Introduction

It is getting to be harder to run a constitution than to frame one.

Woodrow Wilson, 1887

This book concerns a set of problems that arise from the distinctive conceptual and practical tension in the first period after a new constitution has been adopted. We shall argue that at a very general level, a new constitution must manage a balance or tension between two forces. These are aspirations for transformation and demands for preservation through entrenchment.  

The first period, as we will elaborate, is the conceptual, temporal, and institutional bridge between the past and future. It is the moment when the transformative and the preservative vectors of constitutional design can come into the sharpest conflict. The variable nature of these conflicts – and the diverse means through which they are mediated, whether successfully or less successfully – is the focus of both this introduction and, in different ways, the chapters that follow.

The term “constitution” can be defined in many ways, and it is worth clarifying the scope of the book’s inquiry before proceeding. We are focused here on written documents that specify the terms of central governing institutions and individual rights. This is not to understand constitutions as solely a function of their written terms, or to ignore the sociopolitical, economic, and cultural contexts in which they are written.  

But it is to take the project of crafting and ratifying a new text as a

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* Thanks to Eric Alston, Rosalind Dixon, Richard McAdams, and the conference participants in the “Parchment to Practice” event for valuable feedback.


2 On the importance of such context in comparative constitutional studies more generally, see Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law. New York: Cambridge University Press, 2014.
paradigmatic point of departure for the institutional articulation of new political arrangements that are fairly characterized as “constitutional” in character.

We can usefully start with the transformative aspect of constitution-making and implementation. Constitutions are often audacious blueprints for social and political change. They are crafted to inspire and motivate a new polity, and adopted at moments of high optimism in the possibility of change. As Jon Elster has underscored, constitutions might reflect aspirations, but the expression of those aspirations may be possible only within and because of background social and political crises that have upset the historical equilibrium. This then leads to the creation of a new order, in which a constitution is the template. Transformation is a costly proposition. It involves elections, the creation or restructuring of an executive, and institutional checks on the new leviathan in the form of courts, independent commissions, and civil society institutions. In a territorially extended state, it can require the creation of new administrative apparatus, such as new local courts, government bodies, or new police and security forces. If a new constitution is to persevere, both officials within the state and citizens subject to their rules must view the state as a reasonably legitimate one, acquire habits of obedience to its rules, and adopt favorable dispositions toward both the state and their fellow citizens. As we shall explain in this chapter, mere convergence on common understandings of what counts as a constitutional violation may not be sufficient to engender sustained compliance. On this point, we diverge from one of the prominent theories in the literature, which emphasizes coordination on common understandings as a necessary condition for constitutional implementation; while it is surely necessary, it is not sufficient.

At least in a post-war world wherein talk of individual rights is pervasive, constitution-making means that the state, so as to be minimally normatively defensible and sociologically legitimate, must take some steps to promote, respect, and protect the new rights and duties contained in the new constitution. In many instances, both the state and citizenry must develop some effective mechanisms for accountability. Failures in navigating national political conflicts or in delivering essential social services can undermine the creation of necessary social trust. All this takes time and effort. The latter makes sense only if it is anticipated that a constitution will be transformative of the larger social or institutional fabric.

But consider the other side of the coin – the preservative character of constitutions. To begin with, constitutions are, of course, just pieces of paper at their


inception, the moment they come into force. In translating paper into practice, and in setting up institutions and changing beliefs, forces of resistance will surely be encountered. Getting a constitution up and running entails some measure of accommodation of existing patterns of political power, institutional development, and socioeconomic arrangements. Even in situations of dramatic upheavals, some elements of the prior political and social order are likely to linger and to set their face against disadvantaging change. A constitution that fails entirely to accommodate them – that is, one that fails to preserve what key members of the constitution-making coalition perceive as valuable and important – has a questionable future.

More generally, a constitution may be adopted to prevent change that would otherwise occur, or to lock in benefits for the most powerful political and economic actors in a society. A large body of literature on constitution-making characterizes such organic documents as deals struck among these powerful actors. This theme is especially prominent in the treatments of judicial review, for example by Ginsburg in his earlier work, as we shall see in this chapter.⁶ In American constitutional scholarship, this position is most closely associated with the progressive historian Charles Beard, who contended that the 1787 Constitution was designed to facilitate the retention of wealth by, and the transfer of wealth to, a small minority of propertied men.⁷ Common to these theories is the assumption that those who engage in constitution-making are self-interested actors, unwilling to sacrifice much or any of their material and political status for ideological ends. Such rational, self-interested actors will not reach a deal that undermines or redistributes their power in the aggregate. Short-term concessions may be made, but only to avoid subsequent, larger losses. This self-interested group of framers, if they reach a mutually beneficial bargain, will want to preserve their bargain going forward. If there is no mutually beneficial (i.e. Pareto superior) deal to be struck, then we would not expect to see a new constitution emerge. It follows from this analysis that constitutions will tend in whole or part to be preservative in character.

This tension between transformation and preservation evidences itself in several different ways. At the same time, it can be mediated through many devices and strategies. So it is best thought of as a tension rather than a fatal flaw. But it is also a tension that is predictably most acute at the moment just after a constitution’s

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creation. We call this the first period. This is the period in which there is likely to be
the greatest gap between the aspiration recorded on parchment and the actuality of
political practice. Of course, constitutions must navigate problems of institutional-
ization and legitimation without regard to their age. The US Constitution is the
world’s oldest, and hence continues to face questions about the legitimacy and
fairness of basic representational elements, such as the electoral college. But new
constitutions face an especially sharp version of these difficulties, for there is likely
neither deeply shared understanding of legal norms that can serve as coordinating
focal points beyond the bare text nor any internalized norms of deference and
legality oriented toward that text. Institutions have yet to arise in which politicians
are trained and socialized, leading to the internalization of constitutional norms and
commitments. No cadre of bureaucrats, for example, will have vested stakes in the
maintenance of stable governance instruments. Both the constitutive and regulative
elements of the constitutional order are at this instant likely to be fragile, awaiting
subsequent reinforcement. Any errors or internal conflicts in the constitutional
design, moreover, may not yet have been identified and instead are most likely to
be uncovered by the initial acts of politicians and officials working through the new
constitution’s machinery.

There is abundant evidence for these propositions in the world of national
constitutions, which are notoriously fragile, short-lived, and often divorced from
actual practice. Figure 1.1 presents data from the Comparative Constitutions Project
(CCP), showing a distribution of constitutional duration at the time of collapse. As
these data make apparent, the modal age of constitutional death is one year; more
than 15 percent have died by that moment. Some of these are by design, in cases in
which the constitution is interim or meant to be replaced. But even excluding
interim constitutions from the calculus does not change the basic shape of the
distribution. The data’s leftward skew suggests some caution is appropriate before
embracing an expansively aspirational view of constitution-making. It further hints at
a distinctive problem of institutionalization and legitimation in the first period of a
constitution’s history. And surely it picks out empirically a phenomenon that calls
out for analysis.

The CCP data also provide a measure of the different ways in which the tension
between the transformative and the preservative is mediated in practice. The data
contain a measure of the similarity between one constitution and the document that
immediately replaces it. We use an overall similarity index, aggregating subtopics
into a single measure. That measure, to be clear, does not wholly capture the

8 The Comparative Constitutions Project uses the country-year as the unit of analysis, and credits
a constitution to the year it was adopted. It counts the lifespan as lasting from the year of
adoption until the year of replacement. In an extreme case, a constitution adopted in January of
one year and replaced in December of the following year would be counted as lasting a year.
These kinds of noisy variations cut both ways. A constitution adopted in December and
replaced the next month would also be counted as lasting a year.
**Introduction: From Parchment to Practice**

**Figure 1.1** Age at death of world constitutions
transformation/preservation dynamic we focus on here – a constitution, for example, may accommodate and entrench distributions of social and economic power that are not registered in prior constitutional language through the design of electoral arrangements or the way in which subnational governance is carved up. Nevertheless, Figure 1.2 usefully illustrates the fact that constitutions display a range of approaches in balancing the tension between transformation and preservation. It provides an index of similarity with the previous constitution, by age of constitutional death, for all constitutions up to the median predicted lifespan of nineteen years. The dashed line indicates the median similarity across all such constitutions, which tends to be higher than it would be between any two randomly drawn constitutions. The dotted line provides the fitted line or trend. As one can see, by this measure constitutions that die in the first period tend to be slightly more conservative (in the sense of requiring less change from the prior constitutional baseline) than those that die later. Perhaps then the marginally more significant risk of the first period is being insufficiently transformative, or of hewing too close to the status quo.

The relationships illustrated in Figures 1.1 and 1.2, we should emphasize, are correlational rather than causal. For example, it may be that a conservative attitude to constitutional change in relation to a prior constitution indicates a failure to agree to new terms in a constitution. That bargaining failure, which is reflected in the stickiness of the text from one constitutional regime to the next, directly leads to a breakdown in political compromises and constitutional death: The actual text, however, wise or unwise, would have only an epiphenomenal role in this dynamic.

In the balance of this introduction, we therefore set out a theoretical and practical agenda for the study of what we will characterize as the first-period problem. Our first aim in what follows is to unpack in more detail the various theoretical claims sketched previously in this chapter. Our second aim is to sketch a general framework for thinking about the first-period problem through a common analytic device in studies of constitutional design. This is the analogy of a constitution to a contract among the most powerful social formations (or factions) in a polity. We emphasize at the inception that the contract analogy is just that—it is an analogy that captures one way of thinking about the complex social, economic, legal, cultural, ideological, and political matrix from which constitutional success (however understood) or failure emerges. It is not the only way of evaluating constitutional choice; nor does it necessarily provide a morally compelling standpoint for evaluating such choices. Nevertheless, understanding constitutions as contracts provides a perspective on the incentives and actions of powerful actors at a constitution’s framing moment. As a result, it may cast light on the kinds of problems likely to arise in the first period, and the repertoire of institutional solutions available for their mitigation. We conclude by summarizing and reflecting on the case studies contained in the balance of the book, in light of the framework laid out here.

1.1 ORIGINS OF THE FIRST-PERIOD PROBLEM

A written constitution generally describes the basic political institutions of a polity, explains how those institutions are to be created and then renewed on an ongoing basis (e.g. through election, sortition, or hereditary transmission), and circumscribes the power of those institutions in various ways. So described, a constitution can play one of several functions, including defining a political community, protecting rights, and making government possible. But whatever its foundational architecture, its inward or outward-regarding character, and whatever mix of ends it pursues, a constitution is generally intended to be efficacious. So-called sham constitutions do exist. But they do not represent the

modal case. As a result, they are peripheral to the questions we aim to frame and pursue in this volume.\textsuperscript{12}

As noted previously, to be effective, a constitution must navigate between the competing demands for transformation and continuity. This dichotomous pressure not only influences the design of many constitutions, but shapes the extent and manner in which the design on paper is immediately translated into a new set of ongoing, efficacious institutions – defined as the “rule[s] of the game in a society or, more formally, are the humanly devised constraints that shape human interaction.”\textsuperscript{13}

It is rarely the case that a constitution will merely codify the status quo ante; to the contrary, constitutions are often intended to transform the status quo. Outside of the context of imposed regimes, such as that embodied in Japan’s postwar constitution, a constitution tends to require costly negotiation.\textsuperscript{14} The process of creating a constitution may involve a collective body, such as a legislature or a constituent assembly, allocating time to “arguing and bargaining” over new entitlements.\textsuperscript{15} In the contemporary era, more elaborate processes of public canvassing and consultation are increasingly perceived as necessary legitimating steps in constitution-making.\textsuperscript{16}

And it is easy for Americans to forget in retrospect, but the enterprise of national constitution-making entails political risk, sometimes under conditions of great uncertainty, that may not materialize into political benefits.\textsuperscript{17} All this entails transaction costs, which would hardly be worth incurring unless there was some potential positive improvement to be obtained. Whether their goals are ideological or material, or some mix of the two, dominant actors in a given polity are unlikely to expend effort and capital (either financial or political) without the possibility of some change.


\textsuperscript{17} This is a theme in Klarman’s account of the American constitutional founding, and is a lesson of Lin-Manuel Miranda’s popular musical \textit{Hamilton}. 
In some instances, change entails an escape from a violent or unstable status quo. Constitutions are often adopted after violent crises such as wars, revolutions, or the fall of empires that have undermined or destroyed previously regnant political orders.\(^\text{18}\) Change – in the sense of the fashioning of new institutions – is thus an obvious, pressing, need. In other contexts, however, the institutional status quo may evince a continuing measure of durability, along with sufficient flaws, such that constitution-making may be plausible but hardly unavoidable. The 1958 Constitution of the Fifth French Republic is one such constitution created in conditions of perceived political “crisis” that might well not have required a new organic document, had there been relatively minor changes in the underlying political dynamics.\(^\text{19}\) Constitutions created under such conditions are similarly unlikely to be merely preservative of the status quo. The fact of change may itself catalyze new expectations and demands on the part of political actors that disturb the status quo, generating new forms of state-building or new challenges to state preservation.

Change is also embedded in constitutions that are principally economic or ideological projects. For example, Douglass North and Barry Weingast’s well-known account of the quasi-constitutional settlement that flowed from England’s Glorious Revolution focused on the relation between new constraints on the monarchy’s fiscal and taxing authority and its access to international credit markets. In their view, change to constitutional institutions is motivated by economic pressure.\(^\text{20}\)

Constitutions can also be ideological projects intended to instantiate, or at least further, a normative account of state–society relations such as liberalism, Islamism, Bolivarianism, or neoliberalism.\(^\text{21}\) The increasingly common inclusion of human rights language in postwar constitutions is yet another example of an ideological project.\(^\text{22}\)


even if it not always recognized as such. Like their economically motivated counterparts, ideologically driven constitutions are intended to be transformative on the ground. They are not intended to be cheap talk, even if they are not always as efficacious as their proponents might have hoped.

A final reason for underscoring the role of change in constitutional transformations concerns the sources of stability. An influential approach to theorizing constitutional stability underscores the possibility of text serving as a “focal point” for citizens seeking to coordinate their expectations and actions. If citizens agree on what counts as a violation of the constitutional order, they can coordinate enforcement efforts and deter governmental transgressions. Setting aside important questions about the inevitable ambiguity of constitutional text and the dearth of citizen knowledge of the constitution (both of which might prevent the emergence of a focal point), it is unclear why we should expect focal solutions to be stable over time.

At the moment of inception, a constitution provides a solution that is superior to the status quo for all veto players. This fact will be stable so long as there are no changes to the economic, social, or geopolitical environment that produce a situation in which one veto player prefers noncompliance or a change to the constitutional agreement. But under changed conditions, mere understandings enabled by focal points will be unable to elicit compliance with the constitution. Rather, some amount of internalization – achieved through socialization, habituation, or even fear – may instead be necessary to ensure continued compliance.

The transformative character of constitutions abides in uneasy tension, and sometimes in potentially outright conflict, with the necessarily preservative character of those same documents. The backward-looking, status-quo favoring character of the modal constitution is a function of several political and technical dynamics.

First, the so-called strategic accounts of constitutional review, developed by Ginsburg and Ran Hirschl among others, argue that some features of a new constitution are motivated by the drafters’ desire to preserve their interests. Dixon and Ginsburg go on to typologize these interests as coming in several kinds: personal, political, and policy.

Sometimes drafters will be concerned with their own welfare or personal safety, as in cases of democratization from authoritarian rule. In other cases, they may wish to preserve their party’s interest in holding power. Finally, they

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26 We are grateful to Richard McAdams for discussion on this point.