From Parchment to Practice: The First–Period Problem of Constitutional Implementation

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“"It is getting to be harder to run a constitution than to frame one."”
--Woodrow Wilson, 1887

This conference (and the anticipated book it will produce) concerns a set of problems that arise from a conceptual and practical tension in the first period after a new constitution has been adopted. We shall argue that at a very general level, constitutions involve a balance or tension between two forces, namely aspirations for transformation and demands for entrenchment that are conservative in character. The first period, as we will elaborate, is the conceptual, temporal, and institutional bridge between the past and future. It is therefore the moment when the transformative and the conservative vectors of constitutional design can come into the sharpest conflict. The nature of these conflicts—and the means through which they are mediated, successfully or less successfully—is the focus of both this introduction and, in different ways, the chapters that follow.

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. 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 convulsions that have thrown the historical equilibrium of political power into disarray. This then leads to the creation of a new order, in which a constitution is translated into the going business of a state. This is a costly proposition. It involves elections, the creation of an executive, and institutional checks on the new leviathan in the form of courts, independent commissions, and civil society institutions. If a new constitution is to persevere, both officials within the state and citizens subject to their rules must view the state as a legitimate one, acquire habits of obedience to its rules, and adopt favorable dispositions toward both the state and also their fellow citizens. This in turn 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 effective

1 For a different version of these two concepts, see Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, Yale Law Journal 105: 2117, 2178-87 (1996).
mechanisms for accountability. Failures in navigating national political conflicts or in delivering ground-level essential social services can undermine the creation of necessary social trust. All this takes time and effort. All this investing in a constitution makes sense only if it is anticipated that doing so will be transformative.

But consider the other side of the coin—the conservative character of constitutions. To begin with, the latter are, of course, just pieces of paper at their inception. In translating paper into practice, institutions and 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 order are likely to linger and to set their face against disadvantaging change. A constitution that fails entirely to accommodate them 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 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 below. In the American constitutional historiography, 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. Common to these theories is the assumption that those who engage in constitution making are self-interested actors, unwilling to sacrifice much 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, and in any case will want to preserve their bargain going forward. It follows from this analysis that constitutions will tend in whole or part to be conservative in character.

This tension between the transformative and the conservative evidences itself in many ways. It can be mediated through many devices and stratagems; it is a tension, not a fatal flaw. But it is also a tension that is predictably most acute at the moment just after a constitution’s creation. We call this the first period. This is the period in which there is likely to be greatest gap between the aspiration recorded on parchment and the actuality of political practice. Of course, constitutions must navigate these problems of

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institutionalization and legitimation without regard to their age. But new constitutions face an especially sharp version of these difficulties, for there is likely no deeply shared understanding of legal norms that can serve as coordinating focal points beyond the bare text. Institutions have yet to arise in which politicians are trained and socialized, leading to the internalization of constitutional norms and commitments. Both the constitutive and regulative elements of the constitutional order are at this instant likely to be fragile, awaiting shoring up. Any errors or internal conflicts in the constitutional design, moreover, have yet to be 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 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, and more than 15% die by that time.\(^7\) 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. Surely the problem calls out for analysis.

\(^7\) 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 kind of noisy variations cut both ways. A constitution adopted in December and replaced the next month would also be counted as lasting a year.
The CCP data also provides a measure of the different ways in which the tension between the transformative and the conservative is mediated in practice. That data contains a measure of the similarity between one constitution and the document that immediately replaces it. We use the overall similarity index, aggregating subtopics into a single
measure. That measure does not wholly capture the transformation/conservation dynamic we focus upon here—a constitution, for example, may accommodate and entrench extant distributions of social and economic power that are not registered in extant constitutional language. Nevertheless, Figure 2 usefully illustrates the fact that there exists a range of possible ways of mediating the transformation/conservation tension. More specifically, 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 19 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, constitutions that die in the first period tend to be slightly more conservative by this measure than those that die later. Perhaps then the marginally more significant risk of the first period is being insufficiently transformative.

**Figure 2: Similarity of constitutions with predecessor, by age (n==640)**

In this Introduction, we set out a theoretical and practical agenda for the study of what we will characterize as *the first period problem*. Our first aim in which follows is to unpack in more detail the various theoretical claims sketched above. 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.

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8 Elkins et al.
We emphasize at the inception, however, 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. Nevertheless, understanding constitutions as contracts provides a perspective on the kind of problems likely to arise in the first period, and the repertoire of institutional solutions available for their mitigation.

I. 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 in the first instance, 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 common functions, including defining a political community, protecting rights, and making government possible.\(^9\) It is also the case that such documents are signals on the international plane, and hence one of the first acts of new states.\(^{10}\) 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, and as a result are peripheral to the questions we aim to frame and pursue in this volume.\(^{11}\)

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 on ongoing, efficacious institutions—i.e., the “rule[s] of the game in a society or, more formally, are the humanly devices constraints that shape human interaction.”\(^{12}\)

It is rarely the case that a constitution will merely codify the status quo ante; to the contrary, it is commonly the case that constitutions are intended to transform the status quo. Outside the context of imposed regimes, such as Japan’s postwar constitution,\(^{13}\) a constitution requires costly negotiation. The process of creating a constitution may involve a collective body, such as a legislature or a constituent assembly, allocating time to


\(^{13}\) Charles L. Kades, "The American Role in Revising Japan's Imperial Constitution," *Political Science Quarterly* 104, no. 2 (1989): 215-247
“arguing and bargaining” over new entitlements. In the contemporary era, more elaborate processes of public canvassing and consultation are increasingly perceived as necessary legitimating steps in constitution-making. And it is easy for Americans to forget in retrospect, but the enterprise of constitution-making entails political risk, sometimes under conditions of great uncertainty, that may not materialize into political benefits. 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.

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. The change—in the sense of the fashioning of new institutions—is 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 precipitated a new organic document given relatively minor changes in the underlying political dynamics. Constitutions created under like conditions are similarly unlikely to be merely preservative of the status quo.

Change is also embedded in constitutions that are principally economic or ideological projects. For example, Douglass North and Barry Weingast’s famous account of the quasi-constitutional settlement that flowed from England’s Glorious Revolution focused on the relation between new constraints upon 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. Constitutions can also be ideological projects intended to instantiate, or at least further, a normative account of state-

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16 This is a theme in Klarman (2016), and is a lesson of Lin-Manuel Miranda’s popular musical Hamilton.
society relations such as liberalism, Islamism, or neoliberalism. The increasingly common inclusion of human rights language in postwar constitutions is yet another example of an ideological project, even if it not always recognized as such. Like their economically motivated counterparts, ideologically-driven constitutions are intended to be transformative in effect. They are not intended to be cheap talk, even if they are not as always as efficacious as hoped.

The transformative character of constitutions abides in uneasy tension, and sometimes in potentially outright conflict, with the necessarily conservative character of those same documents. The conservative 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 interests of the drafters in preserving their interests. Dixon and Ginsburg go on to typologize these interests, as coming in several flavors: personal, political and policy. Sometimes drafters will be concerned with the 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 may simply be concerned with locking in policies through entrenchment in a constitution. Whatever the motive, constitutions must reflect the interests of those drafting them to some degree, and will thus have a preservative dimension except in situations of total revolution.

Second, more mundane mechanisms can lend a conservative bias to new constitutions. There is, most glaringly, the simple fact that adopting a constitution with a completely new suite of institutions is simply costly. The more is changed, the higher a new constitution’s implementation costs will be. A central problem for new constitutions, therefore, is persuading individuals, political factions, and social formations to expend the necessary resources to get constitutional institutions up and running.

The new constitution, moreover, might incorporate extant institutions and legal norms in ways that have an essentially conservative effect. Especially when adopted in the

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wake of violent crisis, a new constitutional dispensation may require a marshaling of all extant resources. For example, the 2001 Bonn Agreement and the 2004 Constitution both provided seemingly new institutional arrangements for Afghanistan. Yet both effectively preserved administrative and judicial structures created in the late 1970s by the Marxist government—the last administration that exercised effective control over the whole of the nation’s territory in a way that allowed the fashioning of a national bureaucracy. Even absent crisis, it may be too costly to reimagine wholesale the commercial, civil, criminal, and domestic laws of a polity. Because these subconstitutional regimes commonly intersect with, and inform, constitutional law, their persistence lends yet another conservative tilt to a new constitutional order. In the American context, for example, it has been argued that elements of the British common law operate as backdrop elements of the 1787 document.26 The powers of the national legislature to debate without executive interference and to elicit information, for example, are in large part, shaped by pre-Revolutionary British practice and only partially specified in the Constitution’s text.27 The immunities of states in federal and state tribunals, or the extent of similar immunities for Native American tribes from suit, are key determinants of the measure of constitutional remedies, and are derived from understandings (whether correct or not) of pre-ratification law.28

Finally, it is important to underscore that transformation and conservation are not strictly a binary. Indeed, the very impetus for constitutional change might also paradoxically be a result of elite efforts to shore up their authority. This possibility is illuminated by Acemoglu and Robinson’s well-known theory of democratic transitions. This account stresses the role of franchise extension as a concession by extant elites to potentially democratic masses that threaten violent revolution.29 A certain degree of constitutional change is permitted (and perhaps even required to render elite promises credible and hence durable), but the effect of such change is to preserve other elements of the social order against redistributive policy or regime change.

More generally, it is possible to imagine a range of ways in which impulses toward transformation and conservation can be reconciled. Most simply, different elements of a constitution might pursue transformative and conservative ends. Alternatively, the different elements of a constitution might operate in different temporal cycles. For example, a constitution might contain rights that operated not as immediate constraints upon a new government, but rather as promissory notes. These would be capable of redemption only over time and over by dint of the blood and treasure split by social groups.30 In Sandy Levinson’s insightful formulation, the “constitution of settlement” and

the “constitutional of legal conversation” may operate in different time frames in a fashion that alleviates the transformation/conservation tension.\footnote{Sanford Levinson, "Do constitutions have a point? Reflections on “parchment barriers” and preambles."\textit{Social Philosophy and Policy} 28, no. 1 (2011): 150-178.}

Notwithstanding this point, a constitution stands at the nexus of two vectors bearing upon the institutional status quo—one that pushes toward transformation and the other that tends toward conservation. Figure 1 at least suggests that the tension between these vectors is sharpest in the first period after a constitution’s adoption. (This is as good a place as any to concede that we do not offer a precise definition of the ‘first period’ here: We mean to capture the sense of an initial cycle of implementation and operationalization, but the precise bounds of this period are likely to vary by context. In a democratic polity, it makes sense to think of two or more election cycles—i.e., sufficient time for the question of transitions of power to be posed—as that period).

The problem of constitutional efficacy, of course, does not ever evaporate entirely after the first period. Even mature constitutions confront the question of why officials vested with state authority obey obligations under the law and limits on the lawful exercise of their authorities. Rational choice theorists have purported to find in these questions deep puzzles,\footnote{Daryl J. Levinson, "Parchment and politics: the positive puzzle of constitutional commitment."\textit{Harvard Law Review} (2011): 657-746.} and express skepticism about whether officials in fact do obey the law absent some adverse political cost.\footnote{Frederick Schauer, "The Political Risks (If Any) of Breaking the Law."\textit{Journal of Legal Analysis} 4, no. 1 (2012): 83-101.} More sociologically oriented scholars have not been so perplexed. They have observed that in mature polities, characterized by longstanding formal institutions, legal norms tend to be internalized even when there are obvious political and material returns from its abuse.\footnote{Richard H. Fallon Jr, "Constitutional Constraints."\textit{California Law Review} (2009): 975-1037; Aziz Z. Huq, "Binding the Executive (by Law or by Politics),"\textit{University of Chicago Law Review} 79, no. 2 (2012): 777-826.} The difficulties of modeling constitutionalism in rational choice terms, they imply is a function of the arbitrary limitations contained within the standard rational choice model. Given the role of socialization and internalization of legal norms in generating constitutional efficacy in mature constitutions, it should not surprise that the tension between transformation and conservation is likely most acute in the first period. For it is then that officials are least socialized, when the habits and routines of formal institutions have yet to settle, and where the uncertainties about the meaning of constitutional and legal provisions are most likely to be substantial. The dynamics of what Barry Weingast and Sonia Mittal have called “self-enforcing” constitutionalism are least likely to have crystallized in the first period.\footnote{Sonia Mittal and Barry R. Weingast. "Self-enforcing constitutions: with an application to democratic stability in America's first century."\textit{The Journal of Law, Economics, & Organization} 29, no. 2 (2011): 278-302.} Whether or not this problem is different in kind from that of constitutional fidelity in mature constitutional context, it is certainly different in magnitude.

II. \textbf{Modeling the First Period Problem with a Contracting Analogy}
If the first period of a constitution’s life is characterized by competing pressures toward transformation and preservation, how might we understand the ensuing conflicts and tensions? We start with a now-common analogy that is drawn between constitutions on the one hand and long-term, relational contracts on the other hand.\textsuperscript{36}

Constitutions can be usefully modeled as contracts in two ways. First, a constitution’s text embodies a deal between powerful national-level interest groups, each of whom can each threaten to exit (whether by secession or through finding alternative negotiating partners) from the deal.\textsuperscript{37} Second, a constitution, in addition to satisfy elites, must also generate a \textit{modus operandi} between elites and the population. Hence, in the political philosophy literature starting with John Locke, the polity is described as resulting upon a “compact” through the agreement of citizens with the aim of “mutual preservation of … lives, liberties, and estates.”\textsuperscript{38} Constitutions can also be understood as a sort of double compact, reflecting a deal among the people or peoples in a state, and also among politically powerful.\textsuperscript{39} Whatever metaphor is taken, the constitution as compact has a \textit{durable} and \textit{relational} quality. Like a more familiar and workaday contract between a supplier and a manufacturer of goods, it entails iterative cooperative interactions by all parties in order for the contractual ambitions to be realized.

Such constitutional bargains are struck in a wide range of circumstances. They take a wide variety of forms reflecting different accents across the two elements of the double compact. For instance, they might involve an elite pact, in which a transition to democracy is negotiated among leaders without any popular or large-scale input. This was the case in mid-1970s Spain. It can emerge from negotiations among the members of a confederated system and yield an arrangement of discrete state units joining together under a constitution systematically inflected by states’ interests (as in the United States). Finally, it can be post-revolutionary negotiation as in Tunisia or the roundtable talks of Eastern Europe, with varying degrees of political pluralism and popular involvement. Bargaining settings are hence myriad, but all involve a negotiation about the future institutions of society, and how disparate elites and the publics they represent will live together.

Drawing from the contracting literature, we can isolate two general categories of dynamics that result in constitutional crisis or failure during the first period. Motivating all of the dynamics we identify is the immanent conflict between those factions and groups that benefit from transformation, and those that seek a conservation of the status quo ante.

\textsuperscript{36} For examples of the analogy, see Zachary Elkins, Tom Ginsburg, and James Melton, \textit{The Endurance of National Constitutions} (New York: Cambridge University Press, 2009); Huq, \textit{Article V}.


\textsuperscript{38} John Locke, Of Civil Government, in Two Treatises of Government and a Letter Concerning Toleration 142, 155 (Ian Shapiro, ed., 2003).

That conflict, however, manifests as a result of either *deficits of drafting* or *deficits of implementation*.

First, constitutions are akin to long-term, relational contracts in that they are necessarily *incomplete*, in the sense that the contracting parties have not written down or anticipated contractual solutions to all possible future contingencies, or because it has simply failed to address a vital practice question of constitutional design. An example of failing to address contingencies might be the U.S. drafters’ failure to anticipate that the cotton gin would lead to demand for the expansion of slavery to feed the industrialized textile industry. An example of the second is failing to articulate mechanisms for constitutional interpretation. The U.S. Constitution, for example, fails to address the rather important question of which institution will have the final word when resolving constitutional ambiguities. The result is a seemingly endless tussle over the scope and legitimacy of judicial review, the role of other branches’ constitutional judgment, and the influence of popular conceptions of constitutional norms. The 2004 Afghan Constitution, erring in the other direction, created two such bodies—setting the stage for their polarized clash. Constitutional incompleteness of either sort arises for three reasons that roughly parallel problems that arise in the commercial contracting context—reasons we call the diverse forms of *deficits of drafting*.41

There are reasons why drafting deficits are inevitable. Start with time. Any negotiation is bounded in terms of time allocated to it, and time constraints are especially important when it comes to constitutional negotiations. Constitutions are typically, though not always, adopted in moments of high political drama and even violent crisis. Often there are what Jon Elster calls upstream constraints that limit the amount of time available to drafters—deadlines that are exogenous fixed and cannot be evaded. These constraints may be helpful to facilitate agreement, as they put pressure on parties to come to agreement. But they also bound the negotiation, and prevent the parties from spelling out a complete set of arrangements, and so the constitutional bargain will of necessity be incomplete. Negotiators may focus only on the largest, most salient issues, leaving more minor ones unresolved. Time pressures contribute to the inclusion of mistakes in the constitutional text, seeding pitfalls for the immediate post-constitution-making period.

A second deficit of drafting relates to knowledge; in the parlance of contract theorists, this is a matter of incomplete information. For those theorists, information is modeled as a public good that will predictably be produced at suboptimal levels. We think this suboptimal production dynamic is not quite the problem in the constitutional context. Instead, it seems likely that information relevant to the constitutional bargain may only be

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41 Huq, "Article V."
42 Elster, "Constitutions and Violence."
revealed after its adoption, leaving constitution makers to negotiate on the basis of their best predictions of what will happen. Most obviously, constitutions tend to be designed to hedge against known risks, where the universe of relevant risks is defined by drafters’ their past experiences. Constitutions will accordingly tend to address the known risks while leaving the polity a hostage to chance when it comes to risks that have yet to materialize (even if they might in some sense be predictable). Compounding the problem further, many major questions about how the constitution will in fact operate cannot be known (unless, that is, a new constitution is characterized by de minimus change in relation to the old constitution). These might include questions of new institutions will actually function; how the relevant domestic or the international environment will change; or what people will demand of their leaders. Indeed, it is arguable that constitutions are sufficiently complex systems that merely avoiding endogenous conflicts that can unravel the system as a whole is a large task, and an appropriate measure of constitutional success.

It is worth noting that one reason we use the term knowledge rather than more conventional concept of information is that the science of constitutional design remains nascent. Even if the problems of incompleteness could be solved in the sense that negotiators perfectly predict what will happen, there is still a choice of institutions that must be made. We have imperfect knowledge about how institutions interact with their environments to produce outcomes. This is a kind of epistemic problem, related to fit, and might lead constitution-makers to choose the wrong institution to resolve a problem that all wish to solve, even if they have access to all otherwise available information.

A third deficit of drafting relates to the task of reaching a durable agreement. Contract theory focuses on multiple strategic barriers to reaching agreement, including “holdout” problems, where one side refuses to give in, in the hopes of getting a better deal. Besides the problem of incomplete information, Elkins et al argue that there is a problem of hidden information hidden in the process of constitutional bargaining. They describe a situation in which one party has information that it is reluctant to reveal to the other side during bargaining. Such reluctance might prevent agreement entirely. Particularly relevant for our analysis, hidden information possessed by one faction of a constitutional deal raises particular challenges in the first period of constitutional performance. Suppose, for example, an ethnic group in a mountainous region has a population larger than is apparent during constitutional negotiations. Counterparties in the constitutional negotiation may prefer an electoral system that might actually advantage the group, but will only become apparent after a post-constitutional census. Once the census is held, the counter-parties might find that they are going to have less power than anticipated, and might in an extreme case simply refuse to hold the election.

Contract theory suggests a second species of problems can arise—which we can call deficits of implementation. The theory of incomplete long-term contracts has identified

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45 As, indeed, one of has argued. Aziz Z. Huq, "Hippocratic Constitutional Design," in Ginsburg and Huq, "Assessing Constitutional Performance."
46 Elkins et al., Endurance of National Constitutions.
two ways in which efforts to realize such a contract can go awry. The first is that parties can fail to make the investments necessary to keep the contractual relationship durable; i.e., they can shade on their obligations under the deal. The second is that they can exploit the investments made by other parties to the deal in order to extract surplus rents from the contract through what is known as “post-contractual opportunist behavior.” In the contracting literature, this is known as the “hold up” problem. It is further recognized that the potential for hold-up has both ex ante and ex post effects. Ex ante, a potential investing party will rationally anticipate the possibility of hold-up and so decline to enter into contracts where that risk exists. Ex post, parties that do enter deals will dissipate resources on both hold-ups and resistance to hold-ups, resulting in intracontractual disputes and haggling that expend resources without commensurate social gain.

In the constitutional context, we call these respectively deficits of will and trust. We address each in turn.

Consider first deficits of will. Here the problem is that performance of the constitutional contract requires political capital. Setting up new institutions or passing legislation to fill in the constitutional contract requires the legislature to actually act. A new legislature, however, is burdened by its own bargaining challenges in addition to those that linger from the drafting and ratification process. In the first period, it may not have developed the necessary cameral apparatus of committees, agenda-setting rules, and deliberation frameworks necessary to resolve contested issues in a timely fashion. It may as a result not implement the instructions given it by constitution-makers. In Nepal, for example, revisiting of boundaries of the new federal units has been on the legislative agenda for over two years, but has not occurred, leading to political violence.

A similar dynamic can take place at the administrative or regulatory level. Suppose a constitution institutes new rules of criminal procedure, but police commanders prefer the old ones and take no steps to train their officers. Or imagine an army that has been mired in civil war for decades, and is suddenly asked to pivot toward a wholly new peacetime role. If officers or bureaucrats want to resist demands for institutional change, they have myriad ways of ensuring that the conservative rather than the transformative vector in constitution-making prevails. Both legislative and bureaucratic agency problems are example of the deficit of will.

A second deficit of implementation concerns trust. In a situation in which parties have concluded an agreement but don’t trust each other, the one who must take the first steps may hesitate. Of course, sometimes parties can learn to trust each other over time, in what is called a course-of-dealing. A famous constitutional example concerns the Spanish transition to democracy, embodied in the Constitution of 1978.\textsuperscript{53} In the negotiations that led to the so-called Moncloa pact, the left’s accepted the monarchy, while the right agreed to democratize the institutions of society. Some years later, in 1982, the Socialist Party won elections but it retained the monarchy during its long rule through 1996. Spain’s left and right wings grew to trust each other in the course of dealing with each other over time.

If such trust is not forthcoming, either because of misinterpretation or because of genuine obstacles to performance, the constitutional contract can unravel in the first period. Suppose the Socialists, for example, had reneged on their promises when they won elections. It is conceivable that the Spanish right wing would have sought to revisit its acquiescence to the deal; if sufficiently power it could mobilize institutions to resist it. In an extreme case, reneging can lead to civil conflict.

The deficits of will and trust provide myriad possibilities for opportunists to ignore constitutional requirements and seek their own advantage. In anticipation, moreover, these deficits of implementation can prospectively shape the politics of bargaining and agreement. In this sense the two sets of deficits interact, and the phases of constitutional drafting and implementation are linked.

To see how these forces can interact, consider the path of constitutional review in Afghanistan under the 2004 Constitution. When the Constitution was being drafted, there had been agreement that there would be a constitutional court of some sort that would engage in judicial review. Constitutional courts were, at the time, a kind of standard constitutional feature, meant to oversee the separation of powers and protect human rights. There was, in this sense, no epistemic deficit in terms of what institution to adopt. However, at the very last stage of constitution-making, with severe external time pressures on the process from the United States and ISAF, the President’s office decided unilaterally to remove the court from the draft. Some believe this was caused by fear that a constitutional court would turn into a theocratic center, a la Iran. In this sense there was a genuine deficit of knowledge. The change upset other negotiators of the constitution, but faced with a take-it-or-leave it offer, the document was approved in early 2004.\textsuperscript{54}

Even if one can say there was formal agreement on this change, the deficit of time meant that there were errors in the draft. The Supreme Court was given the power to review laws and treaties for compatibility with the constitution, but did not allow for constitutional interpretation. In short, the Constitution did not explicitly give any institution the power to interpret it, though a generous reading would say that the Supreme Court should have the task. Three years later, parliament grew upset at the Supreme Court and exploited the poor

drafting to set up a competitor. It relied on another poorly specified institution, the Commission for Supervision of the Implementation of the Constitution, (ICSIC). ICSIC was intended, at one point, to be an institution to oversee the first period, by monitoring the setting up of institutions and passage of necessary legislation. But parliament turned it into an institution to bypass the Supreme Court, creating a conflict among the two institutions. In addition to creating political conflict, the lack of a clear interpreter exacerbates all kinds of constitutional issues.

The story reveals deficits of time, knowledge, and agreement. Uncertainty over how a constitutional court would behave allowed the President to make a last minute change. But time pressures meant it was poorly drafted. Once the constitution began to operate, a deficit of trust became apparent between President Karzai and the forces of the Northern Alliance, which were well-represented in the new parliament. This allowed opportunistic behavior—a deficit of will—in which parliament deviated from good faith understandings of the constitution to a self-serving interpretation. Surely the poor state of constitutional implementation cannot be attributed to the story of this one institution alone, but it is emblematic of the broader forces that have best that country since one optimistic moment in 2004.

Another illustration of the way these deficits interact came from Nepal. In this instance, there was consensus on the need to eliminate the monarchy and produce a more inclusive constitution. But there were significant disagreements among parties as to how to design a new system. The traditional political parties, the Nepali Congress and the United Marxists-Leninists (yes, a conservative party!), sought to preserve their traditional dominance, and represented certain caste and geographical interests. The Maoists, and the Madhesi parties from the Southern part of the country, had been shut out of political power and so sought to reorganize the country along federal lines that would be more inclusive. The negotiations were supposed to be completed within two years of the election of the Constituent Assembly in 2008. However, holdout problems bedeviled the negotiations. Eventually, the deadline slipped and slipped, until the Supreme Court ruled that the Assembly had failed in its task and had to be disbanded. A new constituent assembly was elected, with a different political configuration. Holdout problems continued, however. Agreement on a federal structure was accompanied by an outbreak of severe disputes over the number and orientation of constituent states.

In the absence of consensus, the exogenous shock of the 2015 earthquake pushed the ruling parties to ram through a new constitution without the agreement of the Madhesi parties. While the other parties may have thought they had a stable coalition, the Madhesi were upset that their territorial demands had been met. They have demanded renegotiation of the federal arrangements, and have several times led protests and blockages. This was an instance of a deficit of agreement leading directly to deficits of implementation.

We might add finally a deficit of knowledge. The “outsider” parties early on demanded federalism, even though it is not obvious that this system is viable in a country with 200 languages and many remote populations. It is not clear that more conventional decentralization schemes combined with proportional representation would not suffice to
produce representative and inclusive government. There were no prior boundaries on
which to base the new states, nor prior administrative units that could become state
governments. There are also mutually incompatible demands for previously
underrepresented groups to be able to have their names associated with certain provinces.
The bargaining focused on the numbers, names and boundaries of territorial states, with
central elites preferring few sub-units and traditionally marginalized areas preferring more.

This ambitious choice—to create a federal arrangement without any prior
governmental structure—meant that Nepal was adopting a costly solution. The gap
between the prior arrangements and the new ones was large. Federalism in this context is
being asked to resolve multiple problems at once: a history of exclusion in a context of
tremendous ethnic diversity, but in which the geographic configuration is highly
asymmetric. For the Madhesi population that lives in the lowlands that border India,
territorial federalism makes sense as a way of promoting their self-governance; however,
the delimitation of provinces did not satisfy them and led to violent protests and a reopening
of negotiations. Constitutional amendments to resolve this challenge have not fully borne
fruit. In short, an overly ambitious and unrealistic design choice led directly to failures in
the first period of constitutional implementation.

To summarize, constitution-making is a highly fraught, politically charged and
time-sensitive negotiation in conditions of great epistemic uncertainty. This renders it
likely to generate problems of implementation. Time deficits mean that mistakes will be
made; knowledge deficits mean that, even if drafting is perfect, it will be based on un-
anticipatable contingencies that will affect performance. And deficits of agreement will
create their own challenges, pushing parties toward abstraction, but also perhaps toward
strategic withholding of consent.

Once the constitution is adopted, implementation takes will and trust. Trust is often
in short supply, and may have been damaged during the process of producing the
constitutional agreement. Will is always in short supply, and is threatened by many of the
strategic bargaining problems that threaten constitution-making itself. All this means that
we should expect many challenges in the first period of constitutional implementation.
III. The Plan of the Book

[This section summarizes the chapters and thus provides a roadmap for the volume]