and dignity. If we are a nation, then, we are jointly committed to creating a space for people like us. In this sense, the Chins are a nation insofar as they believe that they share a public culture different from the public culture of those around them, so they need self-determination.

In other words, though nations need share neither language nor ethnicity nor religion, they must share a sense of themselves as an actor in history. They must imagine that as a group, they have acted together in the past, are acting together in the present, and will act together in the future. They must be able to tell a story about themselves as a collective agent—not strangers but participants in a common venture. Commonly, people think of their nationality as similar to their family in that

they come from the same place and feel permanently bonded. We imagine that we are the descendants of our national heroes, kin to our fellow nationals, and we give birth to those who will come after us. So we feel as though the nation is our family. But it is important to understand that this is only a feeling. The nation is not literally one big family or kin group. The members of a nation are not necessarily related, and they do not necessarily come from the same ancestors. Many members of current nationalities came in from the outside. Often, they brought great resources to the nation, and sometimes, they revitalized the nation by changing it. In fact, there are long-standing nations composed primarily of the descendants of those who were once outside. To belong, then, what is required is not birth but participation in the common culture of the nation. Nations that start excluding people because they do not have the right ancestors pretty soon become rigid, oppressive, and inflexible. They die or explode in civil war.

C. States and Nations

What is required for a nation to tell its common story and create its common home? Some claim that by definition, nations must desire separate sovereignty for themselves. In this view, if a group does not desire self-government—if it is happy to live within a larger state—then it is not really a nation but something else, such as an ethnic group. For similar reasons, many argue that a national group must have a claim to an ancestral homeland: after all, if the nation is to claim statehood, it must have a territory over which it can exercise sovereignty. In fact, when Europeans first started to talk about the nation as a concept, they commonly insisted that every nation was entitled to its own state on its own ancient territory. Only a state would allow each nation fully to realize its own destiny. Many European nationalists wrote stirring poems on the importance of statehood for their peoples. Some of these are quite moving, and they testify to the courage and hope of a nation long oppressed. And thus was born the idea of the nation-state.

In fact, some historians believe that most nations are not very old; instead, they were imaginatively created just at this time precisely so that they could claim their own state. For thousands of years, people were divided into much smaller groups, and they were ruled in different ways. They certainly did not recognize bonds of nationality with people who lived hundreds of miles away. But in Europe in the eighteenth century, nationalist leaders tried to convince these scattered people that they were really part of one larger nation. The motives of these leaders were complex, but at least one was that at this point, becoming a nation meant getting a state. And getting a state meant that local people could throw off foreign rulers and choose their own leaders—who would presumably include the very same nationalist elites pushing for national unification. In other words, in this view, the conventional account has the causality wrong for many groups: the nation did not exist before the state, calling for its own sovereign state; instead, the prospect of statehood galvanized people to make themselves into a nation that could then call for sovereign rights.

But whether nations are old or new, statehood and nationhood have often gone hand in hand for at least the last two centuries. Nonetheless, it is not true that every nation must have its own sovereign state, nor that every state must have only one nation. To be sure, nations desire to work out their shared destiny in a home of their own. But that desire does not always and everywhere

require full sovereign self-government. As we will see, different constitutional structures allow nations to govern themselves, to some degree, within a larger overarching state that includes other nations as well. Whether a nation really needs full sovereign government depends on circumstances. For example, imagine a nation that has always hated and feared all the other groups in the vicinity, who feel the same way back. All these nations feel that part of their fundamental identity is to hate the other nations. Without some change, it is hard to see how these nations could live together in the same state. They may all need independent sovereignty. Sometimes, however, conditions are not so dire. Today, many nations can and do live together in a single state. There may be some tension between the different nations, but every state has its tensions. There are many prominent examples of multinational states: Switzerland, Canada, Belgium, the United States (with its Native American nations), Spain, Italy, and even France itself. All these states are successful in the sense that though they may have tension, they are stable, affluent, mostly peaceful democracies, in which the member nations are mostly committed to the state apparatus.

It is a good thing that nations can live together in a single state, for a number of reasons. First, the globe does not have enough space for every nation to have its own viable state. To be viable, a state cannot be too small; otherwise, it cannot stand on its own. There are of course some very small states—such as San Marino, Andorra, and Vatican City. But in truth, those are not really sovereign nations; we just call them that. They are really part of the surrounding countries, and they retain independence in only very limited ways. The second reason that multinational states are important is that many states in fact contain multiple nations, so they must find a way to live together. Commonly, when the European nations rolled up their empires, they left behind them new states that contained multiple nations. These states then had to find a way to make a multi-national republic work.

In this regard, we must distinguish two moments in history: the moment that European nations first began to claim statehood, and the moment that colonized states outside of Europe began to claim independence. At the former moment, European nationalists believed that each nation could have its own state because European nations inhabited discrete ancestral territories, were readily distinguishable from each other, and mostly were large enough to make viable states. Even at this moment, many thought that some European nations were too small to make viable states, and even the larger nations seldom had such clear ancestral territories or such discrete cultures as the nationalists claimed at the time. Still, let us concede for a moment that the ideal of the nation-state might have been appropriate for Europeans in the eighteenth and nineteenth centuries. Conditions, however, were very different when colonized nations managed to free themselves of European domination and to establish their own states in the twentieth century. Many of these states contained a number of nations. Some were traditionally hostile to others. Often they had different goals, ideals, practices, and theories of government. When they all merged into one government, they often fell to squabbling. Sometimes they even fell apart in civil war. Many of these nations looked to Europe for an answer to their problems (though they often refused to admit that they were actually looking to their former colonizers). Following European ideas, they concluded that they needed nation-building. Even if they were not one nation, they needed to become one so that they could live together in one state. And they began to use the state apparatus to make themselves into a single nation.

Notice that there is an irony in this strategy. Europeans first claimed that wherever there was a nation, there needed to be a state, so that the nation could express itself through statehood. There is a nation, so there must be a state. But the leaders of these newly decolonized states reversed that order: in their view, wherever there was a state, there had to be a nation to support it. In other words, the Europeans claimed that because of their unity, nations had to have sovereignty. The new states claimed that because they had sovereignty, they had to have unity—even if they had to force people into it.

Fortunately, states do not have to be composed of people from a single nationality; indeed, few are. Unfortunately, when leaders do not realize that fact, they often do bad things to their people in the attempt to make them all alike. And so nation-building, which can be a good thing under the right conditions, can also be a bad thing under the wrong conditions. What is involved in nation-building? In the sense in which I am using the term, it refers to forcing everyone to be more the same, to share a single cultural identity. Sometimes these leaders come from the dominant nationality in a state, and they try to achieve unity by forcing the minority peoples to become like that dominant group. Sometimes, nationalist leaders instead try to impose a culture borrowed from some other state: they may insist that everyone become pious Russian communists or American capitalists. But wherever they find their preferred culture, the important point is that nation-builders choose one way of life, anoint it as the only loyal way, and try to force everyone to follow that way.

When a dominant nationality tries to force the minority nationalities to give up their culture, the result is usually tragedy. Everyone must now speak the dominant language, practice the dominant religion, identify with the dominant culture, and forget their old ways. The leaders of the dominant nationality (who are often military officers) claim that the true soul of their country is the dominant nationality: people from other groups are grudgingly tolerated at best, persecuted at worst. They are always seen as potential traitors. The leaders may even use the army or law enforcement to force people to adopt their ways. The irony is sad and savage. A group of colonized people managed to throw off a foreign master, only to become subject to a local master; they went from external to internal colonization. The two great ideas--nationalism and decolonization--promised liberation, but instead they led to a new form of oppression. Nation-building became another name for nation-destroying, as those from one group tried to destroy the cultural identity of those from another group.

Multi-national republics should therefore eschew nation-building, at least in this extreme and oppressive form. But all nations need unity. To find it, multi-national republics might look not to nation-building but to state-building. All states must build the apparatus necessary for the government to function and for citizens to participate. Building up the courts, the legislature, the executive, the agencies, the military, the schools, the roads, the rail, air, and communications systems, and so forth—all these are part of state-building. But in a multi-national state, state-building also involves the creation of a general scheme of law and governance that allows nations to relate yet also to keep their differences. Frequently, the people entrench this scheme in a constitution. Such constitutions take a different approach to creating a stable nation from that pursued by the nation-builders. Nation-builders try to remake the citizenry so that they are all one nation. Multi-national constitutionalists instead try to create a shared legal and political framework that will allow

people to live together, with all their differences. They share, not their language or religion or any of the other things that characterize a nation, but instead a common body of constitutional principle and a public culture associated with it.

Good multi-national constitutions must therefore accomplish two things. First, they must allow enough internal diversity, so that their various cultures can govern themselves in their own way. But second, they must also find some basis for unity across the various cultures. This unity is necessary to allow people from all parts of the country to participate in national politics, to relate to each other in positive ways, and to have some control of the federal government. If the nations isolate themselves, then the state will likely fall apart. To make the whole work, everyone needs to agree on some basic ways of relating across difference. So it turns out that some unity is necessary after all, and the nation-builders were not wrong in thinking so. They were wrong only in the way they went about the task, by trying to make everyone alike. Nationalists strive for unity; multi-nationalists strive for diversity within unity and unity within diversity. The attempt to find a good balance between these two principles is most characteristic of multi-national constitutionalism.

To put the point another way, we can think of the state in terms of layers, from the most local to the most central. Each of these layers needs some amount of unity, some shared culture and common ways of relating. But as you go from the bottom to the top, the amount that is shared goes down, and the cultures become thinner, so as to allow more diversity. At the very base we might find families, whose members are probably much alike, at least when compared to other people. When we move up the ladder to villages, people still share a great deal; they mostly have the same language, the same family structure, perhaps the same religion and so forth. But then when we move up to the level of state governments—such as Shan state, Karen state, and the others—we run into more diversity. Within each of these states, people speak different languages, practice different religions, follow different styles of government, etc. At this level, we must allow for a good bit of diversity, because people cannot be expected to share as much. They still need unity, but thinner. And when we jump to the federal government, we should thin the public culture down even more. We must still share enough to participate in the governance of the country, so we cannot be strangers or enemies. But we must also be careful not to demand more unity than the country needs to work. At every level, we balance unity and diversity, but at each level, the balance will be different. Unity matters more as we move closer to the ground, and diversity matters more as we go up the ladder. The trick is getting the balance right. Because every group is different, the balance will not be the same everywhere, even for everyone at the same level. For example, some states may be quite homogeneous, and they may look for a good bit of unity; but others may be very diverse, and their public space must be accordingly thinner.

At the federal level, people must share at least one thing: a shared devotion to the principles of the constitution, such as democracy, free speech, separation of power, voting rights, and the like. They may have different languages, religions, ancestors, myths, cultures, and so forth. But because they must live together, they must agree on a framework to allow them to interact in peace. If this constitutional system is secure, it frees us to be different in every other way; in fact, the structure of the constitution should explicitly protect our freedom to be different in ways that do not touch on constitutional stability. In that sense, it might be said that our difference actually depends on our

unity: without a shared constitutional structure that protects our home rule, our right to be different would be in peril. And in turn, our unity depends on our difference: because the constitution protects our rights of home rule, we join together to support it and the state; if it did not protect our difference, we would likely fall apart in civil war, losing whatever unity we might have had. And this truth holds even at the global level. Even sovereign states must work together to create a global culture of international law. This project is important not only to restrain war, clean up the environment, expand human rights, eliminate genocide and so forth. It is also necessary precisely so that states can be sovereign, to control their own destinies. In order to be different (that is, to have the sovereign right to govern themselves), states must be unified in a scheme of international law that protects their right to be different.

Many people think that America illustrates the possibility of a state unified primarily in its constitution. America contains all different sorts of people, and we tend to be very individualistic. We have no sense of belonging to the same ancestral group, even metaphorically. Yet despite these differences, America somehow hangs together. Why? Many believe that America's unity is provided by just one thing: the veneration that Americans feel for their constitution, which they venerate precisely because it protects their right to be different within a shared framework of law.

There is a germ of truth here. Most Americans are devoted to their constitution, and that devotion has gotten us through some difficult times. For example, you may remember that in the year 2000, the presidential election in America was very close, and for months, no-one knew for sure who had won. Democrats and Republicans were angry at each other, and in a few places, there was rioting. But most Americans assumed that the Constitution would somehow carry us through this mess. They believed that as long as we stuck with the constitutional system, we would find a way to settle the election despite our differences, and everyone would go on with their lives. And the two presidential candidates—Mr. Bush and Mr. Gore—repeatedly insisted that they would go along with the result of the process, even if they lost.

So clearly the American constitution is an important part of our unity, perhaps the most important part. But Americans do not just share a set of legal rules codified in the constitution. They also share a public culture, however thin it might be and however reluctant we are to acknowledge our similarities. Overwhelmingly, we speak English; we follow the same market economy; we desire many of the same things from life, and so forth. And in truth, our constitution depends on this public culture to work: if we did not have this culture, we would probably fall apart. No set of legal rules—even constitutional rules—without firm roots in the public culture can long survive. When we say that we find our unity in the constitution, therefore, we must have in mind a specific meaning of the term. Constitution, in this context, refers not just to a set of legal rules administered by courts and addressed to government. Instead, it refers broadly to the country's shared public culture, its ideals and commitments, its mutual devotion and its acceptance of difference. This culture expresses itself in the constitution, and the constitution in turn depends on it. But of course how much shared public culture you need will depend on circumstances.

To this point, I have fairly strictly defined the terms nation-building and state-building, for the sake of clarity: nation-building refers to cultural assimilation to one national identity, and state-

building refers to building a scheme of governance that allows people to live together without assuming the same nationality. But in fairness, it must be said that some nation-builders really espoused a nation-building that was not far from state-building, as I have used the term. They believed that building a nation involved developing a civic culture shared across the state—constitutional principles, political practices, a shared vocabulary, and so on. In my view, these civic nationalists were right to think that every state needs such commonalities. They were wrong only in thinking that the state could tolerate no more than one public culture, and this conviction too often led them to force their minority populations to give up their own life-ways. If they had kept the state-level culture thin enough to allow for local variations, they might have been more successful in creating a stable state—because the minority populations would have felt committed to any state that treated them so fairly.

Finally, the relationship between state and nation highlights a basic principle of constitutional design, so important that every constitutionalist should engrave it on his front door and read it every day. The principle is that good constitutions balance multiple values; they rarely make simple choices. Many political leaders would like for a state to have only unity, and others would like only diversity, as they distrust any talk about the need for unity. But good constitutions must balance both diversity and unity, and because states are different, they will strike the balance in different ways. There is no magic formula that you can just adopt, and so no constitutional consultant can tell you what constitution is best for you. But constitutional design theory can offer some guidance as you think your way through. It can point to the major questions that you must ask and some of the considerations to ponder as you answer them. And in a multinational constitutional republic, the first place to start is federalism.

II. Federalism

Traditionally, constitutional design has four primary parts: separation of powers, federalism, electoral systems, and individual rights. Separation of powers refers to a division of power between the various parts of a government, such as the executive, the legislature, the judiciary, and perhaps the bureaucracy and the military. Federalism refers to a division of powers between different geographical levels of government, such as the central government and more local governments. Electoral systems refer to the process by which the people elect their leaders, such as rules about who can vote, when, where and how they vote, and how their votes are counted to decide a winner. Individual rights refer to the sphere of autonomy guaranteed to each individual which the government may not invade, even if it really wants to.

For Burma, federalism has been a particularly burning issue. A federal system is one in which the constitution divides power between a central government and more local governments. (Across the world, these local governments have different names; they are variously called provinces, states, territories, lander, and so forth. Following American practice, I will call them states.) Federalism thus means that the constitution divides power between levels of governments. Placing this division of power into the constitution has an important implication: constitutions, as we have seen, contain rules that the people regard as fundamental to themselves. Usually, it is

difficult to change, or amend, the constitution, because the point in a constitution is to entrench certain rules, to make them durable. If we put federalism in our constitution, then, we are saying that we regard it as fundamental to us, and we do not wish it to change.

All truly federal states thus believe that federalism is fundamental, not merely convenient, to them. But there are many different sorts of federalisms. To be a federal state, your constitution must divide power between state and federal government, but there are many ways to divide power. Some federal systems are very decentralized: the constitution gives most power to the states. Some federal systems are very centralized: the constitution gives most power to the federal government. And there is everything in between. So once you have decided to adopt a federal system, you must still decide what kind. To answer that question, you need to examine why you want federalism, because your particular style of federalism should serve the purposes that you have in mind.

There are at least three goals that a federal system can serve. First, federalism can help different groups to live together by guaranteeing some self-government to each. We might call this the “plural societies” rationale for federalism, because a plural society is one which contains multiple groups, each with its own way of doing things. Second, federalism can promote local democracy. Local people often understand their problems better than does the central government; they can respond more quickly; and people are often more willing to get involved in the local government than in the central government, because it is closer and filled with their neighbors. As a result, giving power to local governments can encourage people to participate, to initiate projects, and to believe that they really can govern themselves. Let’s call this the “local democracy” rationale for federalism. Third, federalism can allow state governments to keep the central government from getting out of control. It is well and good to write a nice constitution, but if the federal government decides to ignore it, then it is worth nothing. So it is a good idea to give the states some tools to keep the center in line. Usually, state leaders are professional politicians, with the expertise and time to keep track of the central government. They often command the loyalty of their citizens, so they can serve as a rallying point for resistance. We might call this view the “checks and balances” rationale for federalism, because the idea is that state governments can check and balance the central government.

The way that you divide power in your federal system should reflect your reasons for dividing that power. For example, if you pursue the plural societies rationale, you need to identify those areas in which it is important for the various groups to govern themselves. Your constitution should guarantee those areas to the states. If, by contrast, you pursue the local democracy rationale, you need to identify those areas in which local democracy will work best: areas that the local authorities know better, or that don’t need a unified approach for the whole country, or that are likely to attract citizen participation. Again, the constitution should reserve those areas to the states. Finally, if you pursue the checks and balances approach, you should determine which powers the state governments will need to check the central government. For example, state officials might need a right to federal information, so they know what the federal government is up to. State governments might also need way to attract the loyalty of their citizens, such as the power to regulate areas in which citizens feel themselves to be directly affected, such as property rights.

And of course you may want to create a federal system for all three of these reasons, and then you will need to give the state governments all these sorts of powers. Indeed, in my view, a federal system might help to correct Burma's problems for all three of these rationales. The SPDC has tried to make everyone live according to one centralized system. In so doing, it has repressed the self-government of local cultures—so we have grounds for federalism on the plural societies rationale. Because the SPDC has quashed local democracy, everything gets handled from the center, government has become unresponsive, and people assume that the central government will control everything, so they don't bother to get involved. Ergo, the local democracy rationale for federalism might demand a shift in power to more local governments. Finally, although the military government has created various states and divisions, they are really just servants of the central government. As a result, they cannot stand against the government when it is oppressive. The people are left without an official rallying point for resistance. They must therefore look to "unofficial" groups ("unofficial" in the eyes of the regime) such as the Karen National Union and the Shan State Army. The checks and balances rationale for federalism would set the states up to keep an eye on the central government in the future.

Burma might therefore benefit from all three rationales for federalism. I intend, however, to devote most of my remarks to the plural societies rationale, for three reasons. First, Burma is an uncommonly plural society. Second, many of Burma's problems for the last half century have grown out of its pluralism. Third, crafting a federal constitution for a plural society is one of the hardest tasks in constitutional design, so it needs particular attention.

As a technical matter, you must do three things when writing a federal constitution. First, you must decide why you want to be unified. Second, you must decide why you also want to be different. And third, you must figure out how this new federal government can work, without falling apart into angry squabbling. Let me take those up in turn.

First, you must determine why you want to be in a single country with all these different groups in the first place. There are important reasons to join in a government larger than your own nation. Across the world, democracies have tried to organize themselves into larger organizations, because they see the benefits of unity. The European Union is the best current example, but other regions have started down that path. Again, I stress that everyone is different, so the reasons for unity need not be the same for all. Nevertheless, across the globe, people tend to unite for two remarkably consistent reasons: power and productivity.

Power: a central government is stronger and can better protect your interests in the world. For that reason, almost all federal constitutions give the central government the primary role in foreign affairs: when a larger country speaks with one voice, other countries are more likely to listen. For example, the international community tends to pay a lot of attention to what the United States says. But if my home state Indiana tried to set its own foreign policy, the world would pay it very little heed. As a result, Indiana is glad to be part of the United States when it comes to foreign policy—even though people in Indiana do not always agree with what the central government is doing. Relatedly, almost all federal constitutions give the central government primary power over military matters. Again, the reason is that a relatively large, united country can field a more

powerful military force than can smaller republics. If the rest of the world knows that the country will be able to deploy that military in a unified way, speaking with one voice, they will sit up and take notice.

Productivity: a good central government can make your society more efficient and productive by organizing larger systems of activity. For example, a single large market can allow people to concentrate on their own area of expertise: some people can produce good, cheap rice, and others can produce good, cheap computers; if they are all in a single market, they can just exchange goods freely, and then everyone will have access to good, cheap rice and good, cheap computers. For a large market to work, however, a single government must have the power to regulate it, so as to keep trade free and to create a single set of rules by which everyone must live. When the economy is divided into different jurisdictions with different rules, people find it hard to plan, to compete fairly, to know the law and obey it. Foreign companies are less likely to invest, because it is harder for them to know the rules and to calculate the likely return on their investment. For similar reasons, countries usually find it more efficient to create unified regimes for transportation (particularly an interstate road system) and communications (particularly telephone, internet, and television). Those networks in turn help make the economy more efficient, because it is easy to communicate and to move goods and people around.

To summarize: the first of your three tasks is to identify those areas where you need unity, and for reasons of power and productivity, most federal constitutions give the central government primary responsibility over foreign affairs, the military, the economy, transport, and communications. But the second task is to identify those areas where you need diversity, because the point in federalism is to allow local cultures to govern themselves. So you should identify those areas where it is particularly important that local cultures play the dominant role. Again, every country is different, but across the world, people commonly find that a few areas are especially important. In plural societies, the states are concerned to protect their own cultures, so constitutions often reserve cultural matters to the states. Because education is important to acculturation of the young, many constitutions give the states the power to set much education policy. Because nations often want to speak and preserve their own language, multinational constitutions sometimes give the states some power over language policy, particularly the power to keep the local language from dying out. Similarly, because religion is an important part of cultural identity for many, some constitutions give the states the power to regulate religion as well. Many other constitutions take a different approach: to protect local regions, they deny all governments the power to regulate religion, so that believers can make up their own minds. In this case, the states have no power to regulate religion—but importantly, the center has no such power either, so it cannot impose one religion on the whole country.

In short: first you decide which subjects demand unity and so should belong to the center; second, you decide which subjects demand diversity and so should belong to the states. But third, you must decide how the states and the center should relate to each other in practical ways; in other words, you must figure out how to make this system work in practice. Inevitably, plural societies face strains and stresses. The different nations may try to dominate each other; or the center may try to dominate the states; or the states may try to prevent the central government from fulfilling its

responsibilities. It is not enough simply to give some power to the central government and some to the states; you must then set up a structure to enforce that division, so that people have an incentive to make it work. The key is getting all of the actors to feel committed to the system as a whole: the central government must want to allow the states their self-government; and the states must want to allow the national government its unifying functions; and all must feel that they are in a common venture.

To accomplish these ends, the constitution might pursue two strategies. First, it should give people a concrete incentive to do the right thing. And second, it should cause people from different backgrounds to come into regular contact, so they can learn to understand and trust each other. Let me offer you three ways that a constitution could pursue those strategies. First, to keep the center from over-reaching, the states themselves should have some place in the structure of the federal government. Second, to keep the states from becoming closed and hostile, the state constitutions should require the state governments to treat all their people well, regardless of national identity. And finally, when disputes arise—as they inevitably will—over who has the power to regulate something, the constitution should contain detailed instructions about how to settle them.

Let me elaborate. First, the states need to have a role in the federal government itself. The reason is that when the two levels of government are kept rigidly separate, they may become hostile toward one another. They get the idea that they are separated because they are opposed. The constitution itself seems to confirm this view, because it assigns them radically distinct spheres, as though they were competitors. But when two governments are hostile toward each other, they tend to invade each other's space. As a result, you may write a wonderful constitution, but the government may just ignore it. In particular, the central government may overlook all the limits on its own power and do whatever it wants, invading the sphere reserved to the states. The constitution may order the federal government to stay in its own space, but that barrier is made only of paper. If it wants to, the center will have not trouble demolishing a paper barrier. So we need to structure the federal government in such a way that it will not want to invade the sphere reserved to the states.

One way to control this problem is to design a constitution under which each level of government wants the other level to succeed, because each is convinced that the other serves important constitutional goals. One way to ensure that the central government cares about the states is to ensure that the central government is full of people who come from the states, identify with the states, and are politically beholden to the states. For example, in every draft constitution for Burma that I have seen, the legislature has two houses. Members of the lower house are to be elected by the citizens of the Burma considered as a whole, from districts created by the federal government. But in the upper house, each state of the union will send an equal number of representatives—say, two. In this house, the legislators will likely identify with the states, because they are elected by the people of a particular state to represent the interests of the state. To be re-elected, the legislator will need strong roots in the state. Also, each state no matter how small has the same amount of influence in this assembly, because each sends the same number of representatives. As a result, the larger states should be unable to dominate the weaker. Finally, once you have created this assembly, you can assign it tasks that you feel the states should influence. For example, you might assign the upper house the role of ratifying treaties, so as to give the states a role in foreign affairs that they

might not otherwise have.

You can give the states this sort of role in any branch of the federal government. We just discussed the legislature. Regarding the executive branch: Switzerland has a group executive that must include members from different cantons. It is also possible to have one chief executive, but with ministers in roughly equal numbers from the different states. One could also require that high-ranking military officers come from different states. And finally, the constitution could require that the highest court of the Union of Burma include equal numbers of judges from the different states. As always, however, the key here is balance, and it is important not to get carried away. The more that you require that the federal government contain representatives from different states, the more that it will feel tied to the interests of the states. But if you go too far in this direction, it could backfire. If the federal government includes only representatives of the various states, then there may be no-one to think about the interests of the whole. People might start to think that the states are opposed to each other, and then they might try to hurt each other. As a result, some people in the federal government will again become hostile toward some of the states. So the goal is balance: you want to fill the federal government with people tied to the states, but you also want some people looking to the interests of the whole country.

In making federalism work, then, the first goal is to give the states some role in the federal government: the whole needs to care about the parts. But the second goal is to ensure that the states do not become closed and hostile toward each other or toward the federal government: the parts need to care about the whole. When we look at the experience of the world, the great risk here is that if a state has a dominant nationality, such as the Shans in Shan state, then the state will see itself as existing just for the benefit of that nationality. The slogan will be Shan State for the Shans. Again, a balance is appropriate. If the point in federalism is to allow nations to govern themselves, then the Shan nation should be able to make law based on its own cultural values. But it is one thing to govern the state according to local cultural norms; it is another thing to enact legislation that turns some people—i.e. non-Shans—into second class citizens or unwelcome guests. To varying degrees, all of the states in Burma contain more than one nationality. It would be tragic for one of these groups to throw off the SPDC, get control of the state government, only to turn around and oppress some smaller group in their midst. Over time, such treatment will also lead to hostility between states: if Shan State hurts local Chins, then Chin State will likely hurt local Shans. In short order, no-one will feel safe living anywhere except in a state dominated by their own nationality. And then the union will slowly—or maybe violently—fall apart at the seams.

In short, then, the goal of federalism is to allow local cultures to govern themselves, but those cultures cannot become closed, hostile, or rigid. They must work to open themselves to all of their citizens, regardless of background. One common way to strike this balance is the following: the state government has power to nurture local cultures, including the culture of the dominant nationality if there is one; but it may not erect an official religion, language, or ethnicity for its citizens, nor may it discriminate against people on the basis of their nationality, nor may it infringe the basic human rights of any of its citizens. Each state constitution might protect these rights for its own people. In case the state supreme court fails to protect them, the union constitution might also include similar protections for all the citizens of Burma. That way, if Shan State hurts one of

its Chin citizens, he can appeal to the Union supreme court for a remedy. If that court is made up of judges from all the different nationalities, he should be able to trust it. The result is that each state expresses the values of the local culture, offers a special home for the local culture, but also strives to welcome others. If a Chin goes to work in Shan State, he can be assured decent treatment, and the same for a Shan who goes to work in Chin state. (I should mention that I have used the Shan State as my example because I know that it is particularly heterogeneous, and I have observed that the Shan leaders have been very sensitive to this problem).

Another way to achieve the goal of diversity in unity and unity in diversity is to draw state boundary lines in such a way that you have a good population mix in each state. Each state might have a core culture, because the point in federalism is to allow local cultures to express themselves. Ergo, Chins might make up the majority in Chin state and so forth. But it is also important that each state include more than trivial numbers of people from other cultures. The reason is to keep the states from becoming closed and xenophobic. If the state includes people from multiple nationalities, the politicians may have an incentive to appeal across ethnic lines. As a result, politics might not become ethnically divisive. In the state or states populated primarily by the ethnic Burmans., it may be especially important to include people of other nationalities. It may also be good for the Union of Burma to include more than one state in which Burmans are the majority, but always mixed with different minority populations. That way, politicians in all the Burman states will have reason to appeal to people from other groups. As a result, Burman politicians will be less likely to unite on a nationalistic platform of Burma for Burmans. Instead, there will be many different kinds of Burman leaders with many different kinds of views, because they must respond to different political incentives in the different states. I know that the boundary lines for many of the states and divisions may be traditional, and so it may be hard to move them. But actually, the existing states and divisions may already be sufficiently heterogeneous. (When we discuss electoral systems, we will return to this issue, because even with heterogeneous states, you need the right electoral system to encourage politicians to reach out to people outside their own group).

The third requirement for making a federal system work is that there must be clear mechanisms to resolve disputes, and people must be committed to living by the outcomes of those mechanisms. Even if you write a clear constitution, with a sharp division of powers, there will still be many uncertain cases, in which you just cannot be certain who has the power. Let me give you an example. Imagine a constitution that gives the states exclusive jurisdiction over education, gives the federal government exclusive jurisdiction over the military, and gives both governments concurrent (or shared) jurisdiction over the economy. Now the central government passes a law requiring all schools in Burma to provide mandatory basic education in military science. The states claim that this is a law about education, and so it is beyond the union's power. But the central government claims that it is really a law about military preparedness, so that Burma will have a citizenry well grounded in military matters. Which is it? In truth, it is both, and you need some way to decide who wins these mixed cases. As another example, suppose that the federal government prohibits child labor, but one of the states affirmatively protects it. These rules are about the economy, which all agree belongs to both the states and the federal government concurrently—but when they disagree, who wins?

To resolve these cases, you need a rule of decision and also an authoritative decision-maker, like a court. In cases of concurrent power (like the child labor case) or in cases of exclusive powers that overlap (like the military science case), who wins? Different federal countries have adopted different rules to resolve such cases. In the US, so long as the federal government is acting within one of its enumerated powers, it wins—even in cases where the states might also have some constitutional power. In other countries, in mixed cases, the courts try to determine whether the state or federal elements predominate. In our military science case, they might decide that the issue primarily involves curriculum in the public schools, rather than military preparedness, so the states win. But the important point is that because you will face hard cases, the constitution needs to specify some such rule of decision. When the states and the federal government are locked in a turf battle, tempers flare. To the extent possible, you must ask people to be loyal to the system, even when they lose. One way to earn that loyalty is for the constitution to adopt a clear rule of decision and assign it to a clear decision-maker. That way, people may believe that the issue is being fairly decided, even when they don't agree on the outcome of particular cases.

III. Federalism in Foreign Affairs

We now come to the subject of federalism in international relations—how power may be divided between the states and the union government in setting foreign policy. In all federal states, the federal government holds the dominant role in this area, and usually it has exclusive power. As a result, the states play little part in foreign affairs. Some have observed that federal states exhibit a kind of schizophrenia: for internal matters, they carefully divide powers, but for external matters, they behave as though they were unitary states.

There are several reasons for this federal dominance. First, people join federal states in part because they want to present a united front to the rest of the world. They want to speak with one voice, because they think that they will command more respect. But then it is important that foreign policy be controlled by only one government—necessarily, the federal government as it can speak for the whole. In fact, many constitutions concentrate foreign affairs powers not only in the central government, but particularly in the executive branch of the federal government, because it can act in a decisive way. In the United States, for example, the Supreme Court has insisted that the President is our sole agent in foreign affairs; Congress can set policy but not conduct our international relations.

Another reason for federal dominance is that the international system is more comfortable with unitary states. International law presumes that the world is composed of sovereign states. Legally, sovereignty means that no state may interfere in the domestic matters of another state. But in order to respect this rule, states must know exactly who holds the sovereignty in any given country. For that reason, international law has insisted that over any territory there can be only one sovereign—the central government. In addition, for practical reasons, states prefer to deal with unified governments. It is often difficult for one state to understand the legal system of another state. When you conduct business with a foreign country, before you even get started, you want to know who can speak for this country. Ideally, you want a simple answer, and you never want to

guess. Most states are unitary states, with limited understanding of federal systems, and so they like to deal with other unitary states. Even federal states like to deal with unitary states, because they are easier to understand. As a result, the international system puts pressure on federal countries to behave as though they were unitary states. For example, many states are unhappy with the United States, because we cannot speak with an entirely unified voice. The president negotiates treaties, but they do not become law unless the Senate ratifies them. Sometimes, the president agrees to a treaty but the Senate afterwards rejects it; commonly, the other country feels that we have reneged on the deal. Imagine their consternation if not only the Senate but also the state legislatures had to approve a treaty!

For all these reasons, state participation in foreign affairs has never been common, and it has become less common over the last hundred years. It is an uphill battle to carve out a place for the states in foreign affairs. But there are good reasons that member states might wish to participate in foreign affairs. For one thing, states might have different views about foreign affairs process. For example, once Burma becomes democratic, the government will have to decide how it wants to relate to three major nearby powers—India, China, and Thailand. The different states of Burma may feel differently toward each of these countries, and so they will want some influence over Burma's relations with them. Similarly, Burma will need trade agreements with other countries, and these will have different effects in different states. If Burma decides to allow the importation of cheap rice, for example, it will help consumers feed their families, but it will hurt rice producers, who may not be able to produce such cheap rice. If the rice growers are concentrated in a particular state, then it will be particularly burdened by the agreement. Again, it will want some role in foreign affairs to protect its interests. Or, as one last example, in order to secure international grants of money, Burma may have to hold free and fair elections, and the funding agencies will send in observers. But some of Burma's states may not be well organized enough to hold the kind of elections that these observers will demand. In the long run, Burma will need to apply that money, but the timing is critical. If Burma takes an international grant, promises to do something, and then fails to honor that promise, it may be harder to get another international grant. It would have been better to hold off taking the money until all the states were ready. For that reason, the states will want to have a role in the foreign affairs process, so that they can express their concerns about not being ready. In the long run, if the states feel that the federal government is ignoring their worries, the union may experience great strain.

Luckily, though it may be hard to create a role for the states, it is not impossible. In fact, in many federal systems, the states do have a role, though usually only a limited one. I would like therefore to outline the different ways that a constitution can allow for state participation. There are two basic methods. First, each state might conduct its own foreign policy: it might make its own treaties or wage its own wars or receive its own ambassadors, and so forth. Second, even if the state cannot conduct its own foreign policy, it might participate in the making and implementation of federal foreign policy: before signing a treaty, the federal government might have to consult the states or get their permission, and so forth.

A. The States' Ability to Make Their Own Foreign Policy

Even in federal systems, states are usually prohibited from making their own foreign policy. Generally, the constitution itself gives plenary power to the central government over foreign affairs and denies the state any power. Sometimes this rule is explicit in the constitution; if not, constitutional interpreters usually infer it. This conclusion is not surprising because of the pressures on states to act in a unified way. If the states had the power to formulate their own policies, that unity would disintegrate. In fact, one definition of statehood is unified authority in international affairs. If each member state could formulate its own foreign policy, then the union would not really be a state at all, but a treaty association. Most of the prominent federal states—the United States, Canada, Australia, and Switzerland, for example—deny their subdivisions (provinces, states or cantons) the power to make treaties independently of the federal government. By contrast, the European Union, which is not yet a true state, makes its own treaties but also allows its member states to make treaties. Sometimes the EU makes mixed treaties, in which both the EU and the member states sign a treaty made with states or organizations outside the EU. In mixed treaties, the EU pledges to honor the treaty in its sphere of power, and the member states promise to do so in their theirs. The states of Europe are therefore still independent sovereign states, not part of a single sovereign state. In Europe, some would like for the EU to have a common foreign policy, so that only the Union can make treaties or wage war, but they are not there yet, and they may never be.

In the foreign arena, then, states may not generally go off on their own. On the other hand, it is fairly common for member states to make international agreements so long as they have federal permission. In this case, the risk of disunity is not present, because the states are acting as agents of the federal government. For example, the United States Constitution forbids the states from making treaties, but it allows them to make compacts or agreements with foreign states if they have federal permission. The Supreme Court has never clearly told us the difference between a treaty (which states cannot make) and a compact or agreement (which states can make, so long as they have federal permission), but presumably it has to do with the significance of the issues. A treaty would be a large-scale attempt to deal with matters of some moment; a compact would be a relatively small-scale attempt to deal with matters that primarily affect just one state and its foreign neighbors. In practice, Americans have followed that distinction: the federal government negotiates all the agreements with important effects for the nation as a whole, but the states have entered into compacts with neighboring countries to govern border issues, such as waterways or bridges that connect the two countries. In fact, sometimes, the states do not even bother to get federal permission in advance on such issues. They just go ahead and make the compact in confidence that Washington will approve it after the fact. In truth, they are right to have this confidence, because the central government always ratifies. This system works pretty well: the states never try to make large-scale treaties, and the federal government always authorizes the states' small-scale agreements.

In short, federal constitutions generally do not allow the states any international power. But suppose that a federal state wanted to give such authority to its member states: could it? Clearly, as a matter of domestic constitutional law, it could: constitution-makers can put anything they want in a constitution. But here's the harder question: would international law allow these states to enter into foreign relations? The short answer is that because so few states have tried this practice, we don't really know. There is no definitive answer, partially because it has not come up very often and partially because international law does not speak with one voice on this question. On balance,

however, the most likely answer is that international law would not permit states to make treaties against the union's will.

International law rests on both formal documents (treaties, UN resolutions, and the like) and state practice (just what states do). The formal documents of international law suggest that the subdivisions of federal states cannot maintain their own foreign policy. The Vienna Convention on the Law of Treaties is probably the most important instrument, and Article 6 is the relevant section, as it recognizes the right of sovereign states to make treaties. The article does not speak explicitly to whether units of federal states can create treaty obligations. For guidance we must therefore look to the Reporters' Notes for the convention. In 1953, the reporter claimed that member states may make international treaties, but in 1958 the reporter held that member states could make treaties only as agents of the central government. In 1962, the reporter explained that only the central government possesses in principle the capacity to make a treaty. He did leave open one possibility: member states could enter into binding international treaties if the federal state recognized their power to do so and the other contracting state agreed to recognize that power. So in this view, it all depends: whether China can make a treaty depends on whether the Union constitution and also the other contracting state agree to recognize that authority. That makes China's power to make a treaty depend on the discretion of other states, but at least it is a window of opportunity. That window seemed to close, however, as the 1960s wore on. The International Law Commission proposed a revision of the Vienna Convention that would allow member states to engage in foreign policy so long as their own federal constitution allowed. In other words, your international power would depend on your own domestic constitution. The Vienna Conference, however, severely criticized this provision on the familiar ground of uncertainty: if you were thinking about making a treaty with a member of a federal union, you would have to parse that other states' constitution to determine whether the member had treaty-making authority. In other words, the participants in the conference rejected the idea that units of federal states should have power to make treaties, even if their own domestic constitution gave them that power.

International law does not come just from pronouncements of legal conventions; it also comes from state practice. Overwhelmingly, the practice of federal states is not to allow their member states to make independent foreign policy. There are only two possible exceptions—Germany and Quebec. But because their situation is confused, they are only possible exceptions, and probably not reliable evidence of state practice. In Canada, Quebec has claimed power to make its own international policy, largely because it feels closer to the French-speaking world than does the rest of Canada. So Quebec has entered into cultural ententes with France and Gabon, and it has participated in meetings of franco-phone states. The federal government of Canada has denied that Quebec has this power, without federal permission, and most people think that the Canadian Supreme Court would agree. This conflict might have created some real tension, but the governments of France and Canada found a solution. They signed their own agreement allowing Quebec to make these concordats. As a result, even if Quebec needs federal permission, it now has it. For that reason, we have no definitive answer whether the Canadian constitution gives Quebec the power to make its own foreign policy; the matter has never been forced to a head.

The situation in Germany is even more confused but more significant, because Germany has

probably gone the farthest toward giving its member states independent authority in foreign affairs. In the 1950s, the German Constitution seemed to give the treaty-making power to the federal government in some areas and to the states in others. It also seemed to require, however, that the states get approval from the central government before concluding any treaties, though some experts thought that the federal government was required to give approval. But mostly, the whole area was murky. No-one really knew what the law required, and everyone needed some clarity.¹

To clear up the problem, the states and the federal government entered into an agreement in 1957, called the Lindau Compact. In the years since, state and federal governments have followed this compact, rather than the confusing constitution itself, in this area. Under the compact, the states delegated to the federal government broad treaty-making power over consular relations, commerce, navigation, residence, trade, financial transactions, immunities and privileges, and adherence to international organizations. These subjects cover an enormous amount of ground, so the central government can make almost any treaty that it wants. But—and this is another large but—the federal government has given the states a very important role in the process of treaty-making. Under the compact, the central government has agreed that whenever a treaty implicates the interests of the Lander, the federal government will not sign unless the Lander agree to the treaty as well. These days, the Lander even have permanent representatives to the central government to advise it of the states' views on particular treaties. And although the Lindau compact does not require it, the federal government generally includes Lander representatives in the teams sent out to negotiate treaties.

Despite its complexity, this system seems to work well for Germany. The states feel that they have a role, and the arrangement is even fairly efficient. Importantly, whenever Germany enters into a treaty, both the states and the federal government have already consented, so both are prepared to stand behind it. But note that the Lindau Compact allows the states to participate in making federal foreign policy—our next topic—rather than to make their own independent foreign policies. Under the current arrangement, the federal government must work with the states, but in the end, there will be only one foreign policy for Germany. The Lindau Compact does not allow states to go off on their own. The states still do make some foreign agreements, but they have been on the decline since the Compact. And these state agreements involve local issues, such as the management of bridges, boundary rivers, or parks that fall across an international border. Such agreements are small-scale and uncontroversial, and if federal permission were needed, the central government would surely give it. In practice, then, German states behave much like American states in working out international agreements, even though federal permission is clearly required in America but not so clearly in Germany.

It is time to summarize. We asked whether international law forbids states within a federal system from making their own treaties. We have seen that the Vienna Convention on Treaties indicates that they may not do so. We have now seen the state practice is confusing to all concerned. Quebec claims to have the constitutional power to make its own treaties, but that claim is dubious at best. The German constitution appears to give the states some independent treaty-making power, but it is so murky that it was effectively replaced by the Lindau compact. Under that compact, the Federation makes treaties with state participation. In practice, the states make only uncontroversial agreements on issues that are geographically localized and with implicit federal permission.

At last, let us go to the bottom line. Suppose that the drafters of Burma's constitution wanted to give the states power to conduct their own foreign policies. Could they? We can offer several conclusions. First, the states certainly could make international agreements so long as they were acting with federal permission. Such an arrangement would not violate international law, and it would not even be unusual. Second, however, international law probably would not recognize treaties made by the states in defiance of the wishes of the central government. Third, in addition, the international community would bring a great deal of pressure to discourage states from making treaties in defiance of their central government. In all probability, no foreign state would be willing to make such an agreement with one of Burma's units. In short, then, even if the states somehow managed to secure a constitutional power to make their own foreign policies, international law would probably reject that authority, and no other state would be willing to deal with Burma's member states anyway.

It is therefore probably not worthwhile for Burma's states to struggle for a constitutional power to make their own foreign policy. But it would not be at all unusual—and it might be very wise—for the states to have a constitutional right to participate in the making of federal foreign policy. And that is the subject of the next section.

B. The States' Participation in Federal Foreign Policy

How could the states participate in the making of federal foreign policy? To understand the possibilities, let us begin with two basic models of federalism: "competitive federalism" and "co-operative federalism." In competitive federalism, the states and the federal government imagine each other as a rival for power. They fear the other, and so they compete with it to seize as much power as possible. In the constitution, they divide power as clearly as possible so that the limits of the other's power will be sharp. And they look for a neutral umpire—like a court—to police the division of power, to make sure that everyone stays within the bounds. The key device is the boundary line, to mark off the property of the central government from that of the states. The chief worry is trespass, that one government should intrude on the others' preserve.

Sometimes competitive federalism is necessary. When the elements of a federal state deeply distrust each other, they naturally want protection for their own separate domain. But competitive federalism has costs: if the system is based on distrust and separation, the parts may end up fearing each other ever more, until the country falls apart. Sometimes it is better to structure a constitution so that the parts must depend on each other. To get what they want, they must co-operate, and as they work together, they develop a shared history of mutual support. As a result, the country becomes stronger as a whole, and the parts even become more secure because the federal government is less likely to invade their spheres. This strategy thus has two pieces: we should structure the constitution so that (1) people from different states and the union all interact regularly under conditions that (2) give them an incentive to do the right things, i.e., to care for each other.

For states, the idea of co-operative federalism may be especially important in the field of foreign relations. Because the federal government will be dominant in this area, states cannot expect

to go their own way. If they think of international policy in terms of competitive federalism, they will try to erect a border between their own turf and the union government's. But in this field, if you draw a line, then all of foreign affairs will fall on the federal side of the line. The union will end up with all the property, and the states will be homeless wanderers. In other words, all that a boundary line can do is to wall the states off from any role. Instead, the goal should be to create a co-operative system, under which the parts rely on each other and the states have a real role in the federal foreign relations process.

More concretely, countries have experimented with three different approaches to giving the states a role in foreign affairs. In the first, the federal government sets foreign policy by itself, but the states have a lot of political power, so they can influence federal decisions. Let us call this the political pressure model. In the second, the federal government sets foreign policy, but it must rely on the states to implement it. Let us call this the state implementation model. In the third, the federal government does not set foreign policy on its own but must consult the states or even get their permission. Let us call this the direct participation model. The political pressure model is most associated with the United States, the implementation model most associated with Canada, and the consultation model most associated with Germany.

1. Political Pressure

In the political pressure model, the constitution gives the central government plenary power over foreign affairs, and it gives the states no formal role. The government is structured, however, so that the states can put a lot of political pressure on the federal government, which will therefore try to make a foreign policy that will please the states. Under this model, the states' power in foreign affairs is just part of the general power that they have in a federal system. This style of governance is particularly associated with the United States. For example, the President will hesitate to sign a treaty that would hurt some or all of the states, because it would be politically unpopular. State governors might denounce the President and urge state citizens not to vote for him next time. Remember also that before a treaty becomes binding, the Senate must ratify it, and that Senators are supposed to represent the collective interests of the states as states, rather than as collections of individuals. As a result, the Senate will seldom ratify a treaty that the states find objectionable. The President knows this, so he will seldom even propose such a treaty. Many draft constitutions for Burma propose an upper house in the Union legislature that would be similar to the United States Senate, and it might have a similar effect on foreign affairs.

2. Implementation

In the implementation model, the constitution gives the federal government plenary power over the making of foreign policy, and it gives the states no formal role in the process. After a treaty has been made, however, it must be implemented. Often the government must pass laws to enforce the treaty against its own citizens. Imagine, for example, that the union government agrees to a treaty banning child labor. To make this treaty effective, the government must then pass a statute

to ban child labor, and it must assign investigators and prosecutors to the task. May the federal government pass such legislation implementing the treaty, or must it rely on the states for that task?

Different constitutions offer different answers. To understand this variety, we need to review some background. Remember that a federal constitution may reserve some powers exclusively to the federal government (say, A, B, and C), some exclusively to the states (say G, H, and I), and some concurrently to both (say D, E, and F). Now suppose that the constitution gives the federal government a general treaty-making power. This arrangement faces us with two questions: does the constitution give the federal government the power to make a treaty on any subject it likes? And does it give the federal government the power to enforce a treaty on any subject it likes?

Let us start with the first question: can the central government make a treaty on any subject? On the face of things, the constitution generally gives the federal government power only over certain subjects; in fact, the constitution is careful to indicate that the union has power only over those areas. So clearly, the union can make a treaty in areas where it has exclusive power—A through C—because those areas belong to it alone. And presumably it may make a treaty in areas where it has concurrent power—D through F—because it has shared authority over them. But may it make treaties in areas that are reserved to the states under the constitution—areas G through I?

Let us use a concrete example. Suppose that the constitution gives the federal government exclusive power over the economy, the military, and foreign affairs, including the power to make treaties. The constitution gives the states exclusive power over education. The federal government makes a treaty with a nearby country: in the interests of regional solidarity, the two countries agree to teach regional history in all their schools. They think that students will feel more connected to nearby countries, if they understand how their histories have entwined. In form this agreement is a treaty, so it appears to fall within federal power. But in content, it is all about education, which the constitution reserves to the states. May the federal government regulate education so long as it does so through a treaty? Would this destroy federalism?

As another case, suppose that the constitution gives the states and the union share authority over civil rights. The federal government has been pushing for protection of more civil rights, but the states like things the way that they are. Now because the states and the union have concurrent authority, the constitution must specify a process for resolving cases where they disagree. But the federal government does not want to use that process, either because it fears that it will lose or because it's too time-consuming. So what does it do? It signs a multilateral treaty under which it agrees to protect a whole range of civil rights. It claims that the constitution gives it exclusive power to make a treaty, and that's all it has done, make a treaty. But the states will respond that the treaty is on the subject of civil rights, over which the federal government and the states share power. By using a treaty, the federal government has made the field of civil rights its own exclusive arena, rather than one in which it has only concurrent authority. Would this destroy federalism?

How do we deal with such cases? The general answer is that in most federal constitutions, the federal government has the power to make a treaty on any subject, even on subjects reserved to the states under the constitution. It would be illegal for the central government to pass domestic

legislation on the subject, but a treaty is different. Whenever the union signs a treaty, the subject automatically has international implications. And when we are in the international sphere, we want to speak with one voice through the federal government. Many federal countries have adopted this rule, including the United States, Canada, Switzerland, and Australia. The most famous case to articulate this rule is an opinion by Justice Oliver Wendell Holmes, called *Missouri v. Holland*. For that reason, the rule is sometimes called the *Missouri v. Holland* rule. In technical terms, the way that lawyers express this rule is to say that the federal government has plenary treaty-making power. Plenary power has a precise meaning: the power is not limited to certain subject matters but can instead reach any issue that the central government would like to put in a treaty.²

But we are not done. Even if the federal government can *make* any treaty it likes, it does not necessarily follow that it can *implement* any treaty that it likes. Perhaps it can make certain treaties but must rely on the states to enforce them. If we allow the union to make a treaty on any subject, we have obviously allowed some intrusion on the states. But if we allow the union to enforce a treaty on any subject as well, we have perhaps given it the power to do anything that it wants, even in the domestic arena. First, it negotiates a treaty on any subject that it wants, and then it passes law to implement the treaty. As a result, the central government can reach anywhere. Some have predicted that such a reach would mean the death of federalism. So how have federal countries responded to this worry?

In all federal states, the central government may implement treaties in those areas over which it has exclusive or concurrent authority—in our hypothetical, subjects A through F. For example, if the constitution gives the federal government power over trade, then it may enforce a treaty governing trade. But here is the harder question: may the central government enforce a treaty in areas reserved to the states? For example, if education is reserved to the states, may the central government enforce a treaty mandating a certain curriculum in the schools?

Different countries have adopted different rules to answer this question. In fact, the United States and Canada have adopted polar opposite answers. Under the rule of *Missouri v. Holland*, the United States government can enforce any treaty, on any subject. It can therefore regulate areas that it might not be able otherwise to reach, so long as it uses a treaty to get there. According to Justice Holmes, the author of *Holland*, for the federal government to make international promises, it must be able to follow through on those promises. If it cannot implement treaties—if it must rely on the states to do so—it will make few treaties, and the national interest will suffer.

Canada's constitutional law is somewhat unclear on this subject, but it appears to take the opposite approach: the federal government may make any treaty, but it may enforce only those on subjects within its exclusive or concurrent power. If education is reserved to the provinces, for example, then the federal government may make an education treaty, but it must rely on the states to enforce it. According to the Canadian judiciary, this rule is necessary to keep the federal government from gaining unlimited power. This rule is often called the *Labour Conventions* rule because the Supreme Court most notably propounded it in a case of that name. (Australia's practice is someplace in between the United States and Canada: the federal government can make treaties on any subject, but it can enforce them only when they address "external affairs.")

So here we have two opposite views, and each predicts that if the other is rule is adopted, dire consequences will follow. In point of fact, both America and Canada are still alive and well, despite having such different rules. In America, the rule of *Missouri v. Holland* theoretically would allow the federal government to rule all of American life, but in practice that doesn't happen because the states have enough political power to stop it. In Canada, the Labour Conventions rule theoretically threatens the federal government's ability to develop a coherent foreign policy: it can make promises, but the states might refuse to enforce them, to Canada's great embarrassment in the international sphere. (In fact, Canada would then be in violation of international law, because at international law, it is never a defense that your domestic constitution forbade you from complying with your international obligations). But in practice, the states do voluntarily enforce federal treaties, because the Labour Conventions rule has forced Canada into a kind of co-operative federalism.

Let us examine how a system like Canada's works at its best. In a federal constitution, the states receive powers over subjects that the framers think belong with the states. But the Framers also think that treaties belong with the federal government, and sometimes treaties must address matters reserved to the states, because of international demands. So we have a tension here: on the one hand, some subjects belong to the states, but if they are in a treaty, they also belong to the federal government. How to split the difference? If we insist that the federal government rely on the states for enforcement, the states gain several significant powers in the foreign affairs area.

When the states enforce treaties, they actually have some power to control the meaning and scope of the treaty. For one thing, the state must make choices about how aggressively to enforce the treaty. To implement a rule, you must commit resources to it, such as prosecutors, investigators, and judges. No government ever fully enforces any law; they don't have the money. Every government must of course enforce the law in good faith, but they have some discretion about how enthusiastically to do so. If a state disagrees with a federal treaty or thinks it unimportant, then the state may decline to dedicate many resources to it. In fact, the state could in practice choose not to enforce the treaty at all—though this would probably be illegal. When the state does enforce the treaty, state officials will likely be more sensitive to local people and local ideas, and local people will accept them more since they are more like neighbors. Because it has the power to implement the treaty, therefore, the state has the power to oversee how it affects the lives of its citizens.

In addition, before the state can implement a treaty, it must decide what it means: it must interpret the treaty's terms. But treaties are not always clear; their language will sometimes bear several meanings. If the state has the responsibility to enforce the treaty, in practice it has the power to choose which meaning it prefers, because it has the power to enforce the treaty according to its own interpretation. For example, suppose that the federal government wants to encourage the harvesting of timber throughout Burma, but the states want to restrict it. The union makes a treaty with Thailand to allow Thai companies to cut down Burmese trees above thirty meters in height; clearly, the central government is trying to win its disagreement with the states by adopting a treaty, which it has plenary power to do. Remember, however, that the treaty allows the Thai companies to take only trees over thirty meters in height, and the treaty does not say how the trees are to be measured, before being cut down. The states take the view that someone actually has to measure

the trees with a tape rule to make sure. . The union government and the Thai logging companies believe that using this method would be too expensive; if they have to use it, the companies will not harvest any trees. So, the companies and the union take the view that Thai loggers may just estimate the height of the trees by sight, based on their experience. The treaty does not tell us in so many words which method is required; it will bear either meaning. So who wins? Under the Labour Conventions rule, the state wins in this case, because it is charged with implementing the treaty. To implement the treaty, the states must allow the loggers to take tall trees—but only if they actually measure each one by hand! The federal government may make a promise for the country, but it falls to the states to decide how to fulfill that promise. When states receive the power to apply the rules, they have some discretion in deciding what the rules mean.

In short, if the states have the power to implement foreign policy, they also have some power to make foreign policy. This state power will in turn change the behavior of the union government itself: because the union knows that it must rely on the states for enforcement, it will make no treaties that the states find truly objectionable. The union knows that the states can read treaties very narrowly or even decline to enforce them. The country would then suffer serious international embarrassment, maybe even sanctions. As a result, the union will adopt only those treaties that it feels confident the states will enforce. So to give the states an implementation role is to give them an indirect influence over the making of federal foreign policy.

3. Direct Participation

Our last model allows the states directly to participate in making federal policy. In our first two models the federal government has plenary power in the field of foreign affairs. The states have some influence, but only by way of a threat: if the federal government makes bad treaties, then the states may turn the federal officials out of office (political pressure), or they may refuse to enforce the treaties (implementation). Knowing this, the federal government will hopefully control itself, adopting only good treaties. But that's only a prediction about federal behavior. If they really want to, federal officials can still ignore the views of the states. By contrast, the direct participation model requires the federal government to involve the states directly in the formulation of foreign policy. In this model, the state cannot make their own separate policy, so the country still speaks with only one voice. But the constitution guarantees the states some direct say over what that voice has to say.³

How do we secure this interest? Again, Germany provides the most instructive example, as the Lindau Compact suggests four primary ways that states can participate in making foreign policy. First, they might have a veto over some federal actions; in other words, the union must get state permission before it acts. For example, the constitution might prohibit the union from going to war without the agreement of a majority of the states. There is a risk in such a rule: because other countries know that the union must get permission to wage war, they might not fear its anger. But there is also a benefit to this rule: the federal government is unlikely to get involved in a conflict without widespread support. As another example, the constitution might provide that a treaty becomes law only when a majority of states approve it.

The second possibility is that the states have consultation rights: before it can act, the federal government must inform the states and ask for their input. Even when the states do not have a veto power, they might have the right to be informed and consulted. In other words, the federal government might be required to inform the states about almost all its international activity, even when the states have no power to block that activity. In a scheme of co-operative federalism, the federal government should always listen to the states' concerns and respond appropriately. Of course, with no state veto power, the union could theoretically listen politely and then ignore the states' advice. But at some level, constitutional democracies must believe that sometimes people actually listen to rational arguments. For that reason, consultation requirements are quite common: government agencies very often must listen before they act. And we must hope that if the union listens and discovers widespread resistance, it may actually change its mind. If the union is negotiating a treaty that only the states may implement, then the union has a particularly good reason for listening. If the states implacably oppose the treaty, the union might worry about whether they will enforce it. As a result, the union might decide not to sign the treaty in the first place—but only because it asked the states for their views. Finally, as a general matter, it is good for the government to be as open as possible about its actions. The people cannot govern themselves unless they know what the government is doing.

In short, the constitution might give the states the right to veto some actions and to give their views on more. But as good as they are, these rights empower the states only to react to federal moves: the federal government initiates policy, and the states merely have a chance to criticize or block it. But it is also possible to give the states a more pro-active role by including them in the commissions that formulate foreign policy in the first place. For example, states could send representatives to the federal teams that negotiate treaties. Or the states could send representatives to national security agencies to consider whether the government should start a war or target a group of terrorists. If the states already have veto, consultation or implementation rights, any sensible union government should include the states in this way, even if the constitution does not require it. After all, if the federal government must eventually inform the states, get their approval, or ask them to enforce the treaty, it is just more efficient to do it early on by including them in the negotiations. And if the states participate in developing foreign policy, they will more likely be committed to it down the road. That's good for the federal government, because that way, the policy will more likely be successful and win broad popular support. And if it ultimately fails, the federal government will not have to bear the blame alone.

For the states, inclusion on foreign policy teams offers two important opportunities. First, the states can keep watch on the federal government to protect the states' constitutional prerogatives. Second, if the states are in the negotiations from the beginning, they can have an early, directive influence. If they have the right only to veto after the fact, then they have much less flexibility. A veto right allows you only to accept or reject the federal policy as it stands. But what if the states really want to keep part of the federal policy but reject other parts? For example, suppose that the federal government has made a treaty with China agreeing to free trade and mutual military support. The states might really want free trade but not entangling military alliances. If they have the right only to veto, then they cannot pick and choose; they must either give up both or swallow both. Neither option is good. But if the states had been included from the beginning, they could have

pushed for a different strategy—to get free trade without a pledge of military support.

4. Permanent Staffs

Finally, the fourth way that states might participate in foreign affairs is by sending permanent delegates to the union for foreign policy. The primary job of these delegates would be to carry out the functions described in the first three options: the federal government would keep them informed, get their permission when necessary, appoint them to negotiating commissions, and so forth. In that sense, this fourth device is just a way of carrying out the first three. Nonetheless, I list it as a separate method because it adds two elements to the first three methods. First, if you have a staff that permanently resides in the national capitol, devotes itself to foreign affairs, acquires expertise and long-term contacts in the foreign ministries of Burma and other important countries, then the states will be able to exercise their constitutional prerogatives much more effectively. Second, even apart from the states' formal constitutional roles—that is, even in a case where the states have no consultation, veto, or direct participation rights—a permanent staff can keep track of federal initiatives, make sure that the union government has the benefit of the states' views, and inform the people of troubling federal projects. In other words, a permanent staff can serve as a kind of catch-all to keep the states involved even where the other three devices are not relevant. And so the constitution might explicitly allow the states to maintain such permanent delegations.

In short, if the states want to have a role in foreign affairs, they would probably be ill-advised to agitate for the right to make their own policy. They would be much better advised to ask for a way to implement or participate in the creation of federal foreign policy. There are federal systems that include such features, Germany being the best example. It may still be an uphill battle for Burma to work this way. Federalism in foreign affairs is very uncommon. For that reason, if you give the states a substantial role, other states may be unhappy with you. But increasingly, foreign policy affects the states. It is no longer possible—if it ever was—to discern a bright line between international and domestic affairs. The world is becoming globally integrated. The SPDC has kept the country relatively aloof from that integration, but only at great cost in health, wealth, and openness. A democratic Burma will likely want to become part of the global order. As a result, events in Bangkok, Beijing, Brussels, Berlin, New York, and Washington will have direct and substantial effects in all the states of Burma. In order to govern themselves, the states of Burma may need to participate in foreign affairs. But doing so will take courage, imagination, and a willingness to experiment, because you will be marking your own path.

IV. Electoral Systems

An electoral system is the system by which voters elect their representatives. Because electing representatives is virtually the definition of democracy, choosing an electoral system is at the heart of creating a democratic state. There are many electoral systems; different countries, all stable and successful, structure their process in quite different ways. In other words, there is no one right way to elect people; you must choose the way that is right for you. All these systems have different advantages and disadvantages, so you must consider which system best suits your

particular circumstances. In constitutional design, it is never possible to predict exactly the effects of a particular constitutional provision. But these days, constitutional designers know a fair amount about the likely effects of different electoral systems, and the choice of an electoral system is clearly important to the success of a new democracy. It can have dramatic long-term effects on the kind of politics you have, the degree of commitment to the constitution that different groups feel, and the general level of harmony between different groups. Unfortunately, electoral systems are technical and complicated, so we will use many examples in explicating these systems.

A. Majoritarian Systems

The most basic distinction in this field is between majoritarian systems and proportional systems. I will explain the difference, describe their respective advantages, and then talk about the ways that people have tried to combine the two to get the best of each.

The essence of majoritarianism is winner-take-all: whoever gets the most votes wins (he is elected to office), and the loser gets nothing (he goes home). In a classic majoritarian system, the country is divided into electoral districts, and the people in each district elect one representative: we call them single member districts, because each elects just a single representative to the legislature. The candidate who wins the most votes in the district becomes the representative, and all the other candidates have no role in the government. The great advantage of this system is that because each district elects only one representative, the districts can be fairly small. Each city or county or town can be its own district, and it can elect its own representative. As a result, the representative and the voters have a chance to forge a close bond. Many of the voters may know the candidates personally. If they have a problem, they know where to turn. In fact, representatives usually keep offices in their home districts, so people need only show up there to get some attention. Because the representatives are from a particular place, they are likely to be sensitive to the concerns of people from that place. In a new democracy, when people are trying to figure out how to make democracy work, this bond can be important, because it shrinks the gap between the people and the government. I want to emphasize this upside to majoritarian systems, because I am now going to explain the downside at length.

1. The Majority Premium

There is a large drawback to majoritarian systems, usually called the majority premium. Let's imagine a district—call it District One—with two major parties, the pinks and the greens. The pinks have 52% of the vote, and the greens have 48% of the vote. The pink candidate therefore wins, and the green voters are left with virtually no influence on their own representative. Theoretically, the pink representative might pay attention to the green voters out of the goodness of his heart. But remember that he has just gone through an election in which the greens voted against him, maybe said insulting things about him, and generally did everything they could to block his power. He is likely to be somewhat hostile towards them. When they ask for help, he is likely to say no.

Let's make this more concrete. Imagine that you are a green voter, and the pink candidate has just won from your district. In the legislature—and this could be either the state or the national legislature—there is a proposal to allow construction of a paper plant on a river near your home. You find out that in other places, this company has built paper plants that have polluted the environment and injured the health of people nearby. So you want it stopped, and you ask your representative to stop it. It turns out, though, that almost all the people who live near the site of the plant are green voters. It also turns out that many important pink voters have investments in this company, and they own the land that the company wants to buy for the plant at a premium price. So when you go ask the pink representative—your representative—to stop the plant, he ignores you, because the plant is good for pinks and bad for greens. You are left without direct influence over the legislature, because no-one feels accountable to you, the green voters of District One. Worse, your own representative now goes off to the legislature, and he tells the other representatives that the paper plant is good for the people of District One, so they should all vote for it. Those other representatives know that in the future, they may need the support of your representatives for their own pet projects, so they all vote for the plant to help him out. The plant is built, the environment becomes polluted, and pretty soon, your family becomes sick, just as you feared they would.

So the problem with majoritarian systems is that they tend to under-represent the minority in a given district. That's why we call it the majority premium: these sorts of systems give the majority a premium, an added influence over and above their numbers. That premium can become even more exaggerated than the example that I have given you. Suppose that instead of two candidates, there are five: the pinks, greens, purples, blues, and reds. The vote is split between all of these candidates, so that the front-runner (the pink, let us say) receives only 23% of the vote. Although he has not received a lot of votes, he has still received more than anyone else, so he is elected. In this case, 77% of all the voters in District One voted for someone else, and they are left without any real influence over the legislature. It is even possible that those other voters would have preferred anyone to the pink candidate, because he has based his election on a promise to oppress anyone outside his own party. The pink voters—with 23% of the vote—have effectively become the rulers of this district. This example is not just hypothetical: in the United States, when there have been three-way races for the presidency, the winning candidate has often received less than 45% of the vote. Although less than a majority of the country voted for him, he became the president.

Situations like these are so troubling that some countries now require that the winning candidate must receive at least 50% of the vote. How do we arrange that? The usual solution is called a run-off or double ballot system. In this system, we hold two sequential votes. In the first, all the candidates run, and if one gets a majority, he becomes the representative. But suppose no-one gets a majority: then we take the top two, and we run a second vote with just these two on the ballot. Everyone votes for his preferred candidate as between these two. As there are only two, one will receive more than half the vote and the other less than half. The winner then goes to the legislature with the support of a majority of his constituents. We have language to describe this system: if you can be elected with less than half the vote, then you are in a plurality system; if you must have more than half to win, then you are in a majority system.

The run-off system helps to limit the majority premium, but only to some extent. Suppose

that on the second vote, the winning candidate gets 52% of the vote. In this situation, 48% voted for someone else, and they are left with very little influence. In addition, even among the 52% that voted for the winner on the second ballot, we know that many voted for someone else on the first ballot—someone other than the top two who went on the ballot in the run-off. As a result, for them, the second ballot just offers a choice between the lesser of two evils.

In short, within each district, majoritarian systems over-represent the majority. But now let us consider the country as a whole, rather than just each district at a time. Suppose that we have only four districts, for simplicity's sake. Suppose that in the country as a whole, 48% of the voters are green, and 52% are pink. And finally suppose that in each district, the proportions are the same as for the country as a whole, 48% green and 52% pink. So in District One, who wins? The pink candidate, with 52% of the vote. And in District Two? Three? Four? In each case, the pink candidate wins. So let us now imagine the legislature. How many pink representatives? Four—out of how many? Four. In other words, the pink party holds all of the districts. How much power does the green party have? Essentially none; this is one-party rule. But how many of the voters support the green party? 48%. So, by the magic of the majority premium, 48% of the voters hold zero percent of the power. Again, this situation is not merely hypothetical: in most majoritarian countries, the majority has far more than its proportional share of the legislature, because they are a majority in most districts..

How in the world does this happen? Remember that in each district, the minority elects no-one; they just lose. If that happens in each and every district, then they elect no-one in the whole country, because they are a minority everywhere. In every electoral system, the minority will receive only a minority of seats in the legislature. But in a majoritarian system, the minority usually gets a disproportionately small fraction of the legislature—smaller than their fraction of the voters. In some cases, the minority may receive virtually none of the legislature. Now suppose that the minority and the majority believe that they have systematically different interests and concerns, so that the lines between them are rigid. The majority—the pinks—will therefore govern wholly in the interests of the pinks, with some hostility to the greens. If this continues for decades, the greens may come to feel that the electoral system allows them no power. Democracy is supposed to be about self-government, but for the greens, it has begun to feel like a prison. If they get angry enough, they may resort to armed resistance. And Burma, of course, cannot afford a return to violence.

2. Districting

Can majoritarian systems limit this majority premium? Can they find a way to give minorities a proportional share of power? Most majoritarian systems have tried to find an answer by drawing district lines in such a way that each group holds a majority in its fair share of the districts. In other words, if you are 48% of the electorate, we can try to draw district lines so that you are a majority in 48% of the districts. That way, you have a chance to elect your fair share of the legislature. For example, imagine that we have four districts, 25 voters in each, 100 voters in all, 25 green and 75 pink. Is there a way to give each party its proportional share? Sure. We put 15 green voters and 10 pink voters in district one—who wins? The greens. In District Two, we put 15

pink voters and the ten remaining green ones—who wins? The pinks. And the last two are therefore all pink—who wins? The pinks. So pinks have three districts to the greens' one—75% to 25%, exactly their share of the electorate. In this case, through careful districting, a majoritarian system has resulted in proportional representation, with no majority premium. Here is the way that majoritarian systems can correct the majority premium: they can deliberately group minorities into their own districts, so that they control roughly the same percentage of districts as their share of the citizenry. Abracadabra! The majority premium goes away.

But we must also remember that we can draw district lines in a bad way, to further increase the strength of the majority. When district lines are drawn for bad reasons or in a bad way, we usually call it gerrymandering. Gerrymandering is named after Elbridge Gerry, a Massachusetts politician who figured out how to use district lines to keep his party in power for a long time, even against the wishes of the voter. How did he manage this feat? Again, imagine a country with four districts, and 100 total voters, 75 of them pink and 25 green, with 25 voters in each district. We have already seen that you could draw the lines to give the greens their own district, so they would have their proportional share of the legislature. But now suppose that the pinks are in control of the districting process. They divide voters in the following ways: in District One, 10 green, 15 pink; in Districts Two, Three, and Four, 5 green, 20 pink; in each. Who wins in District One? Two? Three? Four? In every district, the pinks are the majority, so the greens have no representatives in the legislature at all. As we have already seen, this result could occur by accident in a majoritarian system, but it is far more likely to happen if a political party is allowed to draw the lines for their own interest.

And we can do even more amazing things with districting. Suppose that the country has four districts, 100 voters, 25 voters in each district, but now there are 60 green and 40 pink voters overall. The pink voters, though a minority, get control of the districting process. In District One, they put 25 green voters and no pinks, so the greens win that district. But in District Two, they put 12 green and 13 pink; in District Three, 12 green and 13 pink; and in District Four, they put 11 green and 14 pink. Who wins Two? Three? Four? The pink voters control all three, compared to only one for greens. In other words, the pinks control 75% of the legislature—even though they are only 40% of the electorate. Though a minority, they will run the country, and once in power, they will keep drawing district lines to keep themselves in power. How did this happen? The trick is called packing. We pack a lot of green voters into District One, so they win that one, but there are few to go around in the other districts. As a result, the other districts are dominated by pinks. In truth, the greens do not want 25 voters in District One, because it only takes 13 votes to win the district. If they have 25, 12 of them are wasted as far as the greens are concerned. They would rather take those votes and distribute them elsewhere, so that they might control other districts.

In short, districting is magic. It can take a majority and make it a minority; it can take a minority and make it zero; or it can give everyone their proportional share. It turns out that your share of power depends not only on how many votes you have but on how those votes are grouped into districts—in other words, it depends on who is doing the districting. If you are beginning to think that people can abuse and manipulate districting for their own selfish ends, you are right. And

that is one of the great problems for majoritarian systems: someone has to do the districting in a way that is fair. To district well, we need some standard of fairness for dividing people into districts. But when their share of political power is on the line, people are likely to disagree over the proper standard of fairness.

Let's ponder what it would take to devise a standard for fair districting. One possibility is blind districting: we don't pay attention to who is going in each district; we blind ourselves to the identity of the voters; we simply draw arbitrary lines on the map. The advantage is that because they are blind, people cannot to manipulate the process. But the disadvantage is that if you district blind, in practice, the majority will usually get more than its fair share of the legislature. Even if you don't mean to do so, it just happens. Imagine that your voters are split 60 pink and 40 green, and they are randomly distributed across the country. In that situation, even if you draw your lines at random, you will on average include 60% pinks in every district—which means that they will win every district. The greens will still control much less than their proportional share of the legislature.

So most majoritarian democracies do not district blind. Instead, they intentionally district so as to divide power in a fair way. But to know what is fair, we need to decide which groups have legitimate claims to control some districts, and how many districts each group has a right to control. But of course many different groups will apply. In fact, you will find not only many groups but many different types of groups: not only political parties but also racial, religious, language, and ideological groups all want their slice of the pie. It is not possible to give them all districts of their own, because there are simply not enough to go around. So you must decide which types have legitimate claims, and then you must deny the others. And this process of exclusion will prove terribly acrimonious.

For example, suppose that you are districting Shan state into legislative districts. You decide to have four districts, and you decide to divide power between the political parties on a proportional basis. There are three major parties: the pinks have 50% of the vote, so you give them a majority in two districts, and the other two parties—the blues and the greens—each have 25% of the vote, so they get a majority in one district each. You have worked out a map of district lines that will divide power in this way, and you are proud about how fair you have been. But now a group of believing Catholics arrives on your doorstep. They tell you that they are not part of any political parties and do not believe in political parties. They think that religion really matters, and they want to be the majority in a district so they can choose a good Catholic representative. You want to give these people a district of their own, because you think that democracy means that people get to choose what matters to them, religion or party affiliation.

But here's the rub: as soon as you start to change your district lines to create a new Catholic district, you upset your careful plan for dividing power among the parties. It turns out that your Catholics live partially in the green district and partially in the blue district. So you carve out a new district from those two districts. But now you have five districts—the Catholic district, the two pink districts, what is left of the blue district and what is left of the green district—and you only wanted four. So you combine what is left of the blue and green districts into one district. In that new blue/green district, the greens slightly, so they control the district. The blue party now has no

district of its own, so it feels powerless. To make matters worse, in the new Catholic district, the voters are about equally divided between the three political parties, but the pink candidate usually wins because of better funding. So the Catholic district elects a good Catholic who is also pink. What's the net result? The pinks now have three districts, 75%, although they are only 50% of the electorate. The greens have 25% of the districts and of the electorate. And the blues have 25% of the electorate but zero percent of the legislature. You have managed to give the Catholics some power, but only at the cost of under-representing the blues and over-representing the pinks.

And it gets worse: if you give the Catholics their district, then other groups will ask for theirs. Pretty soon you have religious groups, language groups, occupational groups, and so on, all clamoring for their fair share of power. Groups like these put designers of electoral systems into an impossible position. On the one hand, no electoral system can recognize all of these groups without unraveling. But on the other hand, all these groups have a powerful claim. They say that they have waited a long time for democracy in Burma. They say that democracy means self-government, so they must be given a place. They insist that part of governing one's self is to decide for one's self what matters most to one—whether it is political party, language, religion, or what have you. So when you tell some of these groups that they will receive no districts just for them—as you must—you are telling them that they cannot share control of government in the way that they think matters.

When you decide which type of group gets how much power, you have a heavy effect on the future of Burmese politics. For one thing, you must decide how many districts to give each group, and obviously this division will determine just how much political power they have respective to other groups. But in deciding what types of groups to recognize, you also have a big effect on the issues that will dominate your politics. For example, imagine that there are two parties, the Free Marketeers and the Communists, with about 50% each, so you give them each 50% of the districts. Now, if you want to get a political campaign going in any of these districts, you need to appeal to what the voters have in common, so as to get a lot of votes. In each of these districts, there are people with different religions, languages, ethnicities, and so forth, but they all share an economic ideology—communism or capitalism—because we have districted them that way. As a result, predictably the representatives from the communist districts will be pushing for a communist economic plan, and the capitalist representatives for a capitalist plan. But nobody will be pushing hard for a particular religious agenda, because all of these representatives have constituents of all different religions. Politics will be about economic ideology, therefore, because we have grouped voters into districts according to their economic ideology.

And we could have grouped them differently, to create a different sort of politics. Imagine, for example, that the state is divided 50% Buddhist, 25% Christian, and 25% Muslims. We intentionally group people so that the Buddhists are clumped together in two districts, the Christians in one, and the Muslims in one—perfect proportionality. What will the politics now be about? Religion, of course. What unites each of these districts and distinguishes it from the others is religious identity. To generate a political movement, it will be most effective to appeal to the voters' religion. You could try to get a capitalist crusade going, but it won't work as well, because the voters have many different economic ideologies. Again, we witness the electoral designers' quandary: democracy is supposed to allow the people to choose their own politics, but in fact, the

districter has chosen it for them, by deciding whether they should be arguing about religion or economic ideology. And the districter must district on some basis: there really is not another choice. So the districter ends up deciding, before democracy even begins, how the democracy should go.

Now let us suppose that we have somehow decided which groups should get districts and how many districts each should have. For example, we will allow only political parties to claim districts, and we will hand them out in proportion to their numbers. For a moment, we get the balance just right. But then we hit another problem: things change. People move from one district to another; people shift their allegiance from one party to another. Some groups have higher birth rates than others. People in some groups (particularly minority groups) may fail to register to vote in the same proportions as other groups. Pretty soon, your careful balance has gone completely out of kilter. If you want to keep the balance, you must tinker constantly with the boundaries. But if you shift the districts that often, you create still other problems.

Remember that the great advantage of majoritarian systems is that they create a stable, close link between the voters of a particular area and their representative. But if the borders of a district constantly shift, this relationship breaks down. This year, you are in District One, but next year, you may be in District Four. The representative of District One may get to know her constituents quite well, but then the borders shift and she must get to know a new group, who may have little in common with the old ones except their party allegiance. Because of these problems, most majoritarian systems do not shift their borders very often. As a result, with district boundaries stable, the voters and their representatives have a chance to forge bonds. But the balance of power becomes ever more skewed, usually in favor of the majority.

In fact, in many countries, including the United States, the legislature has broad discretion to district in whatever way it likes. It can give districts to the minority party, or it can withhold districts. Sometimes, the legislature overtly admits to gerrymandering: the Indiana legislature, for example, is often controlled by Republicans, who routinely admit that they draw district lines to ensure that Republicans remain in power. To many Americans, this practice is shocking, and they think that it should be unconstitutional. But if the Court strikes down this gerrymandering, it must put something in its place. It must, in other words, have some standard of fairness for dividing power among groups. And as we have seen, people are likely to disagree on of such a standard. So mostly the courts just stay away and let the parties fight it out.

Majoritarian electoral systems have therefore brought us to an impasse. Let me rehearse the steps, so you can see that this impasse is inherent in majoritarianism:

1. In a majoritarian system, the winner takes all; the minority receives nothing.
2. As a result, majoritarian systems tend to over-represent the majority: because they are the majority in almost all districts, they win almost everything, and the minority loses almost everything.
3. The only way to counter-act this majority premium is intentionally to draw districts in which the minority dominates, so they can control their fair share of the legislature.
4. But if you are going to draw district lines so as to allocate power fairly, then you need some standard of fairness according to which you can divide power between groups.
5. But people tend to disagree over how you should fairly allocate power, so districting

battles become heated, with no obvious right answer.

6. And as a result, some political decision-maker—like the legislature—will have to decide how much power to give each social group. But at this point, we must begin to wonder what has happened to the promise of democracy. The point in democracy is to allow people to govern themselves, not to have the government tell them how much power they are supposed to have. Is there a way out of this impasse? Not from within pure majoritarianism. And many people find this problem so vexing that they adopt a very different electoral system: proportional representation.

B. Proportional Systems

The great advantage of proportional systems is that they tend to give groups a proportional share of power, without a majority premium. How? In majoritarian systems, the voters of each district elect only one person, and the winner takes all. In a PR system, the voters from each district elect a large number of people, and those people are divided proportionally between the different parties. If your party polls ten percent of the voters, then it will elect ten percent of the representatives from your district. The winner does not take all; the winner takes only its fair share, and the smaller parties all take their fair share too.

Let us take the simplest form of PR, generally called closed list PR. There are five steps in this process.

1. First, we create large districts that elect many people to the legislature, called multi-member districts. At the most extreme, we could make the whole country one large district, so there are no subdivisions. Small countries like Israel often use this arrangement, and it may be possible in some of Burma's states. So in our hypothetical example, let us imagine that our state is one large district. All by itself it elects the whole legislature—let us say, one hundred representatives.

2. Next, the parties nominate lists of candidates to be elected from the district. Ideally, the parties nominate as many candidates as there are places to be filled from that district. In other words, if our district has one hundred representatives, then each party will run one hundred candidates, in the hopes of capturing the whole legislature. These lists will be ranked in order of the party's preference: the people that they most want to elect will be near the top of the list, and the people that they care less about will be near the bottom.

3. Each voter in the district then votes for one of the party lists. Note that they don't vote for one hundred individuals. Instead, they vote for one of the party lists as a whole, for all one hundred people on that list.

4. We then count the vote and determine what fraction of the votes was won by each party. In our hypothetical, imagine that the pinks won 37%, the blues won 30%, the greens won 14%, the purples won 11%, the oranges won 6%, and some very small parties split the remaining 2% among them.

5. Now, each party receives its proportional share of the legislature: they get the same percentage of legislative seats as the percentage of people who voted for them. For example, if the pinks won 37% of the vote, then they get 37% of the legislature. Since our hypothetical parliament has one hundred people in it, the pinks get 37 places, and so the top 37 people on their list become legislators. Most PR systems have a threshold: to win any places, you must gain more than a certain

percentage of the vote—usually around five percent. In our example, the smaller parties split two percent of the vote among them, so none of them receives any places in the legislature.

Notice the end result: even relatively small parties will receive some representation in proportion to their actual numbers in the population. The purples, for example, command 12% of the votes, and they will receive 12% of the legislative places. In a majoritarian system, by contrast, the winner takes all, so that if you won only 12% of the vote in a district, you would elect no-one. You would just lose. And if you were only about 12% in every district, you would elect no-one at all in the whole country. So people generally think that PR is much better at giving small groups their fair share of the parliament.

How do the two systems produce such different results? Remember that majoritarian systems use small districts. That small size, as we have seen, is one of the great advantages of majoritarianism. But it has a drawback: with small districts, you can usually only assign one legislator to each district. If you assigned more, then the legislature would become too huge. But if each district elects only one representative, then the majority will win that one place, and everyone else is left with nothing. You cannot cut the one representative into pieces and give a proportional share to each party. The result is the majority premium. By contrast, PR uses large districts with many members. The large size, as we will see, creates its own problems, but it allows more accurate representation. If you elect one hundred people from one district, then small groups do not have to be shut out: they can receive some small fraction of the seats, comparable to their fraction of the votes. When everyone is competing for only one place—the single great prize—then the largest party will win everything. But if people are competing for a large number of prizes, then it is possible to divide them in a more proportional way.

In a new democracy, especially one with a history of tension, it can be especially important to represent every group in proportion to its numbers. In a new democracy, people are often not very committed to the system; they are not sure whether it will work out. If small groups find that they are shut out from any voice in the system, they may become alienated, even insurrectionary. What new, fragile democracies need above all is broad support, so they can become stable. That way, people won't try to overthrow it as soon as times get hard. Happily, PR can help even small groups to feel that they have a voice and a place at the table. After being forced into silence for years, they can suddenly speak. This experience can be deeply empowering, so they become great supporters of the new constitution.

But PR has a down-side as well. Its large size allows it to represent groups accurately, but it also breaks down the relationship between the people and their representatives. Remember that at its most extreme, PR systems designate the country as one large district. No legislator represents any place in particular; instead, each legislator represents all the people of the country. All of the legislators may keep their offices in the capitol, and they may know little about conditions in rural districts. Voters may know little about them, and they may not know where to turn for help. And the parties make up the party lists: they choose the candidates and place them in a rank order. People get on the list by being servants of the party, not by being close to the people of a particular area. Indeed, in pure PR—what we call closed list PR—the people do not even vote for candidates as

such; instead, they vote for a party, which chooses who will represent them. As a result, the central party organization tends to be powerful, and people sometimes feel that they have no more influence over the party than over the government itself.

There are ways to limit this downside, but they have their own problems. First, you could impose residency requirements: the parties put together the lists, but they are required by law to include a certain proportion of people from all different parts of the country. For example, you might require each party to list at least one candidate resident from each state of Burma in the top twenty spaces on its list. That way, it is more likely that someone from, say, Chin State will go off to the national legislature. In my own view, PR with residency requirements may be a good electoral system for the Union of Burma. But residency requirements are not a perfect fix for PR's ills. For one thing, although they make it more likely that there will be legislators from the various states, they do not guarantee it. For example, suppose that the pink party wins 10% of the vote for a legislature of 100 people, but their Chin candidate is number 11 on the list. For another thing, to get on the list, a candidate from Chin State must above all earn the favor of the party leadership in Rangoon, rather than the Chin voters themselves. As a result, the Chin candidates may not even keep an office in Chin State, and they may well be more concerned with developments in the capitol than in the country.

To make representatives more responsive to people from the various states, the states might choose to organize their own state parties and run them in national elections. The Shan State Party, for example, might field its own list of one hundred candidates. Now you can be fairly sure that a lot of people from Shan State will vote for the Shan State Party, so it will end up with, say, 8% of the national vote. If the legislature holds one hundred people, the Shan State Party has won 8 seats. And, because these candidates were selected by the Shan State Party, you can be fairly sure that they will be responsive to the needs of Shan State and its citizens. But there is a risk in creating regional, perhaps ethnically identified, parties of this sort. They can damage the union by creating regional division, without the broad unifying structure of truly national parties. And regional parties may not even help the citizens of the regions themselves: if everyone is organized into a regional party, then the party from the largest region will inevitably dominate the legislature. The citizens of the states might do better to create large, nation-wide parties through which they can exercise real influence. But, then, of course, the problem remains: because under PR these large parties will elect candidates from large districts, there is still no guarantee that the legislature will contain even a single person from your state.

Finally, in order to mimic the strong local bond created by small majoritarian districts, you could create smaller districts for your PR system. In our example, instead of one district with one hundred members, we could create twenty districts with five members each. These districts will be closer to the people, so they will have some of the advantages of a majoritarian system. Unfortunately, they will have some of the disadvantages as well. With fewer members—only five in each district—it will be hard to divide the legislature proportionally among the parties. To see this point, let us return to our hypothetical example. First, the pinks have 37% of the electorate: out of the five representatives, they should get two, which is forty percent, as close as possible to their 37% share. Next, the blues have 30%—but what do we do with them? We could give them two, which

would be forty percent of the legislature, or one, which would be twenty percent of the legislature. Neither option accurately mirrors their electoral strength. And whether we give them two or three, we create other imbalances. Suppose that we give them two--forty percent of the legislature, more than their share of the vote. Notice that the blues suddenly have as many representatives as the pinks, who actually received many more votes than they. In effect, the pink victory at the polls has been stolen by the PR system, which was supposed to be accurately proportional. And if we give the blues two representatives, then there is only one left; remember that we gave two to the pinks, two the blues, and now we have one left over. That one will have to go to the greens, who got only 14% of the vote but will thus receive 20% of the legislature. And then all five representatives have been given away--so there is nothing left for the purples and the oranges, who are now completely frozen out of the system, just as they would have been in a majoritarian system.

So let us suppose instead that we give the blues only one representative. But that's only twenty percent, much smaller than their fraction of the vote. And if we give the blues only one representative, then we still have two more representatives to allocate; we have given two to the pinks, one to the blues, and so we have two left over, out of five. What do we do with these two remaining? Clearly, one must go to the greens, who received 14% of the vote, and one must go to the purples, who received 11% of the vote. Notice then this result: we have three parties, each with one representative--the blues, greens, and pinks. In the legislature, they have equal power. But in fact, the blues are far more popular than the other two: 30% as compared to 14% and 11%. Meanwhile, the pinks--who only received 7% more than the blues--have twice as much power as the blues in the legislature. In this situation, the blues are likely to become angry and frustrated. Pretty soon, your second most powerful party may be threatening separation and insurrection, because they don't think that Burmese democracy is working out for them.

All PR systems, no matter how big the district, face these problems. And they all have rules for allocating representatives in confused cases like these. But those rules cannot eliminate the inaccuracy that gets worse and worse as the districts become smaller. People like PR because it represents people more accurately, but only in large districts. But as soon as you move to large districts, you create a distance between voters and legislators. As between pure PR and pure majoritarianism, there appears to be a real tradeoff. Apparently, you just have to choose what matters more to you.

C. Combined Systems

Is there a way to combine the two systems so that you get the best of both? People have devised such combined systems. Though each has its own problems, to many, they seem a distinct improvement over the pure systems. But it is important to remember that there is no perfect system. The tradeoff is real: to the extent that these systems divide power more proportionally, they tend to move the representatives further from the people; and to the extent that they move the representatives closer to the people, they tend to divide power less proportionally. But it is important to know that these compromises are possible: instead of choosing either proportionality or a close bond, you can have some of each. There are an infinite number of systems to strike the

compromise in different ways. Some offer a lot of proportionality, but not so much closeness; and others reverse that priority. It's good to be aware of all these systems so that you can choose the one that offers the right compromise for your particular needs. I will offer just two examples here.

One possibility is to divide the legislature so that some legislators are elected from small single member majoritarian districts, and others are elected nation-wide by proportional representation. The idea is that the majoritarian representatives would have close ties with geographical districts, and constituents would know where to turn for help. As we know, however, these seats will likely suffer from the majority premium: members of the majority party will win a disproportionate number of them. How do we correct this imbalance? We elect some other representatives by PR, so that overall, the legislature is fairly split between the parties.

It turns out, though, that making this sort of system work is more complicated than it might first appear. Let us take a concrete example. Suppose that we have two parties, the pinks with 60% of the vote and the greens with 40% of the vote. Suppose further that our legislature has one hundred seats. To balance the two systems, we provide that fifty shall be elected from small majoritarian single member districts, and the other fifty according to a nationwide PR election. What result?

By hypothesis, the fifty PR seats will be divided 60/40 between the pinks and the greens. The pinks will therefore receive thirty seats (60% of the 50 PR seats), and the greens will receive twenty seats (40% of the 50 PR seats). But then we have the fifty majoritarian seats, which will predictably skew to the majority. Suppose that the pinks form a majority in eighty percent of these districts. Even though they are sixty percent of the voters, they win eighty percent of the races. In that case, they win forty of the majoritarian seats (that's 80% of the fifty seats), and the greens only win ten. What is the end result? The pinks receive seventy seats (30 from the PR race and 40 from the majoritarian districts), and the greens receive thirty (20 from the PR race and 10 from the majoritarian districts). But that's not proportional after all: the division should have been 60/40, not 70/30.

How did this happen? The PR seats were perfectly proportional, but the majoritarian seats still skew to the majority. Half the seats, in other words, are allocated in a proportional way, but the other half still suffer from the majority premium. As a result, the legislature as a whole is still skewed to the majority, because half of its seats are skewed to the majority. Adding in the PR seats reduces this skew by half (as half the seats are truly proportional now), but does not eliminate it. It's a step in the right direction, but we would like to do better.

Luckily, there is a way to eliminate the majority premium in a mixed legislature of this sort. Germany uses a system like the one that I am about to describe, though I am offering you a simplified version for the sake of clarity. Let us keep our example parallel to the one that we have just worked through. Imagine that the legislature has one hundred seats. Fifty are elected from single member majoritarian districts, so that voters feel they have a close connection with someone in the legislature. But of course these seats will skew to the majority: although the country is divided 60/40 between the pinks and the greens, the pinks capture 80% of the single member

districts, and the greens only 20%. How do we rectify this imbalance?

We hold a second election. This time, people vote not for a person to represent their local district but for the party that they would like to govern the country. These are two separate questions, so it is good to separate them. A voter might, for example, want the greens to run the country because they have the best ideas, but for his local district he prefers the pink candidate because she is more honest. Holding two elections allows you to vote on these two separate questions separately.

Now suppose that in this second election, the citizenry divides its votes between the pinks and the greens 60% to 40%. In other words, to reflect the people's wishes, the legislature should be divided 60/40 between the pinks and the greens. To do so, we now allocate the second round seats in such a way that the legislature overall is proportional. In other words, at the end the pinks should have 60 seats and the greens 40. Remember that out of the first fifty seats, the pinks got 40 and the greens 10, because of the majority premium. So, out of this second group of fifty seats (the PR seats), 20 go to the pinks, so that they can have 60 total, and 30 go to the greens, so they can have 40 total. And the legislature is now proportional to the overall vote. Because the pinks got a super-proportionality in the first vote, we now give a super-proportionality of the second election seats to the greens, to balance the scales.

The advantage to this system is that some legislators have a close tie to a particular place and particular voters, but overall the legislature is proportional. It seems, at first glance, that this system therefore combines the best of both worlds. And it is a very good system—but not perfect. It has at least two flaws. First, remember that the pinks have captured almost all of the single member districts because of the majority premium. Those seats are important, because only those legislators are likely to have a close relationship to their constituents. Green voters still suffer from having disproportionately fewer people to represent their local views and interests. To have any real power, they must work through their national party, rather than a local representative—and that can be hard to do. Second, this system is quite complicated and difficult to understand—as we have just seen. Complicated systems can hurt democracy because the people might not understand how to work them, and so might lose faith in them. For example, there is evidence that most German voters do not understand that on the second ballot, they are deciding the overall balance of power in the legislature; instead, they think that they are just voting for a second group of legislative seats.

Some have tried a different approach to combining the systems: they have developed majoritarian systems that do not over-represent the majority quite so much. In other words, though majoritarian, these systems are supposed to be more proportional—so in that sense, they are like a combination of majoritarian and proportional systems. There are many different varieties of these systems. Most of them are called cumulative voting systems or alternative voting systems. In every case, the goal is to allow the minority to have a greater voice in the legislature, while retaining the advantage of relatively small districts.

To illustrate the type, let me give you one concrete example. In this system, each voter is asked to rank the candidates in the order of his preference. If there are three candidates, the voter

gives three points to his first choice, two points to his second, and only one point to his third. We then total all of the votes given by all of the voters, and the candidate with the highest number of total points wins. To win, therefore, you want to attract a lot of first place votes, but you would also like to attract a number of second place votes as well, because they will help you. What you really don't want is a lot of third place votes, because they are worth only one point each. So you have an incentive to appeal not only to your committed support but also to people who might give you their second place votes. In other words, you have an incentive to be moderate and broad-minded, not narrow and angry.

Let us take a concrete example. Suppose that we live in a district in Shan State. In our district, there are one hundred voters divided into three groups: 25 Karens, 35 Shans who are friendly to the Karens (the Friendly Shans) and 40 Shans who have decided that they hate the Karens and would like to hurt them (the Hostile Shans). Each group runs a candidate for the legislature. In a simple majoritarian system, the Hostile Shan will win, and the Karens will be in trouble. Again, this result is typical of majoritarian systems: the majority tends to dominate, and the minority tends to worry. But now let us consider how this election would work with our new rank-ordering scheme. We now count not just the first place votes but also the second place votes. And now the Hostile Shan has a big problem. Precisely because he is so hostile, everyone else puts him last. He gets no second place votes, and so he cannot win.

Let us plug in some numbers. The Karen voters all place their Karen candidate first: 25 votes at three points each totals 75 votes for the Karen. The Karen voters all list the Friendly Shan second: 25 votes at two points each totals 50 votes for the Friendly Shan. And the Karen voters all place the Hostile Shan dead last because they fear him: 25 votes at 1 point each totals 25 points for the Hostile Shan.

The Friendly Shan voters all place their Friendly Shan candidate first: 35 votes at three points each totals 105 points for the Friendly Shan. The Friendly Shan voters then all list the Karen second because they also fear that the Hostile Shan will destroy the peace: 35 votes at two points each totals 70 points for the Karen. And then the Friendly Shans all place the Hostile Shan dead last: 35 votes at one point each totals 35 points for the Hostile Shan.

And the Hostile Shans? Of course they put their Hostile Shan candidate first: 40 votes at three points each totals 120 votes. They are not happy about their second place choices: they hate the Karens, but they hate the Friendly Shans about as much because they view them as traitors and view them as a more formidable enemy. So we get a split vote. Twenty-five give their second place votes to the Karen candidate (so that's 25 votes at 2 points each, for a total of 50 points for the Karen) and their last place votes to the Friendly Shan (so that's 25 votes at one point each, for a total of 25 for the Friendly Shan). And then the other 15 Hostile Shan voters do the opposite: they give their second place votes to the Friendly Shan (so that's 15 votes at 2 points each, for a total of 30 votes for the Friendly Shan) and their last place votes to the Karen (so that's 15 votes at one point each for a total of 15 points for the Karen). So in total, the Hostile Shans give the Karen 65 points and the Friendly Shan 55 points.

And when all is said and done, where does that leave us? The Hostile Shan gets 120 points from his own people, 35 from the Friendly Shans, and 25 from the Karens, for a total of 180 points. The Friendly Shan gets 105 points from his own people, 55 from the Hostile Shans, and 50 from the Karens, for a total of 210 points. And the Karen gets 75 points from his own people, 70 points from the Friendly Shans, and 65 from the Hostile Shans, also for a total of 210 points. So the Hostile Shan comes in dead last and the Karen and the Friendly Shan tied for first.

How did this happen? If we look only at the first place votes, the Hostile Shan would have won, as indeed he would have in a simple majoritarian system. But because we also look at second place votes, he lost. Instead, the Karens and the Friendly Shans swapped second place votes, and that made all the difference. The Karens and the Friendly Shans, who would have been voiceless in a regular majoritarian system, now have some real influence in the legislature. Depending on the tie-breaking system, one or the other will go off to the legislature, where they can push for a program of building friendship rather than hatred. Whoever goes, they all win. This system thus gives candidates an incentive to do the right thing: to win, they must get the second place votes of people outside their own group. The method of counting votes automatically encourages candidates to reach out.

But again, this system has some serious drawbacks. It may give the minority some influence, thus reducing the significance of the majority premium. But when all is said and done, it is still a winner-take-all system, not PR. In our example, suppose that the Friendly Shan wins the tie-breaking procedure because he got more first place votes than the Karen. He then goes off the legislature, and everyone else just goes home. The Karen voters may have some influence over the Friendly Shan, because their second place votes were necessary to his success. If the Karens had given their second place votes to the Hostile Shan instead of the Friendly Shan, then the Hostile Shan would then have thirty points more (because the Karen would have given him thirty two point votes instead of thirty one point votes), and the Friendly Shan would have thirty points less (because the Karen would have given him thirty one-point votes instead of thirty two-point votes). The point totals would then be Friendly Shan 180 points, Hostile Shan 210 points, Karens 210 points. The Hostile Shan and the Karen would be fighting it out for first place, and the Friendly Shan would be out of the running. So the Friendly Shan must try to keep the Karens happy. But even so, the Karens have only indirect influence on the Friendly Shan. When the interests of the Karens and the Friendly Shans, he will likely choose the Shans. So, with 25% of the vote, the Karens have only a limited influence on someone else's candidate. The Hostile Shans are in an even worse situation. The Karens and Friendly Shans both voted against the Hostile Shan candidate because they fear him, so we can imagine that the new Friendly Shan representative will work hard to defeat Hostile Shan. With 40% of the vote from this district, the Hostile Shans end up with essentially zero percent of the political power. Maybe they deserve to be disempowered, but still the system is not working in a very representative way.

The proponents of this and similar systems, however, predict that they will have important long-run consequences that will reduce this winner-take-all quality. Notice that in our example, none of the candidates is likely to win without some support from another party. By giving their second place votes, the Karens decide the winner as between the two Shan candidates. So the

candidates have a pressing reason to appeal to the voters of the other parties. They are unlikely to become rigid and hostile. Parties, voters, and candidates will seek out areas of common ground and emphasize those. They may even find that they change their own understanding of their own interests so as to build bridges. Old angers and prejudices may melt away in pursuit of shared political advantage. And because parties shift around in search of a better deal, even the new alliances will stay fluid. After our hypothetical election, the Hostile Shans know that if they remain hostile to other parties, they will always lose. So they soften their message in an effort to court the Karen voters. If the Friendly Shans ever let the Karens down, the Karens may turn to the Hostile Shans (though we should not probably describe them as the Other Friendly Shans, since all are now seeking out common ground) and let them back into power. Pretty soon, everyone is playing a game of compromise and mutual support, not angry competition.

In other words, the system of representation is still winner-take-all, but that fact no longer matters so much, because to win, you must reach out to as many voters as possible. The legislator does not just go off to parliament and pursue the interests of his own party members, to the exclusion of all others. Instead, he will take account of everyone's interests, because he cannot afford to overlook the desires of any group whose second place votes may be critical to his re-election. In a certain sense, then, this system is proportional in that each legislator himself will represent the interests of every group in something like proportion.

But all this works only if the factual prediction is accurate, that representatives will appeal outside their own party, because they need the second place votes of others. For that scenario to hold, at least three things must be true. First, the district must be divided between a number of different parties, with none holding a majority. If one party holds a majority, then it can usually win just with the first place votes of its own members. As a result, it need not pay any attention to the interests of voters from the other parties. Second, within the district, voters from different parties must in fact share some common ground. Their interests cannot, in other words, be implacably opposed. To put it another way, the promise of this form of alternative voting is that it will give rise to a politics of the common good. But that will happen only if the voters share a truly common good. Finally, for this system to work, the voters must not only have a common good; they must also be able to see it. And they will see it only if they are not blinded by inherited hatreds. In some places, members of different religious or ethnic parties will never form alliances with another. In this case, the candidates have no incentive to appeal across party lines because they know that they will never get their votes anyway. In short, the promise of this system is that even if the election method is winner-take-all, the resulting politics will not be, because the candidates will look out for everyone's good. But that will happen only under particular circumstances: the district has no clear majority, the voters possess a common good, and the parties do not feel deep hostility toward one another.

In other words, no system completely escapes the essential tension: small districts help create close ties, but large districts help create proportionality. We can carefully design modified systems that try to get us small districts and proportionality, but inevitably we end up compromising one value or the other or both. No system does both things perfectly, so the task is to decide where you want to strike your compromise: relatively greater local ties or relatively greater representative

accuracy. To decide that question, you need to consider what particular challenges will be facing you in the next several decades. Your answer must grow out of your own circumstances.

Conclusion

It is important for Burma to draft the right constitution, because it really can help Burma to remain democratic even through difficult times. In truth, countries that have had civil war tend to return to civil war, and countries that have lived under autocracy tend to return to autocracy. But the longer that a country remains democratic, the more that democracy becomes entrenched as a way of life. So the first decade of democracy is critical, and the right constitution can help contain conflict long enough for democracy to take on some staying power.

But as important as it is to design the right constitution, what matters even more is that the people of Burma seek to make the constitution work, after it has been drafted. Constitution-writers hope that if they write the right constitution, then they will make a better future for their country. Constitutional scholars hope that it is possible to know something about the likely effects of particular sorts of constitutions. But the truth is that in the end, the constitution is what the people make it. To be sure, constitutional structure can affect behavior by giving people the right incentives. But those incentives will work only by touching something already present in the souls of the people: a desire to make the country work for the good of all. If you have written a bad constitution but the people really want to make it work, they will find a way. If you have written a good constitution but the people don't feel connected to it, it will disintegrate. Countries work because the people want them to work; constitutions just give them a fighting chance.

We've been talking about a constitution as a structure of rules, a framework for government, to run the country. But there is an even more fundamental definition of the term: a constitution is what creates a country, what knits people together. Constitutions are always therefore based on hope—the hope that people can assemble in peace to build a common future. The only way this ever occurs is that people resolve to work things out together. At the end of the American Constitutional Convention, a woman asked Benjamin Franklin: “Doctor Franklin, what kind of government have you given us?” And he replied: “A republic, if you can keep it.” The point in this story is that the women wanted to know what the Framers had given her; but Franklin wanted to remind her that in the end, it was her responsibility to make this project work.

So stable countries never just happen; they must be built, by people. Constitution therefore refers not just to the document of rules that you are writing. It also refers to the process in which you are engaged, of trying to come together, to forge bonds, to imagine a shared future. As you talk and learn and write, you are constituting yourself a nation. In other words, the process through which you are going matters as much as the end result, the paper that you produce. This is hard and grueling work, but noble work, almost holy work. Constitutional states survive because their citizens realize that they depend on each other to make a good life. Because they depend on each other, they realize that they need each other. In the end, they may even love each other, because sharing hopes for a future is a great gift. Doing this is deeply gratifying; human beings were created to do this. Yet too seldom do they have the chance: history imposes on them and drives them apart.

When the opportunity happens to come back together, it is a miracle. And when you are given a miracle, after all the words about constitutional design are spoken, you can finally offer only grateful silence.

1.

For those who want all the details: In most federal constitutions, the federal government has the power to make a treaty on any subject, even on subjects reserved to the states under the constitution. It would be illegal for the central government to pass domestic legislation on the subject, but a treaty is different. Germany may be the single important exception to this rule. I say that it “may” be the exception because German constitutional law is not very clear on this point. Article 32 gives the central government the power over foreign relations, including a power to make treaties. The constitution does not, however, explicitly tell us on which subjects the federal government may make a treaty. Some experts take the view that the Federation’s treaty power is plenary; others opine that the central government may make a treaty on any subject of great political moment; and still others argue that the federal government may make treaties only on those subjects that fall within its exclusive or concurrent powers. The German High Court has not offered a recent, clear opinion on the question. (The Concordat case is now old, written in 1957, and was never very clear. It seems to hold that if the federal government makes a treaty on a subject of exclusive Lander power, then the Lander would not be bound. It does not seem to decide, however, whether the treaty would be wholly invalid, such that, for example, federal courts could not apply it in an appropriate

One reading of the German constitution, then, would confine the federal treaty power to those subjects over which the federal government has been given power. And since the central government can make treaties only on some subjects, it seems logical that states have the power to make treaties on other subjects. In fact, another part of Article 32 gives the Lander power to make treaties in their own areas of exclusive and concurrent authority. We could thus interpret the German constitution to give the federal government power to make treaties on subjects given to it, and to give the states power to make treaties on subjects given to them, and to give both of them power to make treaties on subjects that they share. So the German constitution seems to give the states some independent power in foreign affairs.

But things are not so clear. By its terms, Article 32 gives the states power to make treaties only with the permission of the federal government. In other words, Article 32 mandates something like the American system: the states have power to make agreements only under federal permission, as though they were federal agents. But there are still two more wrinkles. First, according to some court cases, when the states make a treaty within a subject of their exclusive authority, the federal government must give permission unless it has a compelling reason to refuse. In addition, some have argued that even if the federal government withholds permission, a Lander treaty would still be valid within an area of its exclusive authority. So perhaps, after all, the states do have a power to make treaties without federal supervision.

If that story has left you confused, you are in good company, because it has confused German

lawyers and lawmakers themselves. No-one knew what the law actually required, and everyone desperately needed some clarity. That's the reason for the Lindau compact.

2.

Even under *Missouri v. Holland*, the federal treaty power is not without limits. For one thing, though it can *make* a treaty on any subject, the federal government does not necessarily have the power to *enforce* any and all treaties, as described in the text. In addition, although the plenary power allows the union to make treaties on any subject, it must still respect all other constitutional limits. For example, although the government can make an agreement on any subject, it may not agree to violate its citizens' individual rights. Imagine that the federal government makes a promise to exclude people of a certain religion from the public schools. In our hypothetical, the constitution gives the subject of education to the states, but the federal government may still reach it with its plenary treaty power. The treaty would, however, be unconstitutional for a different reason: it violates the constitutional rights of those excluded from school, because it discriminates against them based on their religion.

3.

There is a question whether the states should have the right to participate in making all federal foreign policy or only on those subjects that the constitution gives to them in exclusive or concurrent power. Because the states have power only over certain subjects, it might make sense to limit their participation to treaties that address those subjects. For example, if the states have exclusive jurisdiction only over education, then they would be able to participate in negotiating education treaties—but only those. In practice, however, it is difficult to distinguish education treaties from other sorts of treaties. For one thing, a treaty might start out about trade but end up about education. For example, Burma might ask Thailand for importation rights, but Thailand will agree only if Burma reforms its educational system. Suddenly this treaty has become an issue of great interest to the states, who will have to do the educational reforming. For another thing, even treaties that may not directly address education may nonetheless have dramatic effects on education. For example, suppose that the union signs a treaty committing Burma to new programs that will cost a lot of money. Federal taxes will therefore go up, so the states may feel required to cut their taxes to help their citizens—but then, with less state money, education will inevitably suffer. Cases of this sort occur all the time. As a result, it is probably best to act on the assumption that the states have a legitimate interest in all foreign policy. They therefore need to be included in the process across the boards.