Social and Political Foundations of Constitutions

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1

Theoretical Perspectives on the Social and Political Foundations of Constitutions

Denis J. Galligan and Mila Versteeg

1.1 INTRODUCTION

The last half-century has been a period of unprecedented constitution-making. New constitutions arose from the ashes of World War II, some freely, others – such as West Germany and Japan – under the direction of the Allies. A second wave of constitutions followed the decolonization of Africa, Asia, the Pacific, and the Middle East, where in countries like Nigeria and Micronesia the colonial powers presided over the drafting process. The collapse of communism in Central and Eastern Europe in 1989 allowed more than twenty nations to rediscover their constitutional past, or, where there was little past to rediscover, to take the first steps toward entering the international community. These were the main constitutional developments in recent years, but not the only ones: South Africa led the way in the 1990s for a further round of constitutional revision in southern and central Africa, followed by various nations in South America and Asia. Most recently, new constitutions are being written in the wake of popular uprisings in North Africa and the Middle East and following foreign invasion in the cases of Iraq and Afghanistan.

These developments have been accompanied by a new generation of constitutional law scholarship dedicated to studying constitutions in their social and political context from the perspective of the social sciences. Traditional approaches have tended to follow one or other of two courses, sometimes analyzing constitutional doctrines either of particular constitutions or comparatively, at other times taking a philosophical approach to constitutional ideas and concepts. Without wishing to draw too sharp a line between the different approaches, because doctrinal and

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philosophical aspects of constitutions are also relevant to a social science analysis, our purpose in this collection of essays is to contribute to the third approach: the social and political understanding of constitutions. In doing so, we have been guided by several questions: (1) what is the character of constitutions as social phenomena and what functions and purposes do they serve; (2) how are constitutions made; (3) what are the contents of constitutions and what are the main influences on content; and (4) what is meant by success and under what conditions are constitutions successful? Complete answers to each of these questions would fill a volume or more, so the analysis here is bound to be partial and contingent on the conditions of particular nations, but nevertheless of utility in advancing our understanding of constitutions.

Interest in the social and political foundations of constitutions can be traced back to the classic texts of David Hume, Adam Smith, Thomas Hobbes, and Jeremy Bentham, and even earlier to John of Salisbury, to name merely a few within the English and Scottish tradition, to which may be added names such as Montesquieu and de Tocqueville, James Madison, and Thomas Jefferson, without mentioning numerous other traditions in Europe and beyond. The present volume continues the tradition of studying constitutions as social and political phenomena, as part of the fabric of nations, and applies it to a range of issues of contemporary interest. The disciplinary approaches are those of the social sciences, including law, political science, sociology, history, and economics. The methods of research are several and diverse: comparative across constitutions, quantitative, case studies of specific issues, or historical accounts of ideas and concepts. While the contributions employ a variety of methods, reflecting their authors' backgrounds, disciplines, and interests, the common purpose is to identify different types of constitutional systems and to show, through empirical study, aspects of their social and political foundations. This volume is just a first step in such an undertaking. Considering there are more than two hundred national constitutions, not to mention the numerous state constitutions in federal systems, or the emerging regional constitutional orders such as the European Union, the scope for research has no bounds and many questions remain unanswered.

Aside from this Introduction, the volume consists of two parts. Essays in the first part offer a variety of theoretical perspectives on the social and political foundations of constitutions, which include constitutions as coordination devices, as mission statements, as social contracts, and as transnational documents, among other things. The second part consists of sixteen case studies of particular constitutions. The purpose of the case studies is to bring to life the theoretical perspectives discussed in the first part of the collection, while also opening up new ideas and providing fresh insights.

We have selected the case studies so that they represent a range of different conditions under which constitutions are written. Constitutions are often written in the wake of crisis or under an exceptional circumstance of some sort (Elster 1995, 370; Sajo 1999). Among such crises are revolutions, decolonization, regime change, war,

TABLE 1.1 *Selection of Case Studies*

Constitution	Region	Legal System	Circumstances
Japan 1947	Asia	Civil law	Postwar occupation
Portugal 1976	Western Europe	Civil law	Democratic transition
Ireland 1922	Western Europe	Common law	Independence
Bulgaria	Eastern Europe	Civil law	Postcommunist transition
Micronesia	Pacific	Common law	Postcolonial
New Zealand 1993	Oceania	Common law	No apparent transition
Nigeria 1960	Africa	Common law	Postcolonial transition
Egypt 1972	North Africa and Middle East	Civil law	Overthrow of autocratic order
Argentina	Latin America	Civil law	Democratic transition
European Union	Europe	n/a	n/a
Israel	Middle East	Common law	Democratic transition
Iceland 2011	Western Europe	Civil law	Economic crisis
South Sudan 2011	Africa	Common law	Independence
Iran 1979	North Africa and Middle East	Civil Law	Post-revolution
Romania	Eastern Europe	Civil law	Postcommunist transition
Venezuela 1999	Latin America	Civil law	Political transition
Ecuador 2008	Latin America	Civil law	Political transition
Bolivia 2009	Latin America	Civil law	Political transition

and economic downturns. Many of the constitutions studied in this volume are written in times of major transition, such as: independence, often from a colonial power, such as in Micronesia, Nigeria, and South Sudan; democratic transitions, as in Argentina and Portugal; and drastic transition from a communist system to a democracy, as in Bulgaria and Romania. Other constitutions, especially those not confined to one document, such as New Zealand, Israel, and the United Kingdom, change as ideas and circumstances change rather than in reaction to a momentous event. The conditions under which the constitution is written represent one of the variables in selecting the sixteen case studies in this collection. The case studies are also geographically diverse, exemplify different legal traditions, and apply to countries of varied size and significance, ranging from tiny Micronesia to populous Nigeria. The time scale runs from the early twentieth century in the case of Ireland (1922), through the era of colonial independence as in Nigeria (1960) and Micronesia (1986), to some of the most recent constitutional experiments, of which South Sudan (2011) and Iceland (2011) are examples. Some of the constitutions considered here, such as those of Ireland, Nigeria, and Egypt have since been replaced, although their legacy in setting the foundation for later constitutions is plain (Brady 2013). We have tried to identify constitutions that exemplify a pattern or wider set of circumstances. The constitution of Nigeria (1960) is fairly typical of the British postcolonial model (Parkinson

2013). Others, such as the constitutions of Bulgaria and Romania, display the context of constitution-making after the collapse of Soviet domination, while the constitution of Iceland (2011) reflects an unusual determination for popular involvement in constitution-making. Finally, we exclude those constitutions that have received disproportionate attention in the comparative constitutional law literature in recent years, such as the constitutions of the United States, Canada, South Africa, Germany, and India. Table 1.1 lists the different constitutions studied in this volume, as well as the circumstances under which they were made, the legal system they represent, and the geographic region to which they belong.

In the remainder of this chapter, the editors provide an overview and analysis of the theoretical issues discussed in the following chapters. We have endeavored wherever possible to integrate the findings from the case studies and to show how they confirm, illuminate, or question our understanding of these issues.

1.2 WHAT IS A CONSTITUTION?

A constitution establishes a system of government, defines the powers and functions of its institutions, provides substantive limits on its operation, and regulates relations between institutions and the people.[1] In doing so, constitutions *constrain* government: they generate a set of inviolable principles to which future lawmaking and government activity must conform. But constitutions also *enable* government, by empowering institutions and, in some cases, by mandating them to promote social welfare. Although use of the term "constitution" in this way is relatively recent, the very idea of government has always included some notion, elementary though it may be, of a constitution – that is, of rules creating, empowering, and limiting government institutions (Stourzh 1988; Sartori 1962). Constitutions are now expected to be in written form and usually contained in a single document, although even today they are not always written and not necessarily contained in one document. Nevertheless, the standard practice across the nations of the world, with just a few exceptions, is to have a single written constitutional document that sets out these basic functions.

This does not mean that the document includes all matters of constitutional concern, or that all constitutional matters can be resolved by reference only to the document. A brief encounter with any constitution will soon reveal that around the formal document arise other ideas, conventions, and practices, which influence its interpretation or even augment, modify, or render obsolete some of its provisions.[2]

[1] For other definitions of what is a constitution, see, for example, Dicey (1915: 22); King (2007: 3), Llewellyn (1934: 3), Palmer (2006: 592–593), Young (2007: 411); Erdos (2013); Elkins et al. (2009: 36–40).

[2] For the idea that conventions emerge around the written document, see also Llewellyn 1934: 3; Strauss 1996).

The success and endurance of Japan's constitution might be partly attributable to the ability of institutions, in this case the Supreme Court in its restrained approach to judicial review of legislation, to marginalize certain of the written provisions (Law 2013). The need to take account of informal constitutional features is the first indication that, while constitutions are distinct and separate social institutions in stating the rules of government, at the same time they interact with the social and political context around them. They present to the world two faces, one independent and autonomous, the other interdependent and interlocking with the social and political context. The interplay of the two aspects is the key to understanding constitutions as social institutions.

Independent and autonomous constitutions are characterized as a set of rules and principles on the basis of which government is conducted and its actions explained and justified or criticized and condemned. Administrative, executive, and legislative officials derive their powers from the constitution and, when challenged, have to justify their actions in accordance with it. Citizens, groups, and associations use the constitution to make claims against government bodies and officials, sometimes restraining action, at other times demanding it. Lawyers spend time advising on and arguing about what the constitution means, while the judges of constitutional courts enjoy high prestige for having the last say on constitutional questions, which for the nation are often questions of great moment. Once constitutions are viewed as interdependent and interlocking with the social and political context, they become both more complex and more interesting. On one approach constitutions are reasonably self-contained and self-referential, where the task of lawyers and judges is to interpret them according to legal doctrine and precedent. It soon becomes plain, however, that arguing over, interpreting, and ruling authoritatively on constitutions involves complex social processes that unavoidably spill over into the wider social and political context, raising questions about relations between that context and the written text. The work of lawyers and judges in interpreting the rules and principles of the constitution has long attracted the interest of social scientists, so that there is now available an extensive body of both quantitative and qualitative research.[3] From there it is a short step to wider and deeper questions about the very nature of constitutions, their purposes, their contents, how they come about, and their effectiveness. These are the questions with which many scholars and researchers are now preoccupied; they are also the questions with which several of our contributors grapple.

To summarize, it soon becomes clear from the study of constitutions in their social context that they are more than just written documents declaring the framework of government; they are also social institutions interacting with society in complex ways. In the remainder of this chapter, we examine further this interaction

[3] See, for example, Martin and Quinn (2002); Ginsburg and Moustafa (2008); Garoupa (2011).

and highlight the nature and function of constitutions as social institutions, deeply rooted in, and intertwined with, particular societies. Our examination is centered on the following issues: (1) constitutions as expressions of values; (2) constitutions as manifestations of power; (3) constitutions as coordinating devices; and (4) constitutions as contracts. We show how these themes relate to each other, how they illuminate the case studies, and how the case studies in turn often provide an empirical grounding for the various theories.

1.3 CONSTITUTIONS AS EXPRESSIONS OF VALUES

A cursory reading of constitutions shows they are steeped in values. The values are many and various: some reflect a nation's "core, constitutive political commitments" and identity (J. King 2013); some reflect international or transnational norms and standards (Goderis and Versteeg 2013); and others express shared notions, such as liberty and democracy (Galligan 2013b). Values appear throughout the text, defining the content and distinguishing one nation from another. However, constitutions are not only declarations of values, and as we shall see in the following discussion, there may be tensions between aspirations and ideals, and other goals. The successful coordination of society and politics, which is or ought to be a major goal of any constitution, may require an adjustment or even compromise of aspirations and ideals. Some constitutions are the outcome of power struggles among the nation's elites, thus reflecting interests and positions that defeat or diminish idealistic goals and values (Hirschl 2013). Constitutions plainly serve diverse ends and perform various functions, yet they are invariably also a declaration of values and aspirations – an aspect we shall now consider in more detail.

1.3.1 *National Values, Identity, and Mission Statements*

National values are brought out in a constitution's dealing with the nation's past, as well as its hopes and aspirations for the future. Constitutions often look back to past events and aim to resolve past problems (Sajo 1999). They are likely to reflect shared experiences, such as Ireland's history of oppression by England (Brady 2013), Japan's subjection to a militarist government and devastation by war (Law 2013), and Hungary's liberation from the Soviet Union's domination (Arato and Miklosi 2010). How a constitution presents the ideals and aspirations of a society matters, as became evident in the depth of feeling shown and the level of controversy aroused over the wording of the preamble to the proposed 2004 constitution of the European Union (EU). At stake are not just the values of the EU but also its identity. National identity as well as national values were on the mind of the Hungarian government when, with the support of the parliament, it felt the need to rewrite the preamble

to the Hungarian constitution, which was transformed into the Fundamental Law. The battle over whether the postrevolutionary Iranian Constitution should declare a "Republic," an "Islamic Republic," or a "Democratic Islamic Republic" reflects a similar search for national identity (Hass 2013).

A nation's history can feature in constitutions as a source of inspiration; it can also be something to overcome and avoid in the future. Several nations of Central and Eastern Europe, upon liberation from the Soviet yoke in 1989, were able to hark back to, and find guidance in, older constitutional traditions and the ideas and ideals informing them. Something similar is happening in the context of the Arab Spring, where constitution-makers are drawing on their own constitutional history in an attempt to design a new future (Brown 2012). But, as the study of New Zealand highlights, constitutional choices are often directed at remedying the past or escaping from its legacy. In this case, the reforms of the early 1990s "had their roots in an aversive reaction against the activities and outlook of" the prime minister, who had displayed "woeful disregard for traditional conventional understandings of how public power should be exercised" (Erdos 2013: 334). Likewise, the 1853 Argentine constitution was preoccupied with creating order and stability because of its previous experience with excessive disorder and instability (Schor 2013), while the Romanian postcommunist constitution was aimed at overcoming the communist past (Parau 2013). Other examples are the 1996 South African Constitution, which aims to overcome its apartheid past by emphasizing international rights and authorizing its constitutional court to take account of foreign and international law (Klug 2000), and the 1949 German Constitution, which, in the wake of a totalitarian regime and the dark shadow of the Holocaust, proclaims "human dignity" as one of its basic principles.[4] Whether or not a constitution cherishes the past or abhors it, there is no escape, to paraphrase Justice Oliver Wendell Holmes, from "the stories of the nation's development through many centuries" (Holmes 1881: 1–2).

In creating a system of government and dictating its powers and responsibilities, constitutions are also forward-looking, stating ideas and ideals and articulating commitments as to how government will be conducted in the future (Elster 1993, Holmes 1995, Sadurski 2009). By the very process of empowering government and defining its limits, constitutions inherently rely on ideals, principles, and values meant to guide and contain the conduct of government not just today but into the future. Features such as the sovereignty of the people, representative government, and civil, political, and socioeconomic rights are statements about the values of the nation for the future.

"Core, constitutive political commitments of the community" (J. King 2013: 73) are also commonly stated explicitly in constitutions. According to Jeff King, constitutions

[4] The Basic Law of the Federal Government of Germany, 1949, art. 1.

are like "mission statements," although the notion is more at home in a business context and novel to constitutions. He continues: "A constitution that exemplifies such a function will express the political ideas that animate the constitution and polity more broadly, including the type of government it represents, the rights of citizens and people, and its conception of citizenship and the values it seeks to respect in its state planning" (J. King 2013: 81). While we should urge caution against sharp distinctions between constitutions that contain mission statements and those that do not, many constitutions do explicitly set out goals and aspirations, with the preamble serving as a useful vehicle for the purpose.

The EU's *Consolidated Version of the Treaty on European Union* 2011, although not strictly a constitution, is typical of numerous constitutions: it draws inspiration from the cultural, religious, and humanist inheritance of Europe, the inviolable and inalienable rights of the human person, freedom, democracy, equality, and the rule of law; it confirms attachment to those values and to fundamental social rights; and it expresses the desire to deepen the solidarity between the peoples of Europe while respecting their history, culture, and traditions (Walker 2013). Similarly, the 2011 interim constitution of South Sudan reflects the nation's Christian heritage by paying tribute to the "[a]lmighty God for giving the people of South Sudan the wisdom and courage to determine their destiny and future through a free, transparent, and peaceful referendum in accordance with the provisions of the Comprehensive Peace Agreement" (Cope 2013: 315).

The idea that constitutions contain the "core, constitutive political commitments of the community," whether as an explicit mission statement or as implicit in the substantive provisions, fits best in the context of democratic and liberal nations, where it may be presumed that the founders intend the constitution to be taken seriously and implemented by suitable institutions of government. But mission statements are not confined to constitutions of liberal and democratic nations and often appear in those of anocratic and autocratic nations. The 1978 constitution of the People's Republic of China contains a six-page preamble that celebrates the achievements of the glorious leader Mao Zedong, the "proletarian revolution," and "socialism."[5] Although this seems an accurate reflection of Mao's mission, it is an open question whether mission statements in authoritarian constitutions are seriously intended, or whether there is a disparity between sentiment and reality (Law and Versteeg 2013).

In focusing on the expressive and aspirational aspects of constitutions, King adds a dimension to the study of constitutions that has largely escaped attention and research.[6] However, we should be careful to distinguish between the fact that mission statements are commonly included in constitutions and the claim that they

[5] Constitution of the People's Republic of China 1978, Preamble.

[6] For studies that highlight this perspective, see Jacobsohn (2010) and Breslin (2007).

perform certain social functions. Mission statements, King argues, serve several functions: to express principles, to channel and guide public bodies in decision making, to provide "an enforcement or remedial function by founding or supplementing claims in the courts or government institutions," and to legitimate the legal order (J. King 2013: 87). It is useful to separate two dimensions of analysis: one is the characterization of constitutions as statements of principles and values, the other the social consequences and effects of such statements. The first dimension is not contentious: as a matter of description, contemporary constitutions commonly express ideas, principles, and values. That constitutions are expressive in this way is simply a feature of constitutions; the expression of values is one of their functions. Claims that such expressions have additional social functions and consequences are of a different order. Rather than being common, even necessary, features of constitutions, they are claims about how constitutions work in practice, and that is contingent on the social context of each. Whether the statements of ideas, principles, and values influence officials in their actions and decisions, or are the basis for claims in courts and government institutions, will vary from one country to another and are matters to be tested by empirical research. In the absence of such empirical evidence, a note of caution should be entered as to whether aspirations typically found in constitutions are intended to, or in practice do, have any real effect on how officials and institutions behave. To promote ideals and values of the kind typically found in preambles, which tend to be open and abstract, to the status of practical standards guiding government is to obscure the difference between such aspirations and other provisions in constitutions, which are intended to be genuine guides to practical decision making and which are often justiciable in the courts.[7] Similarly, there is no empirical evidence that mission statements serve to legitimate the constitutional order, bearing in mind the notorious elusiveness of both the concept and the criteria by which it is established.

While the aspirational aspects of constitutions typically appear in the preamble, they may, in some cases, also permeate other, more substantive provisions concerning the nature and structure of government and institutions, the limits on their powers, and relations between them and the people. A constitution is by nature a statement of values, ideals, and aspirations for the future. Despite the unavoidably imprecise lines between the two – the mission statement aspects on the one hand and the provisions of a constitution of binding force and justiciable status on the other – there is utility in maintaining the distinction. Proclaiming values and identity in the preamble is relatively easy and costless, whereas justiciable standards require practical action by government bodies, which is often neither easy nor costless. An important

[7] Recent research suggests that even justiciable constitutional standards are often not enforced (Law and Versteeg 2013).

question for further research is whether aspirations affect substantive and justiciable constitutional choices or whether they are confined to the preamble. Some examples of national values of a justiciable character include the constitutional ban on abortion and, until recently, the prohibition of divorce in the religious context of the Irish constitution,[8] or a ban on gay rights in the equally religiously inspired Ugandan constitution.[9] The catalogue of social rights in the 1976 constitution of Portugal is, as Pedro Magalhães shows in his essay, attributable to a broad consensus among the parties with origins deep in Portuguese culture and society: "The overall conception of the role of the law and of the state in the Portuguese legal tradition, the values of social Catholicism .... and an international *Zeitgeist* favourable to social rights, all combined to form an ideological environment that was incompatible with the tenets of a 'minimal state' and 'economic liberalism'" (Magalhaes 2013: 449). Thus, as Magelheas shows, Portuguese national values and identity, albeit mixed with emerging international norms, are expressed not only in mission-statement-like preambles but are also the basis for substantive standards of social rights. Likewise, as Phoebe King demonstrates in her essay, the recent neo-Bolivarian constitutions in Venezuela, Bolivia, and Ecuador not only contain radical statements of values in their preambles but also adopt a catalogue of rights that reflect popular preferences and are directed at remedying past injustice. All three constitutions enshrine elaborate socioeconomic policies that address historic inequalities and popular grievances resulting from an era of neoliberal development, structural adjustment, and privatization, as propagated by the international community in the 1980s and the 1990s. The Venezuelan constitution, for example, grants all citizens a "right and duty to work" and "to obtain .... a dignified and decent existence," while the constitution of Bolivia grants "every person the right to water and food," which may not be "object of concession or privatization" (P. King 2013: 373).

While some of the essays here highlight the expressive function of constitutions, it is a task for future research to test how constitutions balance their past with their future and their national identity with international norms. In some systems, such as that of the United Kingdom, which have developed and evolved with relative stability over a long period, constitutional ideas are anchored in their history and almost by definition reflect national character. For most nations, however, relations between the constitution and indigenous ideas and ideals are more variable, depending on many factors, including the simple point that the very purpose of a new constitution may be to cast off the influence of old values in favor of the new ones. This has its own risks, for a set of constitutional ideas and ideals without roots in the society may soon wither and be little more than textual adornments or

[8] Irish Constitution, 1937, art. 40, cl. 3; art. 41, § 3, cl. 2 (amended 1995).
[9] Uganda Constitution, 1995, art. 31. § 2a.

a "sham constitution" (Law and Versteeg 2013). Future research might profitably explore the balance within each national constitution between the past, the present, and the future (see Ginsburg et al. 2013), while at the same time acknowledging the pressures originating from outside the nation.

1.3.2 *Transnational Values and Diffusion*

The influence of the external environment is the perspective that Benedikt Goderis and Mila Versteeg develop in their essay (Chapter 4 in this volume), where they emphasize the influence of transnational factors, international bodies, and the norms and values of foreign nations. Modern-day constitutions, Goderis and Versteeg argue, are inherently transnational documents (Goderis and Versteeg 2013), the content of which is shaped to a large extent through various processes of transnational influence. The thesis at first sight appears to be the direct opposite of the one advanced by King: constitutions do not reflect national values, ideals, and aspirations, but instead reflect more international norms and standards, promoted by other nations. However, as we shall show, on closer examination, the two perspectives supplement rather than oppose each other.

Several mechanisms of diffusion are available: (1) coercion by other nations; (2) competition among nations; (3) learning by one nation from others; and (4) acculturation. Coercion suggests that powerful nations push less powerful ones to adopt particular constitutional arrangements. This is most common in, though not confined to, situations of colonial independence and military occupation. As Charles Parkinson's study of Nigeria illustrates, the constitutions granting independence to Britain's former colonies in Africa and the Caribbean were drafted and negotiated by the British authorities, who insisted on the inclusion of a bill of rights modeled on the European Convention on Human Rights and Fundamental Freedoms (Parkinson 2007, 2013). The Colonial Office thus imposed standard constitutional provisions on states ranging from Antigua and Barbuda to Zimbabwe and Nigeria. In Micronesia, the U.S. advisors pushed for a bill of rights along the lines of the U.S. Constitution, the legacy of which not only shaped the constitutional document but the entire body of Micronesian constitutional law up to the present day (Tamanaha 2013). The 1946 Japanese Constitution offers an example of an occupation constitution, drafted by U.S. officials and naturally reflecting their notions of a suitable constitution (Law 2013). More recent versions of the same phenomenon include the constitutions of Afghanistan and Iraq, both of which were drafted "in the shadow of the gun" within parameters set by the occupying forces (Goderis and Versteeg 2013; Ginsburg et al. 2008).

The logic of the second diffusion mechanism, *competition*, is that states copy particular constitutional arrangements in order to attract foreign buyers and investors

(Law 2008). The more countries are successful in attracting investment by adopting specific constitutional rules, the more likely others are to follow and adopt the same constitutional rules (Law 2008). The case of Egypt has been suggested as an example. According to one study, the Sadat regime in Egypt realized that its "socialist and nationalist commitments obstructed inflows of capital because investors … were always at risk of expropriation," which put the nation at a disadvantage compared with competitors (Tushnet 2009: 996*accord* Moustafa 2007). In response, the government created an independent constitutional court authorized to enforce constitutional provisions, including an anti-expropriation guarantee, and was even willing to accept unfavorable rulings for the sake of securing foreign investment (Moustafa 2007: 67–70, 77–79).[10] Egypt engaged in constitutional reform to improve its position in the global market for foreign capital.

The third mechanism, *learning*, entails a deliberate borrowing of constitutional provisions after assessing foreign constitutional models. Constitutional learning is most common among states that share certain features, because arrangements that work in one case are likely to be successful in similar cases. As the former chief justice of the Israeli Supreme Court puts it, only when "the relative social, historical, and religious circumstances create a common ideological basis" is it possible to use foreign constitutions as "a source of comparison and inspiration" (Barak 2002: 114). When states know that certain constitutional features are successful in other states, which they consider their peers, they have an incentive to follow suit. For example, the drafters of the 1866 Romanian Constitution imitated the Belgian constitution because "Belgium had thriven despite being overshadowed by great powers on all sides." By copying the Belgian constitution, the drafters hoped that Romania, similarly overshadowed by great powers, could "replicate the Belgium success story" (Parau 2013: 500). The drafters of the 1922 Irish Free State Constitution conducted a "diligent search" of numerous foreign constitutions, especially the then new constitutions in Central and Eastern Europe, which were carefully studied to get new insights on how best to "engineer" Irish society (Brady 2013: 274). This deliberate search for the best solutions suggests that the Irish constitution-makers were learning from constitutional choices elsewhere.

According to the last diffusion mechanism, *acculturation*, states copy foreign constitutional rules not because they are convinced of their intrinsic merits, but because they wish to gain international acceptance and legitimacy (Goodman and Jinks 2004). Once a critical number of states adopt certain constitutional provisions, they may become standardized norms of "world society." Conformity to such norms ensures international recognition and legitimacy. Even where states are

[10] For an alternative explanation of the Egyptian constitutional court, see Lombardi (2008), Brown (2009).

indifferent as to whether such provisions should be included in the constitution, the desire for international recognition can be reason enough. The government of Taiwan, having been deprived of diplomatic relations with most other nations, allegedly engaged in Western-style constitutional reform to cultivate their goodwill (Madsen 2001; Law and Versteeg 2011: 1181). Likewise, the transnational elites that drafted Romania's postcommunist constitutions consciously absorbed the constitutional standards of the West "in order to be credible with regard to [its] intentions of building a democratic policy" (Parau 2013: 514).

Transnational influences are documented in numerous essays comprising this volume. In addition to those already mentioned, where foreign influences were a crucial factor in the constitution's foundations, transnational influences are evident in South Sudan, where foreign consultants promoted international models of rights protection (Cope 2013), and the Egyptian constitution of 1923, which was modeled on the constitution of Belgium and Prussia (Lombardi 2013). Even in a highly inclusive constitution-making process, the constitutional assembly of Iceland, aware of its status as a pioneer in popular constitution-making, turned to foreign models, as "the re-writing was always going to be in part a borrowing exercise," as well as to state-of-the-art social science research, including the economic research on constitutions by Persson and Tabellini (Meuwese 2013: 485).

While it is reasonable to conclude on the basis of research to date that constitutions are rarely, if ever, written in isolation, we ought to be careful of oversimplified accounts of either the copying of foreign ideas or the role of the expert in dominating the process. As one of the editors learned from direct involvement in amending the constitution of Pakistan in 2002, while shrewd constitution-makers naturally and reasonably want to learn how other nations have solved common problems, they are not committed to blind imitation; nor does showing respect for the expert's advice preclude its being subjected to rigorous scrutiny. The degree of foreign influence and its effects on the constitution will vary from case to case, ranging from wholesale colonial imposition as in Nigeria (Parkinson 2013), to a deliberate search for Western identity as in Romania (Parau 2013), to more subtle influences in the background, such as the Icelandic constitution-makers surfing the Web for information (Meuwese 2013).

Not only does the degree of foreign influence vary from case to case; foreign influences also blend with domestic values and interests. The 1922 Irish Free State Constitution was "in many ways typical of the .... legal transplantation of the early inter-war period," but was also a reflection of national values "shaped by the intellectual presuppositions of an Irish nationalist movement that, for the most part, was a distinctive blend of Catholic, democratic, and constitutionalist influences" (Brady 2013: 290). Similarly, the study of South Sudan's 2011 Interim Constitution shows how foreign experts competed with local elites, producing what Cope (2013) calls an "Intermestic

Constitution."[11] In South Sudan's Intermestic Constitution, the foreign experts wrote the Bill of Rights, while domestic elites focused on the structural provisions. In each of these cases, transnational values blend with national values as well as the interests of local elites. The mixing of norms is not surprising, for, as discussed earlier, the writing of a new constitution gives each nation the occasion to reflect its history and the lessons of history, while looking to the future and allowing for the expression of values as to how it wishes to govern and be governed. Constitution-making is, moreover, often a politicized process in which local elites and interests groups compete for power and try to vindicate their political agenda in constitutional form (Hirschl 2013). As a result, most constitutions are bound to be a hybrid of localism and particularity on the one hand and uniformity and similarity on the other.

If the diffusion of standards and provisions is inevitable in modern constitution-making, then various questions arise as to its consequences. Perhaps the most important one is whether there is a causal connection between diffusion and the success of the constitution, judged by whether it is faithfully implemented. Intuitively, we may think that the more foreign the constitutional norms are, the harder they will be to domesticate.[12] The Nigerian Independence Constitution's disregard for ethnic tensions and persistent poverty might have contributed to its failure four years later, with the outbreak of a bloody civil war (Parkinson 2013). Though not dictated by foreign occupiers, the more experimental and transplanted elements in the 1922 Irish Free State constitution were often "found to be a dead letter" simply because some of its innovative elements were both untested and foreign to the Irish constitutional tradition (Brady 2013). Yet the Japanese case study teaches a different lesson. Here a postwar constitution dictated by the Americans was later "domesticated," – that is, interpreted and applied to match and reflect the character and values of the Japanese people. The constitution became embedded in national life and has not been amended since its promulgation in 1946 (Law 2013).[13] Bearing in mind the numerous factors contributing to a constitution's success, we have no reason to conclude that the source of the standards bears anything more than marginal relations to later success.

1.3.3 *Democratic Values and the People*

How the people are presented in modern constitutions, particularly those of democratic nations, which is the subject of Denis Galligan's essay, illustrates both

[11] According to Cope, an "intermestic constitution" is a constitution that combines *Inter*national and D*omestic* ideas, values, and preferences (Cope 2013).

[12] The notion that transplanted laws may not be effective in a new context as they were in the old is an old theme in comparative law. See, for example, Berkowitz et al. (2003) and Watson (1974).

[13] Similar success stories of imposed legal reforms have been documented by Acemoglu et al. (2011), who claim that Napoleon's radical externally imposed legal reforms in Germany were very successful.

diffusion and constitutions as statements of values and aspirations (Galligan 2013). After examining the way in which constitutions present the people, Galligan remarks on the "strikingly consistent way the people are presented in modern constitutions despite the diversity of the societies for which they are written." The sovereignty of the people is taken for granted and then the people hand over power to representatives, occasionally reserving the power to take initiatives, which is rarely exercised. Representative government is based on election by the people, leaving the people with no role in government; nor do the people insist on regular accountability, retaining only the ultimate power to change the representatives at the next election. Galligan concludes: "This way of presenting the people is made to appear compelling both theoretically and practically, as a universal answer to a universal problem of how a people can both govern itself and have effective government" (Galligan 2013a: 154). This could be seen as a case of diffusion, very successful diffusion, where one or a few societies over a long period have developed a way of accommodating a problem at the heart of society – how to govern or be governed, or more precisely how the people acquiesce in being governed by the few – which other nations are then willing to adopt fairly much without question. Or it could be construed, as the quotation suggests, as the common resolution through common experience and concerted reason of a problem central to all systems of government, while of special significance for democracies.

The study also illustrates the characterization of constitutions as expressions of values and aspirations. Behind the constitution lies the political ideal of democracy, which means at its most basic that the people are sovereign and self-governing.[14] How then do the constitutions of democratic nations express principles of democracy? At first sight, the principle seems to be reproduced accurately, maintaining harmony between the political ideal of democracy and its constitutional expression. A commitment to democracy sometimes appears in preambles, but the preferred language is that of sovereignty, the idea being presumably that sovereignty signifies the source and location of power, which is then used to create a system of democratic government. Many constitutions begin with the words "We the People," suggesting a clear and confident assertion that the constitution is made by and belongs to a sovereign people, while among others less bold in such assertions sovereignty is present in the text expressly or by implication. Under further scrutiny, however, a different picture emerges: in the practical and substantive provisions for government, popular sovereignty is weakened to the point of dissipation. The promise of self-government implicit in democracy gives way to government by representatives in which the people have no constitutional role, and where the representatives are

[14] According to the Polity Score, roughly 90 nations among 200 qualify as democracies: Marshall and Cole (2011).

required to act on behalf of the whole, with at best minimal accountability to the people other than removal at election.[15] Is this then a case of disjunction between constitutions and society? Is it a failure of constitutions to express adequately the character of democratic societies and conventions and understandings within them? On the contrary, on still further scrutiny, it becomes clear that, regardless of the language of popular sovereignty, the practice of modern democracy is as portrayed in the constitution: the people may be in some sense sovereign, but in reality hand over government to representatives just in the way described earlier. Constitutions, far from being out of step with the reality of modern democracies, in their substantive provisions for government and the place of the people, are accurate reflections of political reality. The disjunction lies instead between the aspiration of democracy as a self-governing people and political reality.

The task then is to explain how this limited sense of democracy has come to prevail in modern constitutional orders. Galligan argues that we need to dig deeply into the historical development of constitutions, especially those of the Western tradition, to understand the origin of contemporary constitutional ideas concerning the people and the practical concerns that gave rise to them. This means showing how at pivotal points in constitutional history new concepts have been developed or old concepts reinterpreted to manage the tension between the people as the source of power and the handing over of that power to government institutions and officials. The essay shows how, long before the advent of democratic commitments, the people were acknowledged as the source of constitutional authority, but the people as a corporate entity rather than as a collection of individual persons. The idea of the people as a corporate entity proves to be of considerable utility, for on the one hand it retains the notion of sovereign power in the people, while on the other hand it solves the problem of government, because a corporate entity cannot act itself but may act only through representatives. How much control the people have over their representatives varies according to the rules of the corporation, but as a matter of constitutional history it was rather low. These notions were formative of the constitutional movements of the eighteenth century, not only in the United Kingdom but also in France and the United States, and were vehicles into which ideas of popular elections could be inserted without rupturing the basic structure.

1.4 CONSTITUTIONS AS MANIFESTATIONS OF POWER

Whatever other qualities they have, constitutions are also the product of domestic power struggles. That is the perspective developed in Ran Hirschl's essay, where he argues that constitutions are "politics by other means" (Hirschl 2013: 157), reflecting

[15] For a fuller analysis of the place of the people, see Galligan (2013a).

bargains, interests, and the self-dealing of different elites and interest groups. Drawing on an influential literature in political science, from Robert Dahl (1991) to Martin Shapiro (1964) and others, and offering many examples, Hirschl summarizes what he calls the "strategic-realist approach" to constitutions. The premise is that "strategic behaviour by politicians, elites and courts plays a key role in explaining the tremendous variance in the scope, nature and timing of constitutional reform" (Hirschl 2013: 159). The approach is prominent in recent comparative constitutional law literature (Hirschl 2004; Ginsburg 2003; Finkel 2008; Erdos 2010). It builds on rational choice theory, which assumes that politicians are rational, self-interested, and utility-maximizing actors who, all things being equal, favor institutions that serve their interests. On the basis of this premise, the image of constitutions changes from being documents written in "constitutional moments" of higher lawmaking (Ackerman 1991: 6–7), or the products of genuine deliberation and reflection on higher values, to an image of haphazard bargains, raw power play, and the political agenda of self-interested elites.

It is no surprise that political actors take a keen interest in constitution-making. One of the primary goals of any constitution, after all, is to create, channel, and monitor power. Constitutions provide an ideal platform for "locking in certain contested worldviews, policy preferences, institutional structures, while precluding the consideration of alternative perspectives" (Hirschl 2013: 166). The writing of the constitution of the world's youngest nation, South Sudan, a process that is still unfolding, is a classic case. As Kevin Cope explains in his essay, constitution-making in South Sudan was characterized by a "my turn to eat" attitude, in which political groups tried to create institutions that would best serve their interests once the constitution were functioning. Most notably, the constitution-makers created a second legislative chamber, the "council of states," which substantially expanded the size of the national assembly, in order to create future jobs in Khartoum for the constitution-makers and their allies (Cope 2013).

Yet at face value, constitutions *do* normally constrain government by enshrining rights and mandating the judiciary to enforce them. How do we explain this apparent paradox? Why would self-interested elites constrain themselves by constitutional means? The answer, according to Hirschl and those associated with the constitutions-as-power approach, is that such arrangements in fact serve the self-interest of political elites, especially in the face of electoral uncertainty. Constitutional constraints are not adopted because of popular beliefs in rights and limited government, but because governments that are "clipping their wings" assume "they will be compensated for by the limit it might impose on rival political elements and/or the reduced probability for other non-favorable political developments down the road" (Hirschl 2013: 167).

There are different ways of explaining why constitution-makers agree to "clip their wings." One account, associated with Tom Ginsburg's work on East Asia, is

that constitutional constraints, including rights and judicial review, serve as a form of "political insurance" (Ginsburg 2003; Ginsburg and Versteeg 2013). The adoption of constitutional constraints, Ginsburg argues, is a "solution to the problem of political uncertainty at the time of constitutional design." Parties who fear losing power in the future are likely to prefer constitutional review by an independent court because the court provides an alternative forum for challenging government action and mitigates the risk of electoral loss (Ginsburg 2003). On the other hand, stronger political parties will opt for fewer constraints because they anticipate being able to advance successfully their interests in the post-constitutional legislature (Stephenson 2003; Chavez 2004). Political division within the legislative branch is thus correlated with constitutional constraints. As an example of this logic, the transition to democracy in Portugal in the mid-1970s was characterized by the lack of a single political power, which made it easier for the fragmented parties to adopt constitutional review (Magalhães 2013).

In another version of constitutions-as-power, Hirschl argues that ruling elites adopt constitutional constraints when they foresee the loss of power and are thus threatened in their political status, worldviews, and policies. The timing of constitution-making is crucial, because in the final stages of their rule, elites who expect to lose power secure their future interests by entrenching suitable restraints on succeeding governments and providing for judicial enforcement. Constitutional change is a means by which outgoing elites preserve their political interests, dressed up as values, by placing them outside the scope of ordinary lawmaking (Hirschl 2004). In short, according to this "hegemonic self-preservation" theory, constitution-making is not merely "a form of Ulysses-like self-binding against one's own desires, but rather a self-interested binding of other, credibly threatening actors who advance rival worldviews and policy preferences" (Hirschl 2013: 170). Case studies of South Africa, Canada, Israel, and Mexico, among others, all appear to support the thesis (Hirschl 2004; Finkel 2008; Magaloni 2008). Other case studies, however, provide little support for the thesis. David Erdos shows in his essay in this volume how, in constitutional reform in New Zealand in the 1990s, elites interacted with civil society and the public in crucial ways, producing what Erdos describes as a process of "elite-mass" interaction, which is closer to an "Ackermanean constitutional moment" than to elite power play (Erdos 2013: 336). In a study of the constitutional situation in Hong Kong, Eric Ip contests the claim that the government's adoption of a bill of rights and judicial review "stemmed directly from its imminent evaporation of political power." On the contrary, he argues, the government faced no serious political threat, and that, as the British government was committed to peaceful withdrawal from the colony, the positions of the business and administrative elites in the new government were secure (Ip 2013). These studies suggest that the explanatory power of hegemonic self-preservation and political insurance theories is likely

to be stronger in some settings than others. While elite power play and self-interest are always present in the background, in some cases they may be overcome by the power of ideas and values, or by a desire for coordination.

What sets the strategic-realist approach apart from an account of constitutions as expressions of values, according to Hirschl, is its ability to explain the *timing* of constitutional change. The theory highlights the political events that trigger constitutional change, such as elites losing power (Hirschl 2004), or major transitions that induce electoral uncertainty (Ginsburg 2003). This is an important feature of the approach and should stimulate further research into issues of timing. Its exponents suggest that the lack of attention to the timing of change is a weakness of the competing idealist approaches.[16] Idealist approaches indeed emphasize a different dimension of constitutions, namely, that they contain a declaration of values. They then go on to make claims about why those values have been chosen, why the constitution of this nation has this content, the usual answers being either because they are indigenous to the society or they have come from sources external to the society.[17] Strategic realism adds a third potential source of content: the claim is that values and institutions are in some cases included in the constitution as a direct result of the self-interest of elites. The power of elites to influence content is after all the main point of the approach. It is not the only point, given that it has the potential also to explain the timing of change. Accordingly, we see no incompatibility between the analysis of constitutions as values and strategic realism. They are, in practice, complementary: strategic realism might explain the domestic politics that lead to constitution-making in the first place; it might also show how the interests of elites at stake, in combination with indigenous values and external standards, can potentially have an influence on content.

How much does strategic realism tell us about the content of constitutions? Its exponents are right to claim a possible causal connection, but is there evidence of what that means in practice, of concrete provisions that owe their place to elite power play? Empirical research on this question is still incomplete. Ginsburg's theory holds merely that electoral uncertainty will produce constraints of some sort, while Hirschl's theory suggests that constitutions somehow reflect the interests of the losing elites, which he conceptualizes as the neoliberal right. It is possible, however, that other elite interests may be enshrined: constitutions may reflect the interests of the progressive left, for example (Bork 2003). At best, strategic-realist approaches produce broad predictions about whose interests the constitution will entrench and in which values and practices they will be clothed. Idealist

[16] Hirschl (2013) and others use the term "ideational approaches" (see Ginsburg 2003; Ginsburg and Versteeg 2012).

[17] They also make causal claims, as we saw earlier, about the social functions of expressions of value.

approaches, by contrast, examine the content of constitutions in more depth, and explain why countries make some constitutional choices and not others, in the light of their domestic values as well as transnational influences (for further accounts highlighting this more complete understanding of the idealist perspective, see Hilbink 2009; Magalhães 2013). In this sense, the potential of strategic realism is unrealized because of an absence of empirical research deploying that perspective and identifying causal connections between power plays by elites and the content of constitutions.

The case studies also suggest that, to the extent domestic politics impacts on substantive constitutional choices, it is more likely to affect structural provisions than preambles and bills of rights (Magalhães 2013). Structural provisions, such as the electoral system and judicial review, define the relationship between different government actors, while rights and preambles do not. As Cope points out in the South Sudan case, rights and values are potentially "cheap-talk," especially in a nation that has a long record of rights abuse, and it was therefore easy for South Sudanese elites to accept an internationally-crafted bill of rights. The structural provisions, by contrast, have a direct impact on the future role of the different elites in government, and elites fought vigorously over the structural part of the constitution. The case suggests that it is mainly bills of rights and preambles that offer a venue to articulate values, ideas, and ideals. Such values can be transnational, as in the South Sudanese case (Cope 2013), but may also be domestic, as in Portugal, where the social rights reflected genuine Catholic and left-wing sentiments (Magalhães 2013).

The strategic-realist approach draws our attention to a number of factors the importance of which may sometimes be overlooked in the study of the social and political foundations of constitutions. First, it highlights the importance of "events that did not occur" and roads not taken (Hirschl 2013), because non-decisions may also offer important insights in the politics behind the making of any given constitution. This theme is brought out in some of the case studies. Sometimes constitution-makers "decide not to decide" (Dixon and Ginsburg 2011; Lombardi 2013). The Egyptian constitution of 1972 was full of strategic ambiguities that would potentially allow the authoritarian and the liberal factions in Egyptian society to work with the same document (Lombardi 2013). The ambiguities in the text were thus a direct result of the presence of two competing political groups – both of which hoped to hold power in the future – which were unable to compromise. Israel's constitutional future was to a large extent shaped by indecision; political tensions prevented the constitutional assembly of 1949 from agreeing on a single constitutional document, which paved the way for a more gradual development of its constitutional order through the adoption of Basic Laws and their constitutional interpretation (Shinar 2013).

Secondly, the strategic realist perspective suggests that constitutional choices may often be haphazard and "accidental," the result of political deadlock and indecision,

or simply chance. The case study of Israel in this volume, for example, demonstrates how political deadlock, and a failure to reach agreement over core constitutional issues, produced what Adam Shinar calls an "accidental" development of Israel's constitution, through the gradual enactment of basic laws and their interpretation. Perhaps even more accidental was New Zealand's prime minister's misreading of his notes on national television in announcing a popular referendum of electoral reform, which set off an unexpected chain of events and produced electoral reform in an "accidental" fashion (Erdos 2013: 339). Admittedly, the latter example is almost a caricature of constitutional realism, one step short of suggesting that "the constitution would depend on what the constitution-maker had for breakfast," to rephrase Llewellyn's famous claim. Even so, it draws to our attention that constitutions are not always conscious and deliberate, but riddled with sub-optimal bargains and even mistakes.

1.5 CONSTITUTIONS AS SOCIAL COORDINATION

The theory of constitutions as coordination contends that the "whole point of a constitution is to organize politics and society in particular ways." Russell Hardin adopts this approach in arguing that "[e]stablishing a constitution is itself a massive act of coordination, which, if it is stable for a while, creates a convention that depends for its maintenance on its self-generating incentives and expectations" (Hardin 2013: 61). There is in fact a double convention: "Government derives its power (not its right) to rule by some specific form of coordination that is a convention and the populace acquiesces in that rule by its own convention. Once empowered by these conventions, the government has the capacity to do many things" (Hardin 2013: 59). The two distinct episodes of coordination and two matching conventions are crucial to the thesis: establishing a system of government is one episode of coordination, which results in a convention mainly, presumably, on the part of government officials to govern accordingly; whether the constitution, and the system of government created by it, then serves to coordinate the society depends on the people adopting a second convention to acquiesce.

The distinction between the two episodes of coordination and the two conventions is vital. One reason is that both conventions are necessary for successful coordination of politics and society: the system of government must be capable of governing effectively and the people must acquiesce in it. Either one without the other destroys or reduces the system's capacity to coordinate politics and society. There is a certain logical problem in separating the two, because whether government is effective depends partly on whether the people acquiesce to it. Effective government has two parts: it means government that is both capable of coordinating politics and society *and* succeeds in practice in doing so, where success depends on

popular acquiescence. In explaining the theory, however, it is useful to keep the two elements separate. The logic of effective government can be expressed in this way. It has two elements. One is a system of government capable of governing, which requires a set of institutions with powers to make and implement laws and policies. The other element is that the people acquiesce in the system of government. Only when both elements are present is the system effective, where the test of effectiveness is success in coordination. In the interests of clarity, we use the terms in the following way: coordination requires effective government; effective government requires both a capable government, as just defined, and popular acquiescence. We see why both have to be present. A system of government can be capable of governing, has the institutions and powers to govern, yet the people do not acquiesce. In the opposite case, the people acquiesce in a system of government that is incapable of governing, incapable, that is, of providing the basis for coordination, perhaps because of such factors as weak and unsuitable institutions, political strife, or corruption. There is a failure of coordination in both cases. It is only when the two elements come together that coordination is fully achieved.

Some observers will insist that what constitutes effective government is open to interpretation and should not be separated from a notion of good government, which means government's having certain qualities beyond the effective exercise of power. The quality of government is of course likely to affect whether the people acquiesce. But the reality is that people often acquiesce in systems of government even though they lack qualities that would be considered vital from, say, a liberal and democratic point of view.[18] It is enough to observe the contemporary world, let alone have recourse to history, for evidence of the kinds of government in which the people acquiesce, often apparently regardless of their lack of higher qualities. We see no obstacle to distinguishing between a notion of effective government and the particular character or quality of government, that is, the nature of the institutions – such as whether they are based on democratic ideas – and the content of the laws – such as whether they protect rights. Coordination theory requires only that government be effective, that is, capable of governing and gaining acquiescence. Above that threshold the people may insist on other qualities, but whether they do and what qualities they demand depend on the social and political context of each nation.

Whether the people acquiesce and the conditions that induce acquiescence are empirical questions awaiting further research. The existence of institutions with the capacity to make laws and policies, and to enforce and implement them, is itself a strong incentive for acquiescence. In some cases it is enough, after a period of upheaval, for instance, when the restoration of order and stability is the priority.

[18] Roughly one-third of nations are ranked as democratic, yet at least some of the other two-thirds have effective systems of government in which the people acquiesce.

But, it is not always enough, and we can imagine cases of the people or a large sector of the people declining to acquiesce in a potentially capable government, after conquest or revolution, perhaps, where the new system is considered repugnant to their way of life. After having acquiesced, the people may rebel and withdraw their acquiescence, as the current situations in Egypt, Tunisia, and Syria illustrate. The work of historians on popular rebellion, a fertile source of empirical evidence on acquiescence and its withdrawal, awaits exploitation by social scientists (Wood 2002). Establishing a system of government is one thing; making it work in practice, in the sense that the people acquiesce to it, is quite another. If the two conventions are in place, the system has succeeded in organizing politics and society in particular ways. The two episodes of coordination depend not just on officials' acting in fact in accordance with the constitution and the people's acquiescing, but on a convention that in each case they do so. The point of the convention is that, once in place, the officials govern and people acquiesce in the system as a whole without having to decide whether to do so in particular cases and despite aspects of the system being contrary to their interests or occasionally working injustice.[19]

While both episodes of coordination are necessary to the effective working of a constitutional order, the emphasis in Hardin's essay is on the people's acquiescence: "Acquiescence is the compelling fact." The English and Scottish people acquiesced in the decision of their parliaments to invite William and Mary to the throne (Hardin 2013); the Israeli people appear to be acquiescing in the constitutional revolution quietly effected by the Supreme Court, despite low levels of support for some of its decisions, especially those concerning security (Shinar 2013); the people of Hungary are acquiescing in recent major changes to the constitution, although they are controversial and divisive. Acquiescence is a necessary condition of coordination because constitutions are self-enforcing, which is to say that unless the people acquiesce in their provisions and in actions taken pursuant to them, a constitution will fail.

The coordination thesis is based on the idea that once the conventions are in place and stable – that is, once the government is functioning and the people acquiescent – two consequences follow: one is that the costs of doing things differently are raised, the other that, even if the constitution does not wholly serve the interests of the people as a whole, or those of a particular group or persons, it is likely to be more in their interests to support it than to try to change it and introduce new rules or government structures. A number of the case studies indeed highlight such path dependence in constitution-making. When countries are faced with an opportunity to change their constitution, even one that was imposed by a former colony, they often maintain the old constitutional arrangements, in a process that one of the

[19] Russell Hardin explains more fully the notion and importance of conventions in Hardin (2007).

contributors describes as "constitutional laziness" (Meuwese 2013). Iceland prior to the 2011 amendment to the constitution largely kept the arrangements that had been imposed by Denmark in an earlier epoch. The South Sudanese interim constitution is closely related to the Comprehensive Peace Agreement for Sudan (Cope 2013). The coordination thesis suggests that constitution-makers may not just be lazy, but instead baulk at the high costs of changing the existing modalities of government.

The notion of acquiescence to some is puzzling and so a further word of explanation is warranted. To acquiesce means to accept or agree tacitly to a set of arrangements. The notion of tacit acceptance fits well. It means no more than a willingness to regard the constitution, and in turn the system of government created, as a power structure within which one finds oneself and compliance with which is practical and prudent. The people do not have to approve of the constitution in some strong sense, nor does it have to be characterized as an agreement, contract, or covenant, and whether there is a moral obligation to comply is a wholly different issue. Unlike other concepts invoked to describe the position of the people in a functioning constitutional order, acquiescence is grounded in social reality and is empirically observable. It removes the need to resort to nebulous notions such as legitimacy, the meaning of which is uncertain and existential authenticity questionable. Acquiescence means only that the people as a matter of convention regard the constitutional system as authoritative, in explanation of which they might give a variety of reasons, some ideological, others principled, while the more mundane – that is, stability and the provision of social goods such as security, protection, and a few basic rights – are likely to be the more authentic. The people, wrote Nicolò Machiavelli, "desire to be free .... in order to live securely"; they want to be able "to possess one's things freely without any suspicion .... not fearing for oneself." "Men of such a humour .... when they are governed well, neither seek nor want any other freedom" (Machiavelli, quoted in Rahe 2008: 51). The people are just as likely to have no clear reasons beyond being part of a society whose culture includes the constitutional order and its shared acceptance.

David Hume long ago pondered how "this wonder is effected" and went on to express his surprise, and that of all who "consider human affairs with a philosophical eye," at "the easiness with which the many are governed by the few; and the implicit submission, with which men resign their own sentiments and passions to those of their rulers" (Hume 2008: 24). Yet force is always on the side of the governed, for "the governors have nothing to support them but opinion." The main influence on opinion, according to Hume, is "interest," by which is meant "the sense of the general advantage which is reaped from government" (Hume 2008: 25). He added other factors shaping opinion, one that government maintains public justice (opinion of right to power), the other that government is necessary to protect property (opinion of right to property). We need not here assess the strength of such opinions, upon

which Hume thought all governments are founded, although it broadly fits the idea put forward in Hardin's account of coordination theory that once a convention of acquiescence is in place, the costs of acting otherwise are high, and even if it does not suit the interests of all, it is probably as good as any alternative. As history shows, the people tend to acquiesce in the system in which they find themselves, regardless of its merits, reserving always the power to rebel and substitute one system for another, although only rarely and under extreme conditions invoking that power. Coordination is grounded in that reality, and while it would be of interest and utility to know more about the conditions under which the people acquiesce, the validity of the theory is not dependent on such empirical knowledge.

The coordination thesis addresses directly the social foundations of a constitutional order. It is "a causal thesis, not a definition of what a constitution is," for a constitution might fail to coordinate government and the people (Hardin 2013: 62). A failed constitution is still a constitution, whereas a successful constitution is necessarily one that creates and sustains an effective system of government. Let us be clear as to the nature of the thesis: the coordination thesis advances a sociological claim about the conditions that must be met in order for a nation to have an effective system of government within a constitutional framework. The claim is definitional of what a successful constitution is rather than an empirical claim to be tested by evidence. Unless a constitution creates a government able to govern, unless government is conducted according to the terms of its authority, and unless the people acquiesce in the system of government, there will be a failure of coordination. This is not to say that in designing a constitution the parties are always committed to the goal of an effective system of government, and hence effective coordination; whether they are and the extent to which they are varies according to the circumstances. Other aims and purposes may be in competition with coordination, some meritorious, such as constraints on government and protection of rights, others without merit, such as lust for power or excessive protection of sectional interests. Both can be subversive of effective government and coordination.

Notice that each of these conditions is in practice variable and a matter of degree rather than a precise standard, so that acquiescence by the people, for instance, is more or less, stronger or weaker. Notice also that the thesis is not specifically about constitutions in the narrow sense of the written document, but rather about a system of government within which the written text has a variable role, sometimes of high importance as in Germany, Australia, and the United States, and more recently Poland, where it took several years to work out the conditions for a strong and stable democracy and to settle the text accordingly (Garlicki and Garlicka 2010).[20]

[20] The major efforts exerted in Spain to achieve consensus at the constitution-making stage suggest a serious commitment to coordination; Bonime-Blanc (2010). A very different case is Bosnia, where

Coordination is often of low priority for constitution-makers, as shown in recent constitutional efforts in Iraq (Morrow 2010), Afghanistan (Thier 2010), and Nicaragua (Walker and Williams 2010) where constitutions were drafted quickly. In all systems there is likely to be some variation between the written text and the workings of government institutions, either by creative interpretation, or allowing some provisions to fall into disuse, or informally creating new principles and practices. A complete account of a nation's constitution would include both the text and the wider context of rules, principles, conventions, and understandings surrounding the text. Such informal means of adjusting and developing the constitution can be of utility in sustaining an effective system of government and its popular acceptance. The Japanese constitution has been a success owing in part, it is said, to the capacity for informal adjustment of the text (Law 2013). The relationship between the two – the formal and the informal – raises interesting issues for further investigation.

The coordination thesis is a forceful reminder that the practical point of a constitutional order is to provide an effective system of government. The thesis is intended as a sociological counter to normative accounts of what a constitution is and what it should contain; it is also aimed at accounts that concentrate their attention on the content of the text while taking no interest in whether it has any effect in practice. Since accounts such as these do not purport to be sociological, they are mere skirmishes along the way to confronting contract theory as the main target. Here the idea is that constitutions are best understood as contracts, albeit of a certain character (an idea considered in the next section). As for the strengths of coordination theory, it may seem obvious and even circular to contend that a successful constitutional order is one that provides for effective government, where being effective means coordinating politics and society. Yet, perhaps surprisingly, so much of the discussion of constitutions is conducted as if oblivious to this obvious fact. Constitutional orders do not always coordinate social life effectively, as the experience of the Soviet Union and neighboring nations shows; as societies they were reasonably well coordinated, but only partly as a result of the constitution and government (Kurkchiyan 2003). Societies consist of networks influencing and regulating the attitudes and actions of their members, both people and officials, so that to be effective, government has to confront and either marshal support or overcome other mechanisms of coordination (Scott 1996; Galligan 2007). Coordination according to a constitutional order is not just any coordination but coordination of a certain kind, the kind that only effective government can deliver.

attempts were made, presumably in order to ensure effective government, to accommodate the warring parties by allocating political positions according to ethnicity and creating a large government structure so that all parties have a role; O'Brien (2010). Whether the resulting system will in practice be effective in coordination remains to be seen.

1.5.1 *The Practical Value of Coordination Theory*

Today, all nations are expected to have written constitutions and to update them regularly. In an age where the importance of constitutions is taken for granted and constitution-making is widespread, we should be curious to know if there are causal relations between the process of making a constitution, its contents, and coordination. Does coordination have a role in guiding how a constitution is made and what it contains? Do the process and contents in turn affect coordination?

Coordination theorists contend that there is no necessary relation between how a constitution is made and coordination; the more robust among them might go further and claim the same about relations between content and coordination. Constitutional systems are capable of high coordination even though made by a select few without reference to the people, as shown in cases such as the United States, the Fifth French Republic, and contemporary Hungary. There also appears to be no necessary connection between the content of a constitution and coordination. The content of successful constitutions varies enormously, just as it does for the unsuccessful ones. The U.S. constitution is successful in coordination, as Hardin points out, in spite of its content, the suggestion being that much of the content is unsuitable for a modern nation of that size and variety.[21]

However, although there is no necessary causal connection between process, content, and coordination, the question remains whether the goal of coordination can, or has the potential to, influence the process of constitution-making and its content, and, alternatively, whether process and content can, or have the potential to, contribute to coordination. In order to understand better the causal dynamics, we propose a model of constitution-making based on relations between process, content, and coordination. The aim is to show how the text, in the sense of process and content, and the people's acquiescence can be integrated into a set of causal relationships. The logic is as follows.

1. The first step is to picture the making of a constitution as a structured process whose threshold goal is coordination through a system of effective government (using the term as earlier defined to include government with the powers to govern capably in which the people acquiesce). Whatever else the constitution aims to achieve, it ought to be effective in coordinating politics and society. The conditions of effective government are partly practical in the sense of what kinds of powers and institutions are necessary potentially to govern; they are also partly based on other qualities, such as concerns

[21] For an analysis of how the U.S. Constitution is out of step with modern constitutional models, see Law and Versteeg (2012).

for liberty and democracy, without which a particular people is unlikely to acquiesce. Above the threshold, there are likely to be other goals, values, and aspirations to include, some of which are unrelated to coordination, others potentially in competition with and capable of jeopardizing coordination. If coordination is the main goal, then such other factors need to be modified accordingly; if, however, they are insisted on, coordination might be in jeopardy.

2. The *content* of the constitution and coordination are potentially causally related in two ways: the goal of coordination provides guidance as to the content, while the content has the potential to influence coordination. Since capable government and popular acquiescence are the two elements of coordination, the constitution needs to be designed with those two goals in mind.

Content ↔ Coordination

There is no formula to apply in the design of an effective system of government, yet a wealth of common experience is available as to what kind of system is likely to be effective and what not, and experts and consultants have long been keen to offer such advice. If the constitution provides a well-designed system of government, then a first step has been taken toward effective government; if it also has qualities important to the society at the time, then it will encourage acquiescence. That the people expect the constitution to institute a workable system of government is normally a reasonable assumption to make. Other expectations may be held both about the qualities of government, such as whether it is democratic and representative, and the inclusion of substantive provisions dealing with such matters as the equal treatment of diverse groups, limits on the powers of government, and the protection of rights. What the people's expectations are is an empirical question that depends on the social and political conditions at the time.

Notice how coordination works reflexively: the text is guided and limited by the concern for a constitutional order that coordinates politics and society, yet substantive provisions that meet people's expectations might encourage them to accept the constitution. Where there are deep divisions in the nation, the goal of coordination could be an incentive for accommodation and compromise (Choudhry 2008). But notice also the tension: too much emphasis on democratic elements, or excessive constraints on legislative and executive institutions, have the potential to weaken government to the point of its being ineffective, while watering down the democratic elements could reduce the people's commitment. While few nowadays would vote for the stern sovereign of Hobbes's imagination, governments rendered useless by excessive constitutional constraints are not impossible to imagine.

3. The *process* of constitution-making has the potential to affect coordination along two causal lines: one is the indirect line from process to content and from content to coordination, the other the direct line between process and coordination.

Process → Content → Coordination
←————————————→

The logic of the indirect relationship is this: the process of constitution-making has the potential to influence the content – for instance, by allowing the people or their representatives to participate – which in turn, as we have just seen, can affect coordination. The second causal relationship depends on the process of constitution -making having a direct effect on acquiescence by the people. Intense participation at the process stage, for instance, might be a reason for the people acquiescing in the resulting system of government.

1.5.2 *Content and Coordination*

With this account of the logic of constitutions in mind, let us consider in more detail how coordination might affect the content of the constitution and vice versa. If constitution-makers are acting in good faith, they would want to create at least a constitutional order with capable government in which the people acquiesce. Unless they succeed in that aim, much else will be in vain. An effective system of coordination, while a major achievement, is unlikely to be their only aim. The parties will have interests to protect, past wrongs and abuses to remedy, and ideals to advance. Pressures from outside – from the international community, for instance – must be accommodated, and so on. Consider the case of past wrongs. Following the sudden end of the communist era in Central and Eastern Europe, the parties engaged in constitution-making were naturally affected by past abuses, one reason for which was the concentration of power in a small executive without adequate constraints. The inclination to distribute power among several institutions and severely to constrain each, while natural and understandable, had to be tempered by the competing aim that the new institutions be able to govern effectively, otherwise coordination would be at risk.

An example of how the content of the constitution was shaped by constitution-makers striving to achieve coordination was the 1971 Constitution of Egypt. According to Clark Lombardi, the document is best explained in terms of coordination. On the one hand, it was riddled with ambiguity and, in the absence of agreement among the parties, who represented authoritarian, liberal, and Islamist elements, left major issues unresolved. On the other hand, the constitution created a system of government that in the short term offered enough to all parties to win their acceptance and the people's acquiescence (Lombardi 2013). The making of the Constitution

of Japan in 1946, where the occupying Allies managed to sideline the reactionary government and connect directly with the people, whose inclinations were more democratic, liberal, and forward-looking, also shows commitment to the creation of a viable system of government (Law 2013). Other examples could be cited, including the Commonwealth of Australia, the Republic of India, Ireland, the United States, and most recently the new constitution of Iceland (Meuwese 2013), all of which display a high regard for effective coordination.

There is no shortage of cases heading in the opposite direction. In the postcolonial context, coordination was not foremost in the minds of officials of the British Colonial Office when they insisted on a bill of rights being included in the constitution of Nigeria, despite the alien nature of such an instrument, regardless of the ethnic and tribal divisions, and apparently oblivious to the unlikelihood of its being enforced (Parkinson 2013). Other striking examples of a lack of regard for coordination are the constitutions of Iraq and Afghanistan, given that in both there is deep disparity between the text with its ideals and aspirations and a political reality of deep conflict and division that was left intact (Morrow 2010; Thier 2010). In a less clear case, the Israeli Supreme Court, in creating a new set of constitutional standards through adjudication, appears to have been motivated by the need to establish principles, without particular regard for the consequences, with the result that the coordinating capacity of such major innovation remains uncertain (Shinar 2013).

Do the case studies in this collection or elsewhere suggest any guidelines as to what contents are likely to contribute to coordination? Can we go beyond the slightly lame concession that all depends on the social and political context? The positive causal connections are always hard to prove, and this is no exception. The best that can be done is to identify potential links from case studies and then see whether they stand up to empirical scrutiny, keeping always in mind the problems inherent in making causal connections. It is possible that constitutions that align with popular and domestic values are more likely to succeed in coordination. The study of the constitution of Japan suggests that its endurance is attributable to General McArthur and his advisers making connections with the "will of the people" (Law 2013). The opposite is likely to occur where a constitution relies heavily on standard constitutional provisions or foreign imports, which are remote from popular values and imagination, as the failure of the Nigerian Independence constitution shows (Parkinson 2013). Constitutions that do not take account of social and political realities, where there is a lack of symmetry between text and reality, are at risk of failing to coordinate politics and society. The constitution of Afghanistan, while strong on provisions for moderation, democracy, an Islamic state, strong government, and the rule of law, is so far removed from the social and political realities of deep divisions and lack of consensus that failure to provide effective government is inevitable (Thier 2010). Negative lessons might also be learned from other cases,

such as Iraq and several from South American constitutions, including Venezuela, Argentina, and Nicaragua.[22] The lack of symmetry between the text on the hand and the cultural and social realities on the other is a recurring negative factor. If we are to progress beyond mere impressions, further research, both quantitative and qualitative, is needed to unravel the link between substantive constitutional provisions and coordination.

1.5.3 *Process and Coordination*

The process by which a constitution is made, too, may affect coordination. Specifically, constitution-making in recent years shows a growing commitment to involving the people (Miller 2010; Elkins et al. 2009).[23] Widespread popular participation was present in the making of the 1996 South African Constitution, the 1995 Ugandan Constitution, the 1997 Constitution of Thailand, the 1997 Eritrean Constitution, and the Brazilian Constitution of 1988, just to name a few. Most recently, Iceland underwent a complicated process aimed at producing a people's constitution, a process recounted in Anne Meuwese's (2013) essay. According to some, the Icelandic case epitomizes a new gold standard in constitutional design. If true, we may expect that future episodes of constitution-making will more frequently and more intensively involve the population (Miller 2010). One reason for this new level of interest is the notion that a sovereign and democratic people ought to be engaged in the constitutional process.

Are such participatory processes conducive to coordination? The causal connection, as noted, between process and coordination takes two possible lines: one is the direct effect of process on coordination, the other the indirect effect of influencing content. The relationship is reflexive: coordination guides process, while process has the potential to influence coordination. Before examining the causal connections, we ought to be clear about the elements of process, which include such matters as: the procedures and mechanisms by which the constitution is established, the nature and powers of the entity responsible for devising the constitution, how the members are appointed, the role of advisers and experts, the position of groups and special interests, and the participation of the people. Leaving aside the possibility of a truly populist process, we find various avenues of popular participation. Perhaps the most direct are exemplified in the case of South Africa, where the people were potentially able to influence the deliberations of constitution-makers by submitting petitions and attending workshops held around the country (Klug 2000). In other cases,

[22] These countries are all referred to earlier in this chapter.

[23] However, the extent to which the people are so engaged in practice is highly variable even in democratic nations and much less than democratic theory dictates (Galligan 2013b).

the people elect the constitution-making authority, as in the Icelandic case, among others (Meuwese 2013). Or they may exert pressure on the constitution-makers in a more informal way, as in the Portuguese case where the constituent assembly was "not immune" to popular demands and the "streets and the fields outside .... brimming with activity" (Magalhães 2013). Finally, the people might participate by voting in a referendum of ratification, although fewer than half of extant national constitutions have been ratified by the people (Galligan 2013b; for an overview, see Ginsburg et al. 2009).[24]

An adequate account of how the process, both generally and with respect to specific parts of the constitution, could be influenced by the goal of coordination would require a fuller analysis than we are able to give here. It would also depend on more research than is now available. It is instructive, nevertheless, to consider in outline the possible causal links between process and coordination by studying popular participation. This is just one aspect of process but, in democratic societies, where constitutions are made in the name of the people, one of special interest. It is plain from constitutional history that popular participation is not a necessary condition of a well-designed constitution or of popular acquiescence. We know many constitutions have been effective in coordination over long periods despite the people not having been involved in their creation or adoption. Among contemporary cases are the constitutions of the Fifth French Republic, post–World War II Japan, postcommunist Hungary, and the 1971 Egyptian Constitution, all of which have been fairly successful in coordination despite participation being minimal or nonexistent. The question, however, is whether popular participation could contribute positively to both the quality of the constitution and acquiescence in the constitutional order so established. In answering, we need to keep in mind the difference between political theory and social reality, for no matter how enticing ideas of participation may be and the sense of satisfaction they induce, whether or not participation contributes to coordination is ultimately an empirical question.

In order to understand the potential causal relationship between process and coordination, we need to have a brief account of the nature of process and the ends it serves (see generally Galligan 1997).[25]

1. We often encounter the idea that procedures, especially participatory ones, are good in themselves: it just is right to hear a person before making a decision affecting his interests. This is not to be taken literally, for what it means is that

[24] For useful discussion of these issues, see Miller (2010).

[25] Acemoglu and Robinson argue in their recent study, *Why Nations Fail*, that the inclusiveness or exclusiveness of institutions is one of the key factors in whether nations succeed or fail; Acemoglu and Robinson (2011). Future research might find the idea of utility in assessing the causal effects of popular participation in constitution-making.

hearing a person serves some value, such as respect for persons, an acknowledgment of their autonomy and dignity. The merit of participatory procedures then lies in serving such values and is independent of whether they also contribute to some further end, such as an accurate or sound outcome.[26]

2. Procedures are potentially useful instrumentally in bringing to light issues that need to be dealt with in the constitution, but which would otherwise have been unnoticed. Procedures might ease the way for the successful resolution of issues, such as the divisions between ethnic groups or powerful interests, in advance of the text and, without which there would be no consensus later on; or, having mixed their labor in its making, the people might be more inclined to accept the product.[27]
3. Most importantly for our purposes, procedures such as participation plainly are instruments to outcomes, of which, in the constitutional context, there are two main kinds: one is the content of the constitution, the other acquiescence by the people. It is to these two possible connections that we now turn.

Whether participatory procedure encourages popular acquiescence is difficult to show in practice, and the relationship is one of subtlety and nuance. If participation influences content to the point where the people are reasonably satisfied with the text, perhaps to the point of actual agreement, the grounds for acquiescence are strengthened. The chain of causation would then be: participation influences content, content influences acquiescence. Participation also relates directly to acquiescence, the idea being that, as a result of their involvement in the process, the people are more inclined to accept or at least acquiesce in the constitution, even if the content does not fully meet their expectations. The reason often given is that if they have participated in a fair and meaningful manner in the process, the people may be – perhaps should be – willing to accept the outcome more or less regardless of its content (cf. Tyler 1988). But again the normative claim needs to be kept apart from the empirical one: whether involvement in the process creates an obligation to comply with the outcome is debatable (Pettit 1997); whether it has efficacy as a causal factor in acquiescence is contingent and variable according to the context.

It is difficult to draw general conclusions about the causal effects of popular engagement in constitution-making on content and outcome (what some have called downstream effects). There is a natural inclination in democratic societies to believe that process matters, and particularly that public involvement matters.

[26] For discussion, see Galligan (1997). Participation is often linked to legitimacy, that is, the constitution gains legitimacy if the people are involved in its making. Such claims suffer from two defects: one is that the concept of legitimacy is left unexplained, the other that legitimacy, whatever it means, does not necessarily result in acquiescence. On legitimacy, compare Arato and Miklosi (2010).

[27] Part of the reason for an interim constitution is to allow the parties time to negotiate difficult issues.

However, there is only limited evidence on the relationship between process and content, and even less evidence on the relationship between process and acquiescence. The former relationship, between process and content, lends itself to relatively straightforward empirical testing, and initial research demonstrates that citizens' participation in designing constitutions is positively associated with the extent of constitutional rights and the presence of certain democratic institutions in the resulting document (Elkins et al. 2009; Samuels 2006). The positive association does not prove a causal relationship, and constitutional design can be idiosyncratic, dynamic, nuanced, and contingent, a process that lends itself to careful, case-by-case process-tracing to uncover the causal mechanisms at work in individual cases (Elkins et al. 2009). There is no clear evidence that participatory processes produce constitutions that are more closely tied to the ideals and aspirations of the society, nor is there evidence that popular participation in the process counters the influence of transnational constitutional diffusion. In the Icelandic case, a notably inclusive constitution-making processes was still a "borrowing exercise," drawing heavily on foreign constitutional notions (Meuwese 2013). In the opposite case, the absence of popular participation does not necessarily prevent the constitution-makers from identifying and accurately reflecting popular values, as the case of Japan demonstrates (Law 2013).

The relationship between the popular participation and outcome – that is, attachment, acquiescence, endurance, or otherwise – is even more difficult to test empirically. The relationship is less proximate than that of process and content, and there are more intervening variables that make it difficult to uncover general patterns and prescriptions (see especially Widner 2008). While there is evidence that public involvement in constitutional adoption is associated with increased attachment to the document (Moehler 2006), increased constitutional endurance (Elkins et al. 2009), and decreased violence (Widner 2008), again, these associations do not necessarily imply causal or generalizable relationships. The case studies in this collection are no exception: the hint of a connection appears in cases like Brazil and South Africa where effective government has been achieved by constitutions that were written with widespread participation, although other factors particular to the social and political context were also instrumental. The experience of Eritrea points in the opposite direction: widespread popular participation in the process failed to produce a working system of government (Maalo 2013). The Brazilian experience adds an interesting twist: although extensive popular engagement resulted in a long, complex, and unwieldy text, effective government – and hence a high level of coordination – appears to have been achieved.

In searching for possible causal connections between process and coordination, we ought not to forget that the most common situation of all occurs where the people neither participate nor have met their expectations as to content, yet acquiesce. The

most likely explanation for this fits the coordination thesis: the people acquiesce in order to secure the practical gains of a stable and effective government, despite other shortcomings. Acquiescence is of course a variable both as to degree and over time, and sometimes tips over into non-acquiescence or even rebellion, as noted earlier concerning current events in North Africa and the Middle East.

The want of evidence of a significant causal connection between process, content, and acquiescence is not a good reason for concluding that process is unimportant, or that how constitutions are made is a matter of indifference, as long as they are effective in coordination. Process has the potential to serve various ends, as we saw from the earlier discussion. In a society that respects its citizens, participation is a mark of respect and acknowledgment of their autonomy. Participation may, moreover, provide a forum in which social divisions can be discussed and perhaps resolved. These are good reasons, and there may be others, for involving the people in the making of the constitution. At the same time, procedures, even participatory ones, are not necessarily unqualified goods; they also have a darker, negative side. Brazil is often cited as an outstanding case of popular engagement, yet the resulting text, in the drafters' eagerness faithfully to reflect the varied claims and opinions put forward, is long, complex, and unwieldy. Another cautionary lesson emerging from South Africa is that intense popular involvement is prone to raise expectations of the constitution and government that cannot be met, raising the prospect of a disappointed people being more restive than a passive people.

1.5.4 *Critiques of Coordination Theory*

Coordination theory has attracted vigorous criticism, including from some of the essays in this collection (Ginsburg 2013; J. King 2013). We conclude our analysis of the theory with a brief account of the main lines of criticism and our response. The main two are: the notion that coordination is empty of content, and that it employs a measure of success that allows the constitutions of autocratic and repressive regimes to be considered successful.

The first charge is that the theory is empty of content, and that it provides no guidance as to the content a constitution should have (Ginsburg 2013). While it is true that coordination identifies "no best constitution" (Hardin 2012: 68), the complaint seems misdirected, because the joint aims of designing a workable system of government and inducing popular acquiescence plainly provide, as the preceding discussion has shown, at least some guidance as to content, both what needs to be included and what excluded. Successful coordination requires a government that is capable of adopting and implementing law and policies. Beyond that, as we have shown, particular constitutional features may contribute to coordination or militate against it. Those likely to ensure coordination are partly dependent on the local

social and political context, perhaps mainly so dependent. Yet not entirely, for as more knowledge is gained from the combination of experience and research, guidelines of general application may possibly emerge. We already know from experience that certain issues must be addressed in the constitution if it is to have any chance of success. The constitution of a society divided along ethnic lines will not succeed unless the divisions are addressed and efforts made to ameliorate the differences and protect minorities. The same can be said of a constitution rich in ideals but bearing no relation to the social and political realities of the society. Eliminating obvious grounds for failure is a necessary condition of success but not its guarantor, and the formulation of positive guidelines poses more of a challenge than the negative ones, for social and political life is unruly and the wheel of fortune is forever turning. But even here the painstaking study of successful constitutions – successful, that is, in coordination – is likely to offer some guidance for the future. A good starting point – guideline number one – would be that all those engaged in constitution-making grasp that the first aim of their endeavors, regardless of what other goals they hope to achieve, is to produce a constitution that coordinates politics and society.

The second complaint is that the measure of success employed by coordination theorists is compatible with a spectrum of constitutional orders, ranging from such unappealing cases as the former Soviet Union, the Taliban government of Afghanistan, and contemporary Belarus to those based firmly on liberal and democratic principles. The observation is accurate but does not threaten coordination theory: unappealing systems of government are still systems of government, and provided they meet the two conditions of effectiveness and acquiescence, they are successful in coordinating politics and society. Why the critics object to this aspect of coordination theory requires a word of explanation. In the minds of critics, the theory means that the quality of government, the principles and values on which it is based, are of no consequence. This is a misunderstanding of coordination theory, even if some accounts of the theory lend themselves to this interpretation. The theory provides, as we saw earlier, the threshold standards, compliance with which is necessary for coordination. Issues of the quality of the constitutional system enter at two stages. At the first stage, meeting the criteria of capable government and popular acquiescence depends to a considerable degree on factors such as the character of the nation, its history, the stage of development economically and politically, its social and demographic features, and the expectations of the parties. Once the two criteria are met and the threshold test is satisfied, other considerations concerning the quality of government can be added to the constitution, provided they do not undermine the threshold criteria of effective coordination.

To take an example, the most elementary idea of constitutionalism to which modern societies of a broadly liberal disposition are committed requires that government be limited; unlimited government is simply incompatible with modern

expectations of a constitution. In such societies, limitations on government power might be – indeed are likely to be – a factor in both capable government and popular acceptance. The form the limitations take and their extent might also influence the quality of government above the threshold. In a different society, one not committed to limited government or to only minor limitations, the standards of capable government and popular acquiescence are likely to be satisfied by a more autocratic system of government. In short, coordination through capable government and popular acquiescence is an essential condition of a successful constitutional order, although the qualities necessary to meet the two standards depend to a substantial degree on the social and political context of each nation.

A third matter to mention is less a criticism of the theory and more in the nature of a refinement. On the account Russell Hardin advances in his essay, the constitutional text as a distinct social formation has a minor role. The emphasis instead rests on the system of government, in which of course the constitutional text has a place, but not necessarily one of importance. As the foregoing analysis demonstrated, the content of the text and the process by which it is formulated are potentially significant in achieving coordination.

1.6 CONSTITUTIONS AS SOCIAL CONTRACTS

In response to Hardin's claims for constitutions as coordination, Tom Ginsburg offers a modern defense of constitutions as contracts (Ginsburg 2013). Building on the point that coordination theory does not explain the content of constitutions, Ginsburg advances the argument that "modern developments in contract theory provide a set of very valuable tools to understand how constitutions are negotiated and maintained, and may have greater explanatory power than either classical contract theory *or* the coordination alternative in understanding actual constitutional design" (Ginsburg 2013: 182). In making the case, the author begins by refuting the standard objections to constitutions as social contracts. They are threefold: constitutions are not in fact agreed to by all the parties; while contracts are normally enforced by a third party, that is not the case with constitutions, which have to be self-enforcing; and constitutions create a system of government that is not in principle limited by time, while contracts generally anticipate a time at which the parties have fulfilled their obligations.

The essay then considers the positive advantages of drawing parallels between constitutions and contracts. One advantage occurs at the drafting stage in negotiations over design and content, which has some of the features of negotiating a contract. A second advantage of the contract approach concerns the content of the constitution. On the basis that constitutions are usually drafted by experts and lawyers, Ginsburg notes that models are used for the basic or standard provisions, which results in

a high level of similarity in many modern constitutions. International treaties are another source of standard provisions, so that "the content of constitutions may, like contracts, have a form-like quality. Provisions migrate from document to document, sometimes with only minor amounts of local tailoring" (Ginsburg 2013: 197). The third advantage claimed for constitutions as contracts relates to renegotiation and endurance, where again the process of bargaining among the parties has parallels to the parties to a contract.

The challenge faced by the contract theory of constitutions is to show that it adds a layer of knowledge and understanding, and that it opens up a new perspective, which would otherwise be missed. We are concerned here with descriptive theory, not normative theories based on a notional social contract, the point of the latter being to establish the duty of the people to accept the system and obey its laws. The aim of contract theory as descriptive theory is quite different: its aim is to identify actual features of constitutions and constitution-making. The test of its worth then is whether it uncovers aspects of constitutions and constitution-making that are not included in other theories. Ginsburg rises to the challenge and sets out to show why theories of contract continue to have a central role in thinking about constitutions. Despite criticism, the notion that contract theory has something to contribute to the understanding of constitutions persists and the essay is a serious attempt to explain that persistence, citing an array of examples and drawing on a wide range of constitutional experience. Aware of the need to separate a descriptive analysis from the normative, Ginsburg suggests that there are two main ways in which contract theory contributes to the understanding of the social and political foundations of constitutions: one concerns constitution-making, while the other relates to the content of constitutions.

The making of a constitution, on this approach, resembles or is analogous to negotiating a contract. At first glance, one may express skepticism as to whether the making of a constitution is indeed like the negotiation of a contract: constitutions may be externally imposed, as in postwar and postcolonial situations, and the majority of the population is routinely excluded from the drafting process. To see the analogy requires a conceptual shift from a social contract to a private contract: even when the people are not involved in constitution-making, the constitution still represents a bargain between two or more parties. Such parties may be diverse: they might be elites, as in the roundtable talks in Venezuela, or they might be a combination of elites and outside powers, as was the case in Afghanistan, Iraq, and in the postcolonial setting of Nigeria. Only in rare cases, the people at large are actually part of the bargaining game. Thus, when we take "the people" out of the equation, constitutions become like contracts that are negotiated between a limited number of parties. To explain why the populace at large would consent to such elite bargains, Ginsburg points to coordination theory: the constitution is a contract for some, while it is merely acquiesced to by others.

Contract theory does more than shift our attention from a hypothetical social contract to an actual contract between rival groups in society. It also provides insights on the potential problems and solutions that parties – whoever they are – face in the constitutional bargaining game. Contract theory pays close attention to the specific interest of each of the bargaining parties, the information they possess, and the time pressures they are under, among other things. Applying concepts like "surplus," "hold-ups," "asymmetrical information," and "incomplete contracting," and drawing on a wide range of examples, Ginsburg shows how insights from contract theory improve our understanding also of the constitutional bargaining game. To offer just one example: in the face of imperfect information, parties may want to "write a more complete agreement, specifying contingencies," or rely on third-party enforcement. It is with these types of insights that the theory contributes most to our understanding of constitution-making.

The second reason advanced for the utility of the contract perspective is that it helps in determining the content of constitutions. Just as John Rawls used the hypothetical original position and the veil of ignorance to reveal the essential features of justice (Rawls 1972), a hypothetical contract, in the negotiation of which all parties hypothetically participate, may be of utility in designing and accounting for the content of constitutions (d'Agostino 2010). However, Ginsburg's approach is not that of the hypothetical contract. He relies rather on the observation that constitutions are normally drafted by experts and lawyers acting on behalf of the negotiating parties. And in the same way that lawyers drafting contracts rely on standard forms, so those engaged in drafting the text are prone to draw on existing models.

There are numerous historical examples of constitution-makers relying on "boilerplate constitutional provisions," as Ginsburg calls them. In the nineteenth century, a whole generation of Latin American constitutions copied verbatim from the U.S. Constitution (Billias 2009: 105; see also Goderis and Versteeg 2013: 103). Likewise, the Romanian Constitution of 1848 "faithfully copied" about 60 percent of its provisions from the French Constitution (Parau 2013), while about thirty former British colonies in Africa and the Caribbean all adopted what was essentially a carbon copy of the European Convention on Human Rights and Fundamental Freedoms as their bill of rights (Parkinson 2007). Ginsburg claims that constitution-makers rely on standardized constitutional models because "they reduce the transaction costs of negotiation." He does not, however, explore alternative explanations for why such standardized models might be relied on. As the essay by Goderis and Versteeg illustrates, there are several reasons why constitution-makers might and often do imitate foreign models: to signal conformity with the norms and values of the international community; because they carefully considered and deliberated a wide range of models as part of a learning process; because they are deliberately trying to attract economic capital; or simply because these models are coerced by outside powers (Goderis and Versteeg 2013). Considering

the time and effort that is commonly put into the drafting of the constitutional document, it is at least plausible that the reliance on standardized models results from complex social relationships rather than mere cost-efficiency considerations. Moreover, there is an open question of exactly how much of the content of written constitutions is explained by the contract metaphor. It seems unlikely that all content of a constitution is determined by the use of standard forms, and so empirical evidence of constitution-making is needed to show just how much of the content and which parts are explicable on this basis. Cope's essay, for example, highlights that in South Sudan, the bill of rights appears to be based on standard forms, while the structural part of the constitution is not (Cope 2013).

Despite the advantages of the contract approach, the contract metaphor does not appear to capture all the features of constitutions. Specifically, constitutions have a strong aspirational and normative dimension not commonly found in private contracts. Even as elite bargains, constitutions include national and international values and proclamations of national identity. The mission-statement-like character of constitutions (J. King 2013) does not fit comfortably with private contracting, as private contracts tend to be rational bargains rather than symbolic documents. Constitutions, moreover, may be reinterpreted and evolve in unpredicted ways after the bargain has been concluded. This may happen because the people push for a different understanding of certain provisions or because the people develop an irrational attachment to the document, making it harder to amend even when amendment would be desirable. To illustrate the latter, it has been argued that the U.S. Constitution has been amended infrequently because the document is venerated and has evolved into a "civic religion" (Levinson 2012). Contracts, by contrast, may be subject to efficient breach: when rational actors calculate they will be better off without the contract, they simply refuse to live up to the contractual obligations. In sum, there might be something in the nature of constitutions – something sacred or irrational – that is not present in private contracting.

1.7 CONCLUSION

The essays in this collection, both the theoretical and the empirical, demonstrate the need to look beyond the idea of a constitution as simply a written document establishing a system of government. That there is much more to constitutions than that is obvious, for like any social phenomenon, constitutions interact with society in complex and varied ways. Guided by the four questions set out at the start, we have tried in this essay to provide an analysis of the interaction and the issues that arise from it. We show how different theoretical perspectives help in explaining and accounting for the social and political character of constitutions. It has also been important to point out their limitations and ways in which they need to be developed. We have considered

constitutions as expressions of values, both of a national and transnational character, as products of domestic power among political elites, as coordination devices, and as contracts. Where possible we have drawn on the selection of case studies to illustrate each of the theories and to see to what extent they provide evidence, one way or another, for the different perspectives. We have also been concerned to examine the capacity of the various theories to explain aspects of constitutions. The theories and perspectives considered are not the only ones relevant to constitutions, and some readers may be disappointed to find no mention of their own favored approach. For a collection of this kind, some selection is necessary, but others may be inspired to subject other theories to similar analytical and empirical scrutiny. Explaining the social and political foundations of constitutions is the task of a lifetime. Our hope is that this essay offers a framework within which to think about and analyze constitutions in their social context, their social and political foundations, their functions and purposes, and to their practical effects.

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