

## Constitutions as Contract, Constitutions as Charter

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### 7.1 INTRODUCTION

Contractual theories have long played a central role in thinking about the social and political foundations of constitutions, and have been controversial (Barnett 2009; Fallon 2010). In the last two decades, an important line of critique of contractual thinking has come from coordination theorists, beginning with Hardin (1989) and followed by Ordeshook (1992), Weingast (1997), and others. These thinkers, informed by modern game theory, have revived Hume's views, which emphasized coordination, over those of Locke, who emphasized contract. In Chapter 2 of this volume, Hardin lays out the critique with some force.

The social contract metaphor criticized by Hardin and others is primarily a normative one. For early thinkers in the liberal tradition, contract was a natural metaphor for helping explain why a constitution ought to be legitimate in a society composed of fictively autonomous individuals. Hardin's critique is that the contract metaphor is both descriptively and normatively inaccurate. In its place, he argues that coordination provides a better descriptive account of why people comply with constitutional provisions they have not and potentially would not agree to.

I am largely in agreement with this position. However, in this chapter, I argue that, in emphasizing the coordinating role of constitutions, we should not be too quick to reject contractual thinking in its entirety (see also Stone Sweet 2012). Indeed, modern developments in the theory of *private* contracts provide a set of very valuable tools to understand how at least some constitutions are negotiated and maintained, and may have greater explanatory power than either classical social

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contract theory or the coordination alternative in terms of understanding actual constitutional design in many countries. Coordination theory is a valuable heuristic for explaining positive and normative acquiescence to constitutional provisions, but not particularly useful for generating predictions about the circumstances under which actual constitutions will be formed and endure. A successful coordinating device is simply recognizable by the presence of a constitution in force that is generally accepted; however, we do not have anything within game theory that provides insight into what the equilibrium will be. In contrast, modern contract theory helps us make sense of constitutional bargaining in many real-world cases because it allows us to specify interests and trace negotiations and to understand the possible pareto-superior outcomes. Whatever their deficiencies as a normative theory of constitutionalism, contractarian theories are very helpful for understanding how constitutions are formed and operate as a positive matter – in other words, they help us understand the actual social and political foundations of constitutions, as opposed to the theoretical foundations.

I also wish to be clear that I am not attacking coordination as a concept. Indeed, coordination plays a central role in upholding and maintaining the constitutional contracts that I identify (see Elkins et al. 2009). But coordination is not sufficient as a complete account of constitutional formation and endurance, and itself tells us little about the processes and outcomes of constitutional design processes. Contract, on the other hand, does provide a helpful metaphor for these issues because contracts, like constitutions, are negotiated. The concept of contract, then, should not be discarded too easily and can supplement a coordination perspective.

## 7.2 THE COORDINATION CRITIQUE: THREE OBJECTIONS

I will not rehearse the long debate over social contract theories, but focus instead on the critique levied by Hardin and others who favor a coordination account. I focus on three objections to contract theory in particular: the lack of actual subjective agreement to constitutional terms, the lack of third-party enforcement, and differences in prospective temporal scope.

First, a central challenge for social contract theorists is the casual observation that constitutions are not in fact agreed to by all their subjects, a point made by Hume himself.<sup>1</sup> There is no moment of universal mutual acceptance, and many subjects will not in fact agree to the terms of the constitution under which they must live. This may be because the constitution was adopted long ago, or perhaps because the subjects have opposed the adoption of the constitution but lost in the founding

<sup>1</sup> Hume, David. 1978. *Of the Original Contract*. Edited and Translated into HTML by Jon Roland. Available at: <http://www.constitution.org/dh/origcont.htm>.

debates. Surely agreement cannot explain acquiescence, and coordination theory does a superior job on this point. As a descriptive matter, under coordination theory, citizens will have a reasonable basis for complying with constitutional provisions notwithstanding the absence of actual or even implicit agreement to so abide. They will do so because they expect that noncompliance will lead to penalties, or perhaps because of network benefits of remaining in the constitutional order. In this sense, coordination theory is a superior account of acquiescence.

The second objection to contract theory is the fact that contracts are typically enforceable by a third party (e.g., judges). Constitutions cannot rely on such a claim: even judicial enforcement of the constitution depends on higher-order coordination or agreement that the court is to be obeyed as an authoritative interpreter. So constitutions, to be effective, must ultimately be self-enforcing (Ordeshook 1992; Weingast 1997).

Third, constitutions set up an elaborate governance structure, not, in principle, one that is temporally limited, whereas most contracts do anticipate a stage of fulfillment of mutual promises. In this sense, contract is asserted to be an imperfect analogy because contracts can generally be fulfilled whereas constitutions cannot, or at least optimally are not, but endure forever (but see Elkins et al 2009).

Let us take each of these points in turn to see whether they constitute fatal objections for contractual analogies.

### 7.2.1 Agreement

As for the problem of agreement, it is true that coordination theory provides a superior basis for understanding the phenomenon of acquiescence by nonparties. But coordination theory does not explain the *content* of constitutional agreement or how it is produced. Here, the notion of a bargain *is* helpful, particularly for the category of constitutions known as *pacts*. Political scientists have used the notion of a pact to represent negotiated transitions to democracy in which elite bargains are sufficient for transition to occur (Burton and Higley 1987; O'Donnell and Schmitter 1986; Przeworski 1991).<sup>2</sup> Prominent examples include the roundtable talks following the fall of communism in Europe, and the Venezuelan elite bargain from 1958 to 1991.<sup>3</sup> Typically, though not always, such pacts are captured in a formal written constitu-

<sup>2</sup> Consider also the supranational constitution of the European Union, which originates in contract-like treaty negotiations by independent states but set in motion a process that led to constitutionalization. See Stone Sweet and Brunnel (1998).

<sup>3</sup> In Venezuela in 1958, a military-civilian coalition overturned a military leader. The three leading political parties concluded what became known as the Punto Fijo pact to form a government of national unity after new elections and to draft a new constitution for the country. The multiparty commission produced a bargained document that survived for thirty-eight years after promulgation in 1961 – the longest-enduring constitution in Venezuela's history.

tion. For these constitutions, bargaining is an accurate description of the elite-level negotiations that produce the text (about which we will say more later).

This bargaining is *not* the hypothetical bargain between ruler and subjects offered in classical social contract theory. Rather it is more akin to private bargaining among parties exchanging mutual promises and dividing assets. If the various elite groups are backed by broader social forces, it may not go too far to say that pacted constitutions have the implicit agreement of many of the citizens. But social agreement is not the main mechanism that is of concern. The bargains are simply among powerful parties, who may have the will or ability to coerce others to join them.

What of those who do *not* agree to the constitutional bargain? There will always be some fraction of the populace that is unrepresented in the elite negotiations. These citizens and groups may face the choice of remaining outside the constitutional order, perhaps by secession, or of joining a constitutional scheme that they consider unjust. Some of these citizens and groups *may* decide to join because of the network benefits of being in the system.<sup>4</sup> For these actors, coordination takes the form of explicit, if coerced, consent.

Of course many citizens and groups may have no such choice at all. For example, a geographically dispersed ethnic or political minority may have no effective opportunity to secede and so may be effectively coerced to join the constitutional order without either explicit or implicit consent. For such citizens, the contract metaphor runs out, and coordination again provides a superior account of acquiescence. But for the other categories of citizens, the social contract metaphor does a decent job. The point is that a given constitutional order can have both elements of contract and coordination: acquiescence is explained by contract for some groups and coordination by others.

To illustrate, consider the bargaining that produced the constitution of the United States. It is true that many of the principles that were instantiated in that document – popular sovereignty, republicanism, rights – had developed as conventions over a long period of experiments with colonial and American government. But to assert that these simply sprung into being as a result of coordination would be quite wrong. The decisions produced by the constitutional convention were bargained over, among states with diverse interests. The controversies – over slavery, tariffs, voting rules, and amendment – were resolved through contract-like negotiations among the players. Once adopted, of course, the players and the publics they represented had to coordinate. Even reluctant states like Rhode Island, which had not ratified or agreed to the initial deal, found it in their interests to acquiesce. But the formation of the deal was in some sense contractual, involving promises of performance among several discrete sovereigns.

<sup>4</sup> We know that the purportedly more contractual environment of international treaties features some similar dynamics. In 1993, for example, developing countries were effectively given a choice by the EU and the United States of remaining outside the new GATT/WTO regime or remaining in the old system without access to rich country markets.

### 7.2.2 *Third-Party Enforcement*

Next let us consider the objection about third-party enforcement. Russell Hardin has emphasized this point in his sustained critique of the contractual analogy. Contracts derive their authority from the consent of the parties, as well as a set of outside principles that are enforced by the state that bound and limited the contractual space. In the case of constitutions, this second source of authority is lacking. There is no outside authority that can guarantee enforcement of the constitutional contract, in most cases.

As the highest law of the land, it seems unreasonable to assume that there is an external enforcer of the constitution (Finn 1991: 26). Treating judicial review as a third-party enforcement mechanism simply raises the higher-order question of why it is that parties obey the court's pronouncements. Coordination does provide some insight here: even a court without any coercive authority can help parties select focal points in situations of multiple equilibria (Ginsburg and McAdams 2004; Law 2007). One might think of constitutional courts as providing third-party coordination to facilitate self-enforcing contracts rather than third-party enforcement of ordinary contracts drafted in the shadow of a state legal system.

All this said, Hardin may overstate the case. First, in contemporary constitution-making, international actors may provide a degree of external enforcement of the constitutional bargain. True self-enforcement may not in fact be necessary. This is most easily illustrated with regard to constitution-making exercises imposed by external occupation, or when the United Nations or international community as a whole act as constitutional midwife, as in East Timor in 1999 (Ginsburg et al. 2008). But, you might say, this is exceptional. However, a closer look suggests that international involvement is becoming more the norm than the exception. The Afghan constitution of 2004 was produced by a process that began with the Bonn Agreement of late 2001, in which the United Nations was a party along with the various non-Taliban Afghan representatives. The Kenyan constitution of 2010 came into being as a result of a process initiated by Kofi Annan among warring factions in 2008, and was subject to continual outside monitoring (and indeed lobbying). The list of constitutions produced under some sort of international auspices is long and growing, and in such cases an external actor may in fact play an enforcement role.

Nor is international constraint on constitution-making a new phenomenon. Consider the problem of constitution-making in the early part of the twentieth century for several eastern European nations emerging out of the ashes of the Austro-Hungarian Empire. These states were concluding fragile constitutional bargains in an era of nationalistic self-determination. They included within their constitutions rights for minority groups to preserve and develop their own cultural and linguistic

practices.<sup>5</sup> The governments of these states *also* concluded treaties with the great powers of the day, promising to uphold minority rights. This was an instance of duplicate mechanisms of constitutional enforcement, but it is not a stretch to say that the external powers provided a means of external enforcement of the constitutions.

Another example of external enforcement comes from the long tradition of ex-British colonies retaining the jurisdiction of the Privy Council in London as a court of final appeal. This not only helped keep these countries tied to the overall development of the common law, but also helped enhance their credibility with investors and others (Voigt et al. 2007).

The power relationships involved in external enforcement are quite clear in the case of constitutions adopted under occupation (Ginsburg et al. 2008). Some occupying military powers, especially France, the United States, and the Soviet Union, had constitutions written at their behest. For example, Afghanistan had seven constitutional documents written between 1979 and 2004, some of which showed profound influence from the Soviet and U.S. occupiers. One might doubt that constitutions drafted by foreigners are likely to develop into self-enforcing bargains, but there may be certain provisions that the external actors would step in to enforce. This might, under some circumstances, undermine local self-enforcement. If citizens believe a foreign power will punish transgressions, they will have little incentive to pay the costs necessary to organize and challenge the ruling elite and may become unaccustomed to challenging transgressions. Constitutions written under occupation are likely to create a culture of acquiescence in which citizens are explicitly absolved of any responsibility for enforcement. Under such circumstances, the coordination function of constitutions is anemic at best. Leaders anticipate citizen apathy and are more likely to transgress constitutional terms.

Consider as an example the Platt Amendment and the U.S. intervention in Cuba (Carrington 2008). After the Spanish-American War, the United States occupied Cuba and proceeded to prepare the island for self-governance. In a misguided maneuver, the U.S. Senate adopted the Platt Amendment to a military appropriations bill, explicitly stating that U.S. intervention would be forthcoming when and if democratic institutions failed in an independent Cuba. This provision was ultimately included in the 1902 Cuban constitution. As Carrington (2008: 1087) so well describes, it “began the disorders it was designed to prevent.” Domestic factions refused to compromise and each sought to induce the United States to intervene on their own side, preventing stable self-enforcing democracy from taking hold.

More broadly, even those constitutions that do not formally allow for external monitoring are in some sense externally enforced in an era of global attention to human rights issues and a nascent doctrine of humanitarian intervention. The

<sup>5</sup> E.g., constitution of Poland 1921, Articles 109–110.

record of the international community intervening in cases of massive human rights violations is surely inconsistent, but the number of instances has grown. One can think of intervention as an enforcement action to ensure that certain core constitutional obligations are in fact enforced.

### 7.2.3 Ongoing Governance

Finally let us consider the objection that constitutions are designed for *governance*, not simply performance of a discrete set of specific obligations. This objection centers on a model of contract as an agreement of limited duration and purpose in which parties can in principle fulfill their obligations and be done with the contract.

To be sure, constitutions do not generally specify a termination date, although there are some exceptions.<sup>6</sup> But the disanalogies are less than what meets the eye. Contracts are intended to endure, and some contractual provisions, such as restrictive covenants, are perpetual (Finn 1991: 23). Like contracts, constitutions specify a structure of future action for their subjects, providing for some actions that are required, others that are prohibited, and some that are unspecified. Sometimes designers will explicitly specify periods of performance, typically in transitional provisions. “Sunset” clauses might be used for particularly controversial constitutional articles: examples include the U.S. constitution disempowering Congress from regulating slave importation for twenty years, and the Australian constitution limiting several national powers in relation to federalism.<sup>7</sup>

Constitutions, while intended to endure, do not typically do so. In a recent book, Elkins, Ginsburg, and Melton (2009) have shown that constitutions can be expected to last nineteen years on average. In this sense, parties to the constitutional bargain seem quite willing to renege, breach, and start anew. One can describe this as a failure of coordination, which then may lead to a new round of attempts to coordinate. But the process of coordination involves genuine negotiation, akin to other legal documents, including contracts. And so analogizing to contracts may be helpful.

Consider a particular kind of legal document, namely the corporate charter. Modern charters are, of course, a particular type of contract; indeed in one influential view they are nothing more than a “nexus of contracts” (Alchian and Demsetz

<sup>6</sup> The Fiji constitution of 1990 required a review within seven years, and then regular reviews every decade thereafter. The latter mechanism is a feature of many U.S. state constitutions.

<sup>7</sup> U.S. Constitution, Art. I, s. 9, cl 1. The Australian constitution capped the percentage of customs duties that the Commonwealth could apply to its own purposes for a ten-year period; limited the automatic power of the Commonwealth to grant state aid to a similar period; and allowed one state (Western Australia) to impose special import duties after the imposition of otherwise uniform customs duties, but only for a five-year period: see Const. of Australia 1901 ss. 87, 95. Thanks to Rosalind Dixon for this point.

1972; Meckling and Jensen 1976). They are contracts that set out governance institutions for a process of ongoing decision making; like constitutions, they have a fundamental purpose and aim. They are also principal-agent documents in which structures of delegation are defined and regulated. Citizens face an agency problem very much like corporate shareholders who need to strike a balance between giving managers enough power to govern but not so much power that managers can extract resources. Another aspect in which corporations are like constitutional orders is that they have internal organizational cultures that persist over time. And like constitutions that, in one view, *create* identity, charters establish new institutional structures that are distinct from the wills of their creators.

To be sure, a polity is a more complex entity than even a large corporation, in the sense that shareholders are assumed to have a relatively discrete set of objectives, or even a single overarching goal of maximizing firm value. In reality, however, some shareholders may care about others, including employees, creditors, or the public. Some shareholders will be only nominal shareholders, who seek to own shares in order to exercise voice about company policies. Shareholders are not coextensive with stakeholders.

As a historical matter, it is worth remembering that the early written constitutions evolved out of contractual arrangements called charters. The Magna Carta was nominally a charter, which in medieval terms was of the same character as royal promises granting land or incorporating cities or companies. Although nominally between the King and the landholding nobles, some of its provisions benefited those who were not directly parties to it. Like contracts, a *carta* required formalities, and had to contain the ruler's signature along with the signatures of witnesses such as important clergy or nobility. Furthermore, like a contract, the *carta* was directed at future action: it is essentially a promise by the ruler to continue to recognize rights and privileges (in land or otherwise) in the future (Robertson 1939: xv–xvi). It was used by the Anglo-Saxon kings to grant land or rights to subjects and would be signed by lay and ecclesiastical members of the king's court (Martin 1979: 140). An example of a charter granting both land and rights would be royal charters of cities, declaring their boundaries and also their rights of local government. A similar usage of charters also existed in Normandy and continued to be used in Norman England (see, for example, Stenton 1955). So it came to be that William the Conqueror's son Henry Beauclerk, or Henry I, combined the *carta* with the Anglo-Saxon tradition of the written coronation oath in issuing the "Charter of Liberties" on his coronation in 1100 (Pollock 1898/1999: 99).

The early charters of the American colonies provided substantive limitations on the powers of the colonial authorities (Amar 1987). They also established organs for ongoing governance. For example, the Massachusetts Bay Company Charter empowered the offices of the governor, deputy governor, assistants, and regular



“general court[s]” of freemen of the company. The latter group was comprised of the shareholders in the body, and understood itself to have a role in governance (Bailyn 1967: 190). In some states (Connecticut and Rhode Island), these charters served as actual constitutions for several decades after the founding of the United States (Wood 1969: 276–278).

Charters were historically broad in purpose and akin to a kind of legislative license. Any corporate entity came into being only by a sovereign act – they had to be granted by the monarch, regardless of whether their purpose was private or public, or whether the entity was governmental in character. Corporation traditionally referred to human associations, of which government was only one type. This view was echoed in late-nineteenth-century Prussian thought, particularly the ideas of Georg Jellinek and Otto von Gierke. These thinkers explored the distinctive law of communal associations (Mogi 1932; Emerson 1928: 129–142).<sup>8</sup>

The founding fathers of the United States frequently used the notion of a charter (as well as the contractual notion of compact) to describe the powers of the government created under the constitution.<sup>9</sup> They contrasted the American experience from the European one: American governments were, in Madison’s view, “*great charters*, derived not from the usurped power of kings, but from the legitimate authority of the people.”<sup>10</sup> The charter idea was that the government had been granted its authority by the people, and the terms of that grant were limited by the text (Fallone 2010: 1080–82).

The corporate analogy meant that there were limitations on the power of the agents and that these were set out in written form (Amar 1987: 1434). The logical

<sup>8</sup> As part of the historical school associated with Friedrich von Savigny, von Gierke sought to develop normative theory out of historical inquiry into the development of German legal institutions. According to von Gierke, it was in the possibility of forming collective organizations that human society flourished, and the state emerged only out of a very long process of evolution of such associations. Although rooted in a logic of voluntary associations, the state had distinctive qualities as it encompassed all other collectivities. As he put it, “the state alone cannot be subordinate as sovereign collective person to any organized will power external to and above it, and consequently it cannot be limited in its will and action by a higher community participating in its decisions” (von Gierke, *Die Genossenschaftstheorie*, 641–642, quoted in Mogi 1932).

<sup>9</sup> See, e.g., Letter from James Madison to Spencer Roane (June 29, 1821), in *The American Enlightenment*, 461, 461–462 (Adrienne Koch ed., 1965) (“Our Governmental System is established by a compact, not between the Government of the [United] States, and the State Governments; but between the States, as sovereign communities, stipulating each with the others, a surrender of certain portions, of their respective authorities, to be exercised by a Common Govt. and a reservation, for their own exercise, of all their other Authorities.”); Madison wrote: “[T]he Government holds its powers by a charter granted to it by the people . . . . Hitherto charters have been written grants of privileges by Governments to the people. Here they are written grants of power by the people to their Governments.” Letter from James Madison to A. Stevenson (November 27, 1830), in *The American Enlightenment*, *supra* note 66, at 478, 479.

<sup>10</sup> James Madison, ‘Charters: Powers and Liberty,’ *National Gazette*, January 19, 1792, reprinted in *The American Enlightenment*, at 508, 508.

extension was that these limits could be enforced by those traditionally responsible for doing so: judges. This idea, in which violations of constitutional provisions are analogized to violations of contractual provisions, is part of the building block of judicial review. In *Federalist* No. 78, Hamilton evokes the argument that:

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid. . . . [T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

There are, of course, differences between modern corporate charters and constitutions. The chief distinction is the possibility of exit. Shareholders can sell out their interests, whereas citizens who find a particular set of arrangements unsatisfactory cannot opt out (Amar 1988: n. 152; Chander 2003: 160; Hirschman 1970). This has led some to argue that constitutions should care more about minority protections than including corporate law rules, notwithstanding the fact that minority shareholders are frequently a target of protective corporate regulation in battles for corporate control and similar actions (Chander 2003: 160).<sup>11</sup>

The lack of exit poses a problem to charter theorists of constitutions. Citizens are not able to bargain freely for entry with various alternative polities, unless they happen to be possessors of very high levels of human or financial capital (Law 2007). Without any bargaining leverage, the idea that one is in a contractual relationship with the jurisdiction in which one happened to have been born stretches the ordinary meaning of the term. Even here, however, there may be a sense in which competition does operate at the level of constitutional provisions. In a world of mobile citizens, states that compete for capital and labor have some competitive incentives to offer attractive packages of civil rights, at least packages that are attractive to high-end mobile workers who are in demand in many jurisdictions (Law 2007).

In short, the charter analogy suggests that contractual thinking may have some relevance in thinking about problems of constitutional design. The familiar agency problem in both contexts and the need to handle unspecified problems of ongoing governance are similarities, even if the exit condition is not met in the case of (most) constitutions.

<sup>11</sup> See also *Paramount Commc'ns Inc. v. QVC Network Inc.* 637 A.2d 34, 46, 48 (Del. 1993) (expressing concern that shift to control by large shareholder necessitated judicial intervention.)

### 7.3 CONSTITUTIONS AS CONTRACTS

Having made the case that some of the critiques of contract thinking about constitutions are overstated, I now wish to argue that there are significant payoffs to the application of modern contract theory to constitutional design. Again, this theory has been developed in the context of private contracts, not political or social contracts, but it provides useful resources for understanding constitutions. I focus on three issues: constitutional formation and negotiation, the content of constitutions, and constitutional renegotiation and endurance. I draw on the economics literature on incomplete contracts, which has advanced our theoretical understanding of why some things are written and others left unwritten.

#### 7.3.1 *Constitutional Negotiation*

##### 7.3.1.1 Constitutional Incompleteness and Bargaining

A good place to start is to think about how constitutions are actually produced in the real world. One set of parameters that will influence the bargain is the nature of the drafting process. Drafting processes, of course, differ in the degree to which they facilitate bargaining. Three different variables are the degree to which the process is open or closed, time-constrained or leisurely, participatory or exclusive.

In terms of being open or closed, Elster (1995) claims that more transparent processes can lead to more arguing than bargaining, in which parties spend time and energy on posturing before their respective principles. We do not know whether this conjecture is correct but it seems plausible. Another major factor is time. Time constraints might pressure parties to leave more things unspecified if they run out of time to write them down; at the same time, they can reduce the possibility of strategic behavior in the negotiation process. If time for drafting were unlimited, parties might never sit down to sort out the hard issues.

A third factor is the range and diversity of parties to the constitutional negotiation process. It is a fact of constitution-making that it typically takes place among groups or factions who represent, to one degree or another, the individual subjects of the constitution. These might be ethnic or religious groups, as in the recent cases of Bosnia or Iraq, or they may simply have divergent interests, as did Southern planters and Northern financiers during the negotiation of the American founding. The groups may differ with respect to resources, geography, ideology, or other dimensions – the content of their disagreement is not particularly material for present purposes.

Let us first assume a discrete number of groups, and also that there is some “surplus” to be gained from concluding a constitutional deal.<sup>12</sup> Note that the notion

<sup>12</sup> See generally Elkins et al. (2009).

of a negotiating surplus is directly drawn from contract theory, and in the present context, the surplus might include goods like international legitimacy, economic stability, and security. The constitutional bargaining process is costly, requiring the expenditure of time and political capital during both the negotiation and approval phases. Furthermore, each bargainer must be concerned with ensuring that his supporters can be delivered, which provides some constraints. The parties at the table will conclude a bargain or not, based on an expected stream of benefits to particular groups less the transaction costs of negotiation. Parties will also consider alternative arrangements depending on their feasibility. The concept of a *reservation price* from contract theory is relevant here. A reservation price refers to the least favorable point at which a party will accept a negotiated agreement, and depends in part on the value of alternative arrangements.

To provide an example, suppose there are two ethnic groups, A and B, located in different areas of the country, with 70 percent and 30 percent of the population, respectively, as well as a military faction M. Any two of these three players can conclude a constitutional bargain, excluding the other. Ethnic group A would like to conclude a bargain with the military, shutting out group B from political goods. But B has the capacity to impose costs on A; if it does not receive at least 20 percent of the political goods, it would prefer to secede or organize violent demonstrations. If these threats are credible, the 20 percent is the reservation price for Group B. The parties come together and negotiate, and let us assume that they negotiate an arrangement wherein A gets 70 percent of the anticipated stream of political payoffs, B 20 gets percent, and M gets 10 percent.

Note that other stable arrangements are possible, and choosing among them involves coordination – but only among those that lie on the “pareto frontier.” Contract theory helps illuminate the range of possible deals because it pushes us to specify, *ex ante*, the perceived interests of the negotiators.

Contract theory has identified the problem of bilateral monopoly, which occurs in markets where there is only one buyer and one seller. When there is asymmetric information, these markets are subject to “holdout problems” in which each party signals that its reservation price is more extreme than the real price, and parties cannot conclude a deal. Suppose, in our earlier example, there are only two parties to the constitutional bargain, groups A and B. Each one has private information on its actual reservation price. A says that it will only conclude a constitution with a system of parliamentary sovereignty, while B, the smaller and weaker party, says that it will only conclude a bargain in which courts have a powerful role in protecting minority rights. If neither is willing to compromise, a bargain may not be concluded, and in many cases civil strife may result. Something like this seemed to happen in the constitutional negotiations in Iraq, in which Sunni representatives refused to participate in negotiations without prior guarantees of their position. The other parties – various

representatives of Shiite and Kurdish groups – did conclude an agreement, under severe pressure from an externally imposed timetable.

Contract theory also provides useful language for understanding downstream renegotiation. The initial bargain will of necessity be “incomplete,” in that the parties will be unable to specify every future contingency (Persson, Roland, and Tabellini 1997: 1165; Gillette 1997: 1355). Because of transaction costs to negotiation, parties that seek to specify every contingency will never conclude a deal. This means that the bargain will be subject to unanticipated “shocks” that occur downstream. Just as parties to a contract may find, for example, that prices of supplies increase, forcing a renegotiation of the deal, constitutional bargainers may need to adjust their bargain down the road if anticipated benefits do not materialize. This might involve a constitutional amendment or even a replacement of the constitution with a new one.

Another source of pressure on constitutional bargains is that each party may be unaware of other parties’ true capabilities and intentions. In contract theory this is called the problem of hidden information, and is ubiquitous. A party to negotiation may misrepresent its own endowments and intentions for strategic reasons.

Constitutional bargaining sometimes involves attempts to induce counterparties to reveal private information. The Spanish transition to democracy, marked by the Constitution of 1978, was negotiated through an elite pact among political parties brokered by President Suarez (Linz and Stepan 1996). The context was one in which memories of the bloody civil war of the 1930s were quite raw, and both left and right had to reassure each other. The left was seen as divisive and republican, while the right was seen as favoring military intervention in politics. The negotiation process of the so-called Moncloa pact facilitated the left’s acceptance of the monarchy, with the right’s agreement to dismantle the institutions of Franco’s dictatorship. This set of mutual promises set in motion a series of events in which the parties learned to trust each other, culminating in the 1982 election of the socialist party that retained the monarchy. The bargain held, both during constitutional transition and during the long period of socialist rule from 1982 to 1996.

In the U.S. context, hidden information about intentions was a key factor in constitutional negotiations. The intense negotiation over the majority required to pass navigation acts reflected not just different views on morality but hidden information. The South believed that the North was likely to tax the South on exports, which would both subsidize Northern shipping interests and harm the South (Goldstone 2005: 161–163). It thus demanded that navigation acts require a two-thirds legislative supermajority. The North, however, was able to resist this demand, in part because it had conceded so much to the South on other points. The point is that the constitutional negotiation was one in which the South distrusted the true intentions of its negotiating partner and sought to specify further detail and veto power as a way of preventing harm to its interests.

As we note in our account of constitutional endurance (Elkins et al. 2009), the problem of hidden information is particularly severe in the first period of constitutional performance. As parties interact in performing the terms of the constitutional bargain, they are likely to reveal information to each other more fully than can be done in the bargaining phase. They may even develop the constitutional equivalent of a “course of dealing,” a set of informal norms that supplement their formal arrangements. As time goes on, information on the “type” of partner they have is likely to increase. For example, Spain’s left and right wings grew to trust each other in the course of dealing with each other over time. This is just one example of a type of problem illuminated using modern contract theory.

It is worth considering solutions to each of the information problems laid out earlier: the problem of incomplete information because of external shocks, and hidden information that results from strategic incentives in bargaining. One standard answer to the problem of incomplete information is to write loosely defined contracts that allow flexible adjustment over time as new information is revealed. The parties will be able to specify performance within general parameters in light of changing circumstances. The economic theory of contract, however, has identified a risk of moral hazard from loosely specified contracts. Vague language might allow a party to claim that circumstances have changed in order to take a greater share of the constitutional “surplus.” Indeed, knowing that this is a possibility down the road, a party might seek to conceal its intentions and endowments from its constitutional partners.

In contrast, a standard response to the problem of hidden information is to write a more complete agreement, specifying contingencies. By forcing the other party to reveal information, one can minimize strategically generated surprises down the road. But this solution to the problem of hidden information, of course, exacerbates the risk of being too rigid in the face of exogenous change. The more one tries to solve one problem, the more one exacerbates the other.

Another standard solution to problems of hidden and incomplete information is to rely on third parties. Analogizing to contract law, one might imagine a theory of constitutional review in which the courts seek to correct problems that arise during the bargaining process. Contract theorists have identified an important role for courts in providing “default rules” that reflect their understanding of what the bargain would have been in the presence of complete information (Ayres and Gertner 1989). In contract theory, courts that play this role can provide a disincentive for parties to hide information from each other. However, there are significant problems with expecting courts to be able to play this function in the constitutional context because no matter what decision the court makes, the relevant parties *still* face the decision as to whether or not to comply with the court decision. Furthermore, independent and competent courts are themselves a product of constitutional

bargaining, and cannot be assumed to exist *ex ante*. Hardin is correct that self-enforcing provisions are key.

These two sources of uncertainty, caused by exogenous shocks and strategic incentives to hide information, mean that parties are unable to produce a complete contract. For each of them, information revealed later in time, either by a party or by new states of the world, may affect the parties' perceptions of the arrangement. This may lead to moments of potential adjustment – or breakdown – of the constitutional arrangement down the road.

This discussion does not exhaust all potential sources of information constraint in constitutional design. Parties have bounded rationality and may be unable to anticipate the costs and benefits accurately. Doing so requires a certain level of social scientific reasoning in institutional design (Tarrow 2010), which may be suspect in the real world. In short, we should expect a certain amount of unanticipated pressure on constitutional bargains.

### 7.3.2 *The Content of Constitutions*

Contracts are typically drafted by law firms acting on behalf of the parties. Constitutions are drafted by experts, government officials and lawyers acting on behalf of the negotiating groups. In either case, the drafters are likely to take the same initial approach. Rather than draft the document from scratch, they will look for a model, or several models, to see how the document is organized and what subjects it covers (Choudhry 2007).<sup>13</sup> I call these boilerplate provisions of constitutions (see also Law 2005 describing “generic” constitutional law).

As example of boilerplate provisions in constitutions, consider the rights provisions of Commonwealth constitutions (Versteeg, 2013). Many of the constitutions adopted by former British colonies at the moment of independence were drafted in very similar circumstances, involving the so-called Lancaster House negotiations under the auspices of the Foreign Office. These involved local elites who were encouraged to produce constitutions as a condition of independence. The drafting of many of these documents is remarkably similar, particularly those sections related to rights, as they were modeled on the European Convention of Human Rights (Simpson 2001).<sup>14</sup> More generally, Law and Versteeg (2011) have identified the contents of global templates of rights provisions in constitutions.

International treaties can sometimes provide templates for constitutional drafters. With my coauthors I have found that constitutions drafted after the adoption of

<sup>13</sup> See also Symposium on Constitutional Borrowing, 1 *International Journal of Constitutional Law* 177–324 (2003); Symposium: Comparative Avenues in Constitutional Law Borrowing, 82 *Texas Law Review* 1737 (2004).

<sup>14</sup> See also, for example, constitution of Antigua and Barbuda, The Bahamas, Barbados, and Belize.

the International Covenants on Civil and Political/Economic and Social Rights are more likely to include the rights listed in those documents than other rights (Elkins, Ginsburg, and Simmons 2012; but see Versteeg 2013). In short, 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. These can reduce the transaction costs of negotiation.

This approach has the virtue of not reinventing the wheel, and need not be viewed pejoratively. If one believes that constitutional provisions have been adopted by other countries based on an independent assessment of their benefits, borrowing can represent a form of social learning, by which states learn from others' experience. Further, some provisions of a constitution may be directed externally, such as rights provisions that are designed to act as signals to international audiences (Farber 2002). It might make sense for drafters to use conventional forms of rights language to achieve this signaling purpose. On the other hand, boilerplates can lead to adoption of provisions without much local meaning. Perhaps it is not surprising that the paradigmatic phrase "we the people" appears in thirty-eight national constitutions in history; but it may be somewhat surprising to learn that the idiosyncratic phrase "cruel and unusual" punishment appears in ten constitutions, and "due process" appears in sixty-seven, ranging from Afghanistan to Yugoslavia.<sup>15</sup> This latter phrase has a specific historical meaning in common law countries, and yet has been widely adopted in countries with different legal tradition. If there is less local understanding of what the provisions entail, there is less likelihood of effective enforcement in practice (Weingast 1997).

Boilerplate provisions have the advantage of saving on transaction costs of negotiation. Furthermore, in the constitutional context, the usual objections to "boilerplate" in contracts between buyers and sellers – namely that they involve a power imbalance in favor of drafters – are less salient (Ben-Shahar 2007). On the other hand, in the constitutional context, there are few of the mechanisms of market discipline that some believe restrain the use of "inefficient" boilerplates in the contractual setting (Ben-Shahar and White 2007). We cannot be confident that the phrases being borrowed are in fact the best provisions.

Both contracts and constitutions rely to a certain extent on background principles and understandings not specified in the text (Finn 1991: 24). These can include the parties' expectations of proper behavior, unwritten norms and understandings, or other legal documents that are seen as having normative force and are relevant to the terms of the deal. Contract theorists emphasize the importance of such unwritten terms in "relational contracts" in which parties engage in a long-term relationship. This concept has obvious application to constitutional bargains.

<sup>15</sup> Data on file with author. Data drawn from Comparative Constitutions Project, available at <http://www.comparativeconstitutionsproject.org>



Beyond form and unwritten supplements, certain constitutional provisions are nicely understood using contractual language. I have argued previously that those who are prospective losers in the post-constitutional political process have a greater incentive to empower a constitutional court than those who are prospective winners (Ginsburg 2003). The inclusion of judicial review and other minoritarian institutions operates as an *insurance term* in the constitutional bargain, providing an alternative forum to reconsider policies in the event that the bargainer finds him/herself out of power. Other constitutional provisions might benefit from this kind of analysis.

In contracts and corporate law, but not constitutions, the terms of the bargain are supplemented with mandatory law and default rules, which form, in some sense, implicit additional terms to the contract. Default rules consist of provisions that will apply as long as parties do not bargain around them. Mandatory rules of law limit the ability of parties to choose their terms of cooperation freely. There are few analogies here in the constitutional realm, save perhaps the international law of *jus cogens*, norms of such universal acceptance that no deviation from them is allowed. Hypothetically, for example, a constitution that purported to legalize torture would provoke international outrage and potentially lead to enforcement efforts to prevent implementation.

### 7.3.3 *Changed Circumstances and Constitutional Renegotiation*

A central problem for constitutional endurance is that, although the constitutional bargain may be an optimal arrangement for the parties at the time it is drafted, conditions may change over time. A constitution that fails to anticipate the various risk factors to which it will be subjected can be considered genetically defective and unlikely to survive. One that does anticipate such factors may better withstand the waves of exogenous change, surviving through adjustment down the road.

The contract theory notion of efficient breach suggests that parties in some circumstances can and should violate their prior agreements when it is efficient to do so. For every period after the initial negotiation, the parties to a contract or a constitution have to make a decision about whether to remain in the current bargain or renegotiate. Sometimes pressure for renegotiation may result from the revelation of information that was strategically hidden during initial negotiations. Sometimes pressure can result from an external shock that changes costs and benefits over time, leading parties to renegotiate the deal. And sometimes the costs and benefits may simply shift because of internal changes, reflecting the rise of a minority group or newly emerging social force seeking to enhance its position.

Consider the 1926 constitution of Lebanon, supplemented by the so-called National Pact of 1943 that divided power among confessional groups. A 1943 amendment provided that the sects would be represented in an equitable manner “as a temporary

arrangement.”<sup>16</sup> Under the National Pact, the president of the country would be a Maronite Christian, the prime minister a Sunni Muslim, and the speaker of the parliament a Shiite; parliament would have a 6:5 ratio of Christians to Muslims. This arrangement was stable for some decades, but ultimately demographic change meant that the constitution no longer fitted the society, and it died in a bloody fourteen-year civil war. Surely a firmer sunset provision might have prevented the “temporary arrangement” from breaking down in such a horrific manner.

The proponents of renegotiation can be the relative winners or losers in the initial constitutional bargain. The relative winners are often seeking a larger share of the constitutional surplus. On the other hand, it may be a relative loser who seeks to renegotiate the bargain for a larger share of the constitutional surplus. Even if losers do not have the power to win in ordinary politics, they may be able to impose sufficient costs on the winners so as to force renegotiation.

Renegotiation can take several forms. The formal amendment process is one mechanism; however, if that is unavailable or difficult, parties may use informal mechanisms such as judicial interpretations or unwritten understandings. If, on the other hand, formal constitutional amendment is relatively simple, there may be less need for judicial or other institutional reinterpretation of the constitution.

If renegotiation through amendment does not work, one party or another may seek to start the bargain over. This is typically costly. The bundled character of institutional change, with many different issues to be decided, means that parties will find it more difficult to predict *ex ante* what the trade-offs across issues will be. Furthermore, there is some risk that major shifts will inure to the detriment of the group(s) that called for a renegotiation. We have some real-world examples of such dynamics. In the aftermath of the South African Constitutional Court’s 1995 decision in *State v. Makwanyane*, in which it found the death penalty unconstitutional, some elements of the National Party sought a constitutional amendment to overrule the case. The African National Congress (ANC), however, responded by calling for amendment of the property rights provisions that had been central to the country’s negotiated transition and were of great interest to the National Party. These had been subject to grave criticism within the ANC’s constituencies because they slowed down popular land reform (Atuahene 2011). Rather than risk losing property rights protection, the National Party quickly quieted calls for amendment of the death penalty provision. Ten years later, the Constitutional Review Committee recommended that neither provision be amended.<sup>17</sup>

Termination of constitutions, as a legal matter, would seem to require unanimous agreement, even if this is not true as a political matter. Lincoln, in his First

<sup>16</sup> Constitution of Lebanon, Article 95 (1946).

<sup>17</sup> Parliamentary Monitoring Group 2005.

Inaugural Address, wrestled with the issue, arguing that termination required unanimity, or else would be considered a breach. “If the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade by less than all the parties who made it? One party to a contract may violate it – break it, so to speak – but does it not require all to lawfully rescind it?”<sup>18</sup> Yet we do observe breach and rescission quite frequently in the comparative context.

Some constitutions will be fragile, and others not. This has to do with factors related to the environment as well as certain design features that may be within the control of the drafters. Elkins et al. (2009) report that constitutional flexibility (in terms of ease of amendment), inclusive processes, and constitutional detail help constitutions endure over time.

Not all the effects of time are harmful for constitutional endurance, nor are they are for contracts. In either context, time can erode the initial bargain as new circumstances arise, but it can also reinforce it. Scholars who emphasize the importance of path dependency focus on how certain choices, once made, will provide increasing returns from continued investment. Although originally developed in the context of the economy, path dependency is what scholars in political science and law are now turning to as an explanation of why some phenomena endure and others do not (e.g., Pierson 2005; Hathaway 2001). One can imagine that constitutions may generate increasing and continuing support for their institutions, making it less likely that parties would like to exit from current arrangements, “locking in” the current configuration and insulating it from exogenous shocks (Arthur 1994). This is what we might call the self-reinforcing constitution.

In the constitutional context, self-reinforcement first requires that constitutions give actors a stake in participating in the political institutions that are established. As actors invest resources in utilizing these political institutions, they may find that the investments pay off and return political goods to the investor. Over time, actors may develop an increasing stake in constitutional viability.<sup>19</sup> The public, too, can gain an increasing familiarity with and attachment to the founding document over time, making it more likely that they will enforce the bargain, as discussed later.<sup>20</sup> The self-enforcing constitution is sustained by self-reinforcing dynamics.

<sup>18</sup> First Inaugural Address.

<sup>19</sup> Note that this analysis deviates from one point emphasized in the current literature on self-enforcement. Weingast (1997) emphasizes that self-enforcement requires reducing the stakes of politics so as not to trigger actors’ rational fears, which might cause a constitutional breakdown. We agree with this point, but also note that self-reinforcement requires raising the stakes of politics, so as to give actors an incentive to participate and to produce increasing levels of collective goods.

<sup>20</sup> Widner (2008: 6 n. 6) provides the example of new multiparty constitutions in Africa. When leaders sought to amend these constitutions to extend their terms beyond the original bargain, popular resistance has been effective in countries where drafting was consultative, but not so when drafting was highly elite driven.

## 7.4 CONCLUSION

Social contract is the central metaphor in modern Western constitutional thought, and informs the imaginations of constitutional designers as well as scholars. For example, in a recent comment on the transitional constitution of the Sudan, a government official relied heavily on the claim that “constitutions are contracts between people and the government” in arguing for greater public participation in the constitution-making process.<sup>21</sup> Such thinking forms the normative basis for constitutionalism.

This contractual analogy has a long history but has been subjected to recent attack on normative and positive grounds. I agree with the normative critique but in this essay claim that positive contractual analysis can provide helpful perspectives to help us understand how constitutions are formed and what their content is. In this sense I am trying to revive the contract analogy, not as a normative matter for understanding constitutional acquiescence by those who oppose its terms, but as a positive matter for understanding constitutional formation and endurance. My argument is not a defense of social contract theory, as much as an argument that we should move to different elements of the contractual analogy to understand fully the lived social and political bases of constitutions.

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<sup>21</sup> Sudan Radio Service, June 7, 2011.

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