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## Introduction

Nearly 190 national constitutions are in force today. More than half of them have been written or rewritten in the past three decades.<sup>1</sup> Many of these constitutions begin with some version of the famous four words: “We the People of ...” But the theoretical discussion of the role of that “We” in the process of constructing a constitution is surprisingly limited and narrow. The “We” issue is particularly problematic in the context of constitution-drafting in deeply divided societies. Where polities are still grappling with the very definition of their collectivity, crafting a formal democratic constitution that reflects shared norms and values is a daunting challenge. How can a constitution be created in the absence of societal consensus on the norms and values of the state? This challenge is the central question addressed in this book.

In recent years constitutions have become a leading tool for mitigating conflicts and promoting democracy in divided societies. From South Africa to Bosnia, great hopes have been placed in the potential contribution of the process of constitution-making to post-conflict peace and stability. However, under conditions of deep internal disagreement, enacting a formal constitution is a high-stakes game that can undermine political stability and derail democratization. Where intense polarization exists between competing visions of the state, drafting a constitution risks unleashing political crisis. This has recently been the case in countries such as Iraq and Afghanistan, where the debate over the constitution revealed deep divisions among the framers with regard to foundational norms and values that should underpin the state.<sup>2</sup> The need to better

<sup>1</sup> The total number of constitutions in force is difficult to determine. It depends on the definition of what is considered a constitution (see Chapter 1) but also on the meaning of being ‘in force’. For example, among the 192 current member states in the UN, the UK, New Zealand and Israel do not have a formal written constitution, while Kosovo, which is not listed in the UN, adopted a formal constitution in 2008.

<sup>2</sup> See, for example, Barnett R. Rubin, “Crafting a Constitution for Afghanistan,” *Journal of Democracy* 15, no. 3 (2004); J. Alexander Thier, “The Making of a Constitution in

understand the relationship between constitutions and the identity of “the people” who author them has also been raised by recent attempts to write or rewrite democratic constitutions in the context of deep disagreements over the vision of the polity on both national and supranational levels. This is the case, for example, in democratizing Muslim states such as Turkey, Indonesia and Egypt, which are grappling with the question of the appropriate relations between religious traditions and state institutions. These debates are usually discussed in constitutional terms and involve popular demands for constitutional reform and the drafting of proposed constitutions by various groups and organizations.<sup>3</sup> On the supranational level, the attempt to enact a constitution of the European Union and the 2005 failure to ratify it redirected attention to the foundational aspect of constitution-writing and to the importance of symbolic components of constitutions.<sup>4</sup>

Despite these increasing challenges, the puzzle of crafting a formal constitution under conditions of deep internal disagreement over the character of the state has received limited theoretical and comparative attention. In recent years the literature on constitution-writing has experienced a resurgence, following what Jon Elster has termed the “seventh wave of constitution-making,” which since 1989 has included the adoption of new constitutions in former Communist countries in Eastern and

Afghanistan,” *New York Law School Law Review* 51, no. 3 (2006); Peter Kurrild-Klitgaard, “Blood, Baath and Beyond: The Constitutional Dilemma of Iraq,” *Public Choice* 119 (2004): 13–30; Yash Ghai, Mark Lattimer and Yahia Said, “Building Democracy in Iraq” (Minority Rights Group International, 2003); John McGarry *et al.*, “Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription,” in Sujit Choudhry, ed., *Constitutional Design for Divided Societies* (Oxford and New York: Oxford University Press, 2008), 342–68. Andrew Arato, *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq* (New York: Columbia University Press, 2009).

<sup>3</sup> See, for example, on Indonesia: Nadirsyah Hosen, *Shari’a and Constitutional Reform in Indonesia* (Singapore: Institute of Southeast Asian Studies, 2007). On Turkey: Ergun Özbudun and Ömer Faruk Gençkaya, *Democratization and the Politics of Constitution Making in Turkey* (Budapest: Central European University Press, 2009); Mehmet Fevzi Bilgin, “Constitution, Legitimacy and Democracy in Turkey,” in Said Amir Arjomand, ed., *Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran and Afghanistan* (Oxford and Portland: Hart Publishing, 2007).

<sup>4</sup> The academic commentary on the relations between the emerging constitution and the European “political community” is vast, and growing. For some of the leading works see J. H. H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999); J. H. H. Weiler and Marlene Wind, eds., *European Constitutionalism Beyond the State* (Cambridge University Press, 2003); Dieter Grimm, “Integration by Constitution,” *International Journal of Constitutional Law* 3, no. 2–3 (2005); Neil Walker, “Europe’s Constitutional Engagement,” *Ratio Juris* 18 (2005); Jürgen Habermas, “Why Europe Needs a Constitution,” *New Left Review* 11 (2nd Series) (2001). See also special issue of *Constellations* 13, no. 2 (June 2006) discussing the failure to ratify the EU constitution.

Central Europe, as well as the enactment of the new constitution of South Africa.<sup>5</sup> However, most studies on constitution-crafting examine the topic from either an institutional or a procedural perspective, focusing either on public participation in the process of constitution-writing or on the democratic institutions that the process creates.<sup>6</sup> These studies tend to advocate various governmental instruments for resolving ethnic and national conflicts, and view the process of constitution-writing mainly as an opportunity to establish the institutional structure of a democratic government and regulate the balance of power.<sup>7</sup>

<sup>5</sup> Jon Elster, "Forces and Mechanisms in the Constitution-Making Process," *Duke Law Journal* 45, no. 364 (1995): 369.

<sup>6</sup> For example see Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford and New York: Oxford University Press, 2001); Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, Steven C. Wheatley, eds., *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993); Jon Elster, Claus Offe and Ulrich Klaus Preuss, *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea, Theories of Institutional Design* (Cambridge and New York: Cambridge University Press, 1998); A. E. Dick Howard, ed., *Constitution Making in Eastern Europe* (Washington, DC: Woodrow Wilson Center Press, distributed by The Johns Hopkins University Press, 1993); Andrea R. Bonime, *The Politics of Constitution-Making: Spain's Transition to Democracy* (Boulder: Westview Press, 1987); Yash Ghai, "A Journey around Constitution: Reflections on Contemporary Constitutions," *African Law Journal* 122 (2005); Yash Ghai and Guido Galli, "Constitution Building Processes and Democratization," in *Democracy, Conflict and Human Security: Further Readings* (Stockholm: IDEA, 2006); Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press, 2000); Rett R. Ludwikowski, *Constitution-Making in the Region of Former Soviet Dominance* (Durham, NC: Duke University Press, 1996).

<sup>7</sup> For some of the recent studies see Andrew Reynolds, ed., *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (New York: Oxford University Press, 2002); Arend Lijphart, "Constitutional Design in Divided Societies," *Journal of Democracy* 15, no. 2 (2004); Sujit Choudhry, ed., *Constitutional Design for Divided Societies: Integration or Accommodation* (Oxford University Press, 2008); Larry J. Diamond and Marc F. Plattner, eds., *Electoral Systems and Democracy* (Baltimore: The Johns Hopkins University Press, 2006); James A. Dunn, "The Revision of the Constitution in Belgium: A Study in the Institutionalization of Ethnic Conflict," *Political Research Quarterly* 27, no. 1 (1974). Sidney John Roderick Noel, ed., *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (Montreal: McGill-Queen's Press, 2005); Marc Weller and Stefan Wolff, eds., *Autonomy, Self-Government and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (London: Routledge, 2005); Benjamin Reilly, *Democracy in Divided Societies: Electoral Engineering for Conflict Management* (Cambridge University Press, 2001). See also Vernon Bogdanor, ed., *Constitutions in Democratic Politics* (Aldershot and Brookfield: Gower, 1988); Yash Ghai, ed., *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge University Press, 2000); Robert A. Goldwin and Art Kaufman, *Constitution Makers on Constitution Making: The Experience of Eight Nations* (Washington, DC and Lanham: American Enterprise Institute for Public Policy Research, 1988).

However, constitutions also play an important role in expressing the common aspirations and norms of the nation. As such, they serve as the state's charter of identity and play a foundational role in representing the ultimate goals of the state. This foundational aspect of the constitution has been generally neglected by studies in comparative politics. Very little has been said theoretically and comparatively on the relationship between the new (or rewritten) constitution and the identity of "the people" who are supposedly its authors.<sup>8</sup> The political and sociological dimensions of the process of constitution-writing have been studied by very few researchers, and the symbolic, ideological and foundational aspects of the constitutions have been rarely analyzed. The few works that address these issues tend to focus on particular cases, discussing them in terms of their historical context and local political culture, and have given only limited attention to the comparative perspective.<sup>9</sup>

The role of constitutions in multinational, multi-religious or multi-ethnic societies and the question of whether constitutions are made by "the people" or in the name of "peoples" had been discussed in the political literature, particularly in the European and Northern American context.<sup>10</sup> Nevertheless, these studies rarely trace the constitutional debates

<sup>8</sup> Among the rare studies that theorize the link between constitutions and identity are Beau Breslin, *The Communitarian Constitution* (Baltimore and London: The Johns Hopkins University Press, 2004); Gary Jacobsohn, *Constitutional Identity*, (Cambridge, MA: Harvard University Press, 2010). However neither of these studies analyzes processes of constitution-drafting. See also Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* (London and New York: Routledge, 2010).

<sup>9</sup> For example, see the collection of political-theoretic readings on the Indian constitution: Rajeev Bhargava, ed., *Politics and Ethics of the Indian Constitution* (New Delhi: Oxford University Press, 2008). See also Hosen, *Shari'a and Constitutional Reform in Indonesia*; Siri Gloppen, *South Africa: The Battle over the Constitution* (Dartmouth: Ashgate, 1997) and the essays included in Said Amir Arjomand, ed., *Constitutional Politics in the Middle East* (Oxford and Portland: Hart, 2007).

<sup>10</sup> For example: Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press, 2004); James Tully and Alain G. Gagnon, eds., *Multinational Democracies* (Cambridge University Press, 2001); Alan C. Cairns, *Constitution, Government, and Society in Canada/Selected Essays*, ed. Douglas E. Williams (Toronto: McClelland & Stewart 1988); Christopher Hughes, *The Federal Constitution of Switzerland* (London: Oxford University Press, 1954); Hanspeter Kriesi and Alexander H. Trechsel, *The Politics of Switzerland: Continuity and Change in a Consensus Democracy* (Cambridge University Press, 2008). For writings on the relation between "the people" and the making of the European constitution see note 4 above.

that led to the drafting of the constitutions, and they generally tend to analyze the existing constitutional arrangements, focusing on the institutional aspect of governmental structure.<sup>11</sup> The focus of attention is constitutional politics rather than the process of writing the constitution.<sup>12</sup> Similarly, the multiculturalism literature that concerns politics of identity tends to say very little about the dynamics of constitutional evolution. Instead, it discusses particular constitutional arrangements within an already existing constitutional order, or else it merely presents a normative argument for constitutional pluralism.<sup>13</sup>

This book aims at addressing this theoretical lacuna by focusing on the foundational and symbolic – rather than legalistic and institutional – aspects of constitution-making, and by examining the way in which deeply divided societies address their internal ideational polarization over the nature of the state through the drafting of a formal constitution.<sup>14</sup> What political role does a constitution-making process play in such polities that lack consensus regarding their fundamental commitments and ultimate goals? Is the constitutional-drafting process likely to increase

<sup>11</sup> Moreover, as I discuss in Chapter 2, the institutional arrangements advocated by many of these writings – such as federalism, special group rights or various forms of electoral rules – do not address the conflicts that characterize the sort of deeply divided societies that this book is concerned with. The literature on the institutional design in divided societies is vast. For a good review article of the different approaches to accommodating or integrating divided societies see John McGarry, Brendan O’Leary and Richard Simeon, “Integration or Accommodation? The Enduring Debate in Conflict Regulation,” in Choudhry, *Constitutional Design for Divided Societies*, 41–88.

<sup>12</sup> One of the rare works on the creation of constitutions is Walter F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Baltimore: The Johns Hopkins University Press, 2007).

<sup>13</sup> To name just a few among the vast literature on multiculturalism: James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge and New York: Cambridge University Press, 1995); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

<sup>14</sup> To be clear, the role of ideational conflicts does not seem to have the same degree of importance in all processes of constitution-making. For example, constitution-making in former Soviet states such as Hungary and Poland mostly revolved around socio-economic ideological issues and structures of power. See, for example, Andrew Arato, *Civil Society, Constitution, and Legitimacy* (Lanham: Rowman & Littlefield, 2000). Elster *et al.*, *Institutional Design in Post-Communist Societies*; Stephen Holmes and Cass Sunstein, “The Politics of Constitutional Revision in Eastern Europe,” in Stanford Levinson, ed., *Responding to Imperfection* (Princeton University Press, 1995), 275–305; Ulrich Klaus Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress* (Atlantic Highlands: Humanities Press, 1995); András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: Central European University Press, 1999).

factional tensions, or can conflicts be mitigated through constitutional means? How can a constitution be drafted, and what kind of a constitution can be adopted, when there is no consensus on the foundational framework that the constitution is expected to represent? These questions are the main concern of this book.

The book, in other words, endeavors to explore the relationship between constitutions and the identity of “the people” who are deemed to have authored them. This link is by and large perceived in the existing theory through two competing paradigms: the essentialist paradigm of the “nation-state constitution” views constitutions as legal embodiments of pre-constitutional homogenous unities, which gain their legitimacy through an exercise of the people’s *constituent power*. The alternative proceduralist paradigm of “the liberal constitution” strives at emptying formal constitutions from all identity elements and constructing a political collectivity on the basis of shared democratic procedures embodied in the constitution. As Chapter 1 of the book explains, both conceptions of constitutional identity require some form of pre-constitutional consensus – whether understood in “thick” terms of cultural, national or religious homogeneity, or in “thin” terms of shared liberal political culture. Neither of these types of consensus exists in deeply divided societies. Such societies are struggling over the question of who are “We the People” and what do “We” believe in, and they cannot adopt either of the two ideal-type constitutions. For this reason, the book seeks to go beyond the essentialist–proceduralist dichotomy and to delineate an alternative approach which reconciles the goal of constructing a democratic constitution with the need to address deep internal disagreements over the vision of the state as a whole.

Since the existing theory does not provide an adequate answer to the puzzle of constitution-making in the absence of a consensus on the shared norms and values that should underpin the state, this book seeks to find the answer in historical cases where similar problems were confronted. The book traces the process of constitution-writing in three deeply divided societies that faced the challenge of writing a new democratic constitution at the time of their foundation – Ireland in 1922, India in 1947–50 and Israel in 1948–50. It shows how by deferring controversial decisions regarding the character of the state, deeply divided societies can formulate a democratic formal constitution or function with a material, unwritten, constitutional arrangement. This approach, which I term *the incrementalist approach to constitution-making*, is presented in

Chapter 2. By postponing constitutional choices on foundational issues, the incrementalist approach deviated from the common perception of the moment of constitution-making as a “revolutionary moment,” introducing instead elements of gradualism into the process. Moreover, in order to circumvent the potentially explosive conflicts that were present at the time of independence the incrementalist constitution embraces competing visions of the state, thus representing the identity of “the people” as it really was at the time of drafting – in other words as a *divided* identity.

The incrementalist constitutional toolbox included such strategies as avoiding clear-cut decisions, using ambiguous legal language, and inserting internally contradictory provisions into the constitution.<sup>15</sup> The second part of the book (Chapters 3–5) explores the way these strategies were employed in Israel, India and Ireland, tracing the political and constitutional choices made by constitutional framers in the three countries. My purpose in these chapters is not to provide a comprehensive study of the entire constitutional drafting process in these countries, and the chapters do not therefore address all controversies raised during the constitutional debates. Rather, each chapter will focus on one or two fundamental divisions which were explicitly addressed by the constitutional drafters and that were managed through a variety of constitutional incrementalist strategies.

Chapter 3 focuses on the Israeli constitutional deliberations which ultimately encountered deadlock over the conflict between secular and religious definitions of the Jewish state. This was one of the major reasons for the decision taken in 1950 by the Knesset, Israel’s parliament, to refrain from writing a constitution altogether. The chapter traces the constitutional debates in 1948–50, and analyzes the material and informal constitutional arrangements that evolved in the absence of a written

<sup>15</sup> Michael Foley had theorized a similar concept of “constitution abeyances,” which he describes as “keeping fundamental questions of political authority in the state of irresolution.” However, Foley addresses constitutional abeyances as an often unintentional and even unconscious “working anomaly within the constitution,” and rejects the view that they are instruments of conflict resolution or “a conscious form of mutual accommodation between contending parties.” Michael Foley, *The Silence of Constitutions: Gaps, “Abeyances” and Political Temperament in the Maintenance of Government* (London and New York: Routledge, 1989), 9–10. For another book that discusses Foley’s concept of constitutional abeyances in the context of the Canadian constitution see David M. Thomas, *Whistling Past the Graveyard: Constitutional Abeyances, Quebec, and the Future of Canada* (Toronto: Oxford University Press, 1997).

constitution in religious matters. Since the incrementalist approach to constitution-writing was achieved by an explicit decision of the framers to defer controversial choices, a direct and open discussion over these contentious issues was an important stage in the framers' realization that the dispute was intractable. For this reason, the chapter on Israel focuses on the religious–secular divide within the Jewish majority. Although the non-Jewish population of Israel has been since independence approximately 20 percent, the constitutional debates within Israeli society have until recently been an exclusively Jewish affair. The definition of Israel as a Jewish state gave clear preference to a particular ethnic-cultural group, and non-Jews were consistently excluded from these debates. The leadership of the non-Jewish minority has only recently begun voicing a demand to participate in the deliberations over the future constitution of the state. The relationship between the Arab minority within Israel and the non-written constitution will also be discussed in the chapter.

In addition to the constitution debates in the early years of the state, the chapter also explores the growing involvement of the Israeli Supreme Court in the Israeli constitution's evolution, and demonstrates how more than sixty years after independence, the Israeli constitutional debate continues to revolve around the same foundational issues that impeded the adoption of the constitution in the formative period of the state.

Chapter 4 traces the constitution-drafting in India, which began in December 1946, seven months before the partition with Pakistan. Even after partition, India has remained one of the most diverse societies in the world, and the challenges inherent in this diversity were at the heart of the three years of constitutional deliberations which followed. Although the framers of the Indian constitution made clear-cut decisions regarding the institutional structure of the Indian government, they opted for an indecisive and incrementalist approach when it came to foundational issues that touched upon the definition of Indian nationhood. The long and intense conflicts over the unification of personal law and over the national language were ultimately circumvented by the adoption of ambiguous constitutional arrangements. Thus, for example, a uniform civil code was mentioned in the constitution, but in a part of the constitution that contained non-justiciable provisions, which could not be enforced by the courts. The debate over the national language was resolved by deciding that within fifteen years the government would appoint a committee to decide the issue. Meanwhile, English would continue to be used “for all official purposes,” in addition to Hindi and fourteen other official languages.

The third process of constitution-writing which is explored is that of the Irish Free State (Chapter 5), which occurred in 1922 in the midst of a civil war among the Catholic population of the twenty-six counties. More people died in this war, which lasted almost a year, than in the preceding two-and-a-half years of struggle against British rule. Despite being chronologically the first among the three countries discussed in this book to enact a democratic constitution, it is dealt with last because of its unique circumstances. Unlike the cases of Israel and India, certain provisions of the 1922 constitution of Ireland were imposed on the Irish political leadership by an external power – the British government. Nevertheless, the Irish constitution was ratified democratically by the Dáil Éireann (Irish Free State Parliament). The deep divisions over the meaning of Irish nationalism and Irish sovereignty were reflected in various conflicting provisions in the constitution, and reflected both Irish independence and political subordination to the United Kingdom. The chapter argues that a similar constitutional ambivalence is embodied in the constitutional arrangements agreed upon in the 1998 Good Friday Agreement regarding the future of Northern Ireland.

A comparative constitutional study raises particular difficulties. First, a constitution is designed for a specific society, with its unique culture and concerns. As these differ from country to country, “questions about constitutions can never be answered for all societies and states, for all times.”<sup>16</sup> Nevertheless, comparative constitutional studies are important to the extent that they enable us to identify common challenges and possible structural ways to deal with them. Despite the vast differences between them,<sup>17</sup> Israel, India and Ireland all faced the similar challenge of writing a formal constitution for a newly independent state that was experiencing increasing internal polarization over its most fundamental principles and norms. The process of constitution-making in all three countries involved intense disputes over the identity of the polity: should the Jewish state be understood in secular-national or religious terms? Should the principles underpinning the Indian state be those of national uniformity or of societal diversity? What is the meaning of Irish nationalism and sovereignty? Despite the differences between them, the constitutional debates in all three cases followed a

<sup>16</sup> Ruth Gavison, “What Belongs in a Constitution?” *Constitutional Political Economy* 13 (2002): 90.

<sup>17</sup> The differences and similarities between the three countries in terms of political, cultural and historical background are elaborated in the introduction to Part II of the book.

common pattern which led the drafters to adopt incrementalist strategies for addressing their most pressing foundational conflicts. This common pattern will be presented in Chapter 6. At their heart was the acknowledgment that any unequivocal choice regarding the identity of the state could have potentially destabilizing effects. And so the framers in Israel, India and Ireland departed from a “revolutionary” perception of the seminal constitution-making moment, and adopted an incrementalist constitutional approach, thus transferring the most controversial choices regarding the foundational aspect of their constitution from the constitutional arena to the political one. Recognizing the ingrained nature of their societies’ internal conflicts over norms and values, the architects of the constitutional arrangements in the deeply divided societies refrained from entrenching one or another normative perspective of the state, as any attempt to do so, they feared, might exacerbate the conflict instead of moderate it.

Another typical concern in comparative studies, particularly those that analyze a limited number of case studies, is that of case selection. The constitutional drafters in Israel, India and Ireland were not the only ones to prefer the adoption of incrementalist strategies and to defer controversial constitutional choices regarding foundational issues. Other countries may have adopted a similar approach. For example, the 1978 constitution of Spain used an ambiguous constitutional formulation in an attempt to forge consensus on the “national question.”<sup>18</sup> Article 2 represents the competing visions of Spanish national identity in that it recognizes at the same time both the unity of the “Spanish nation” and the basic right of regional “nationalities” to autonomy, a right that precedes the constitutional order itself.<sup>19</sup> This paradoxical conception of the Spanish nation embedded in the constitutional text was accompanied by a decision of the drafters to determine the definite contours and scope of the institutions and mechanisms of Spanish regional autonomies outside the constitutional text – in Title VIII. Eventually, however, the committee that was supposed to draft that Title failed to reach consensus and agreed to disagree, thus

<sup>18</sup> For discussion of the process of constitutional framing of the ambiguous formula regarding the Spanish “national question” see Enric Martínez-Herrera and Thomas Jeffrey Miley, “The Constitution and the Politics of National Identity in Spain,” *Nations and Nationalism*, 16:4 (2010) 6–30.

<sup>19</sup> Article 2 of the Spanish constitution reads: “The constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country for all Spaniards, and recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and solidarity amongst them all.”