

# 1. Introduction

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Constitutions are topical. Within Europe the rules of political association are under challenge in the Union – both from those who want more done by the Union and from those who want less, including the British who have voted to leave the Union. The rules of political association are also under challenge within the United Kingdom itself, in Italy and in Spain. Belgium is sometimes referred to as a ‘failed state’. Democratic arrangements in several democracies in Central and Eastern Europe are also under strain, including in Poland, Romania and Hungary. In the Ukraine the rules have broken down entirely.

In Latin America, Chile wishes to replace its Pinochet era constitution and Brazil finds itself involved in constitutional conflict over levels of corruption. In Asia, Thailand is constitutionally unstable and Myanmar searches for a settlement with its minorities. In North Africa, the legacy for systems of government of the ‘Arab Spring’ is not resolved. In Turkey, constitutional change to a presidential system has been approved in a referendum.

In the United States, President Obama used the occasion of his 2016 final ‘State of the Union’ speech to Congress to state, ‘If we want a better politics . . . it’s not enough to change a congressman, change a senator, or even change a President. We have to change the system to reflect our better selves.’<sup>1</sup>

The symptoms of stress in systems of democratic government often appear as a political malaise rather than as a constitutional weakness. The malaise is signaled by the rise of populist movements from right and from left and by a distrust of authority in all forms, including not only politicians but also that of religious leaders, as well as the experts who pervade modern government. It is signaled by a protest against the distance people feel from their government, against ‘Brussels’ or ‘Washington’, and by a tendency to characterize political contest as ‘insiders’ versus ‘outsiders’. It is signaled by a resentment of immigrants who provide an easy target in societies whose attachment to existing beliefs and ways of doing things is challenged by much greater social diversity. It is signaled too by the tendency of political debate to harden pre-established positions, rather than to encourage ‘trade-offs’ between conflicting values, by the reluctance

of the losers in political contests to accept the results and by claims that systems are ‘rigged’.

It is commonplace to attribute political malaise to economic causes. The 2008 financial crisis brought an end to an exceptional period of world economic growth sparked by the entry of the former Soviet system, and by China, into global trading arrangements. Long-term economic growth prospects for the global economy now appear much more uncertain. The transition from an age of mechanically assisted living to computer-assisted living is also driving radical shifts in employment conditions and prospects.

The attribution of political discontents to economic determinants is an oversimplification. It also encourages complacency – a belief, or a hope, that as economic prospects improve so the political discontents will also evaporate. This book, however, explores an alternative explanation. It attributes the discontent to the rules of political association themselves. Possibly this discontent too is transient and will pass. It may simply reflect the debate that inevitably accompanies democratic systems of government.<sup>2</sup> It may, however, be that the support needed by democratic systems fails to respond to twenty-first-century conditions. In this case we must treat the discontent as reflecting something more fundamental and long lasting. We need to take seriously the anger in the voices of those who protest against distant ‘elites’, those who feel they are strangers in their own neighborhoods and countries, those who no longer readily accept being losers in electoral contests, and those who see systems of power as ‘rigged’ by insiders against outsiders.

This book therefore looks at the ways in which the traditional rules for democratic political association may have become dysfunctional. It explores how we would go about reconfiguring the content of a constitution for a democratic society, starting from first principles, if we were to make one now.<sup>3</sup>

## CONSTITUTION MAKING

The focus on constitutions for democracies means that this exploration into constitution making starts with the normative assumption that the design of the constitution should be supportive of democracy. This means it should specify the relationship between citizens and those with authority in terms that are consistent with democratic standards such as freedom of expression and association. It means that the rules should not just be about the mechanics of attributing powers, but also about the character of a democratic society.

A political entity can have a constitution without being a democracy.

China has a constitution. It is not a democracy. Almost all countries around the world have constitutions. The challenge is about how far they provide the kind of structural support that democracies now require. The challenge is one that applies to all constitutions in democracies around the world – the new as well as the old; to the European Union and its members, and to countries outside.

The phrase ‘constitution making’ can be interpreted in different ways. It can be seen as about the actual processes and practices of putting together a constitution, and about the norms that should govern those processes and practices.<sup>4</sup> It can also be seen as centered on what goes into the rules themselves – either by taking inspiration from the content of existing constitutions around the world, or by starting from a normative perspective of what should be in the content. The different perspectives on content can also be combined.<sup>5</sup>

Contemporary analysis is uneven.<sup>6</sup> There are comparative studies of actual constitutions.<sup>7</sup> There is an extensive literature on the impact of changes in particular rules. There are also descriptions of constitution-making processes in particular contexts. This study focuses on the composition of rules. It is about what should enter into the content of the rules for a contemporary constitution from the normative viewpoint of a democratic society.

Although the perspective is a normative one, the analysis is backed by empirical evidence and examples. Constitutional examples are mainly drawn from the Treaties of the European Union.<sup>8</sup> The precise status of the Treaties is contested in politics. However, the reason for using the Treaties is that they represent a contemporary attempt to create a constitutional framework. Moreover, they have relevance beyond the challenges faced by the European Union itself. The discussion also draws on other examples from around the world. At the same time, the conclusions take only limited inspiration from existing constitutions. Replication of what is already out there simply risks locking in the past.

## THE APPROACH TO THE ANALYSIS

There is no generally agreed analytic approach to the content of constitutions. As discussed later, each potential starting point has its own drawbacks. However, one requirement, applicable to all and any approaches, is to distinguish between different levels of constitutional analysis, the different units of observation that are germane to the different levels, and to specify the connections between levels and between levels and units.

**Units of Observation and Levels of Analysis**

Different levels of constitutional analysis range from the ground level of day-to-day interactions under the constitutional rules, to the organizational level of bodies and institutionalized rules, and to the 'meta' level of the overall framework itself.<sup>9</sup> The meta level involves a focus on the dynamics of system inter-relationships, the stability of the framework and the need for oversight.

Individual behavior is important at each of these levels as a basic unit of observation. For example, assumptions about individuals are important for thinking about how individuals react to social differences at the ground level. Assumptions about individuals are also important at the organizational level for analysing how people relate to democratic politics and approach problem solving. At the meta level they are important too for the way in which we treat our privacy and think about consent to constitutional rules. However, individual behavior is not sufficient by itself.

Another key unit of observation is that of groups. At the ground level, group affiliations often provide the way in which individuals reduce uncertainties and make sense of the world around themselves. At the organizational level, the associative and aggregative role of parties and other social affiliations are crucial in assessing the weaknesses and strengths of democratic politics that depends on party and other group affiliations. At the meta level, in modern heterogeneous societies, group behavior is also crucial for thinking about how to provide the guiding norms of a democratic constitution. For example, guiding norms are typically provided as declarations of rights. Later analysis discusses how groups may form 'linked ecologies' that influence the guidance that rights can provide.

Not only does each level of constitutional analysis have to respond to both individual and group interactions and behavior, but also, at the 'meta', or macro level, a key unit of observation is the system. System analysis directs attention to how systems of social coordination and authority, the political system, the law, the market and its regulators, expert bodies, and civil society, differ in their characteristics, respond to the demands placed on them and how they behave together.

The need to distinguish between and to connect different levels of analysis, and different units of observation in constitutional thought and practice is not a new problem. The founders of the American constitution saw the separation of powers at the institutional level as a way to respond both to the imperfections of human nature at the ground level and to organizational behavior (the tendency of the executive to encroach on other powers) at the mid level and to achieve stability at the meta level. Human nature has not changed. However, the challenges facing demo-

cratic governments have changed, societies have changed and the interactions can no longer be expressed in terms of a simple separation of powers.

In the light of this requirement to distinguish between different levels of analysis and units of observation, there is a key choice to be made between the adoption of a single perspective, or an eclectic approach that draws on a number of different strands in the social sciences.

A single perspective such as that provided in recent decades by analysis based on 'self-interest', or distributive fairness, or democratic 'discourse' provides for consistency and rigor of treatment across a wide canvas. The drawback is that it leads to a huge simplification of actors, relationships and levels of analysis. The key aspects of contemporary society that constitutional analysis must grapple with all require an eclectic approach that can draw on a wide variety of perspectives and disciplines. The major elements in this more eclectic approach adopted in the analysis are as follows.

### **Motivation**

A central issue in constitutional theory is about why people would ever want to allow others to wield authority over them. Later analysis of motivation adopts the starting point of individual motivation rather than some assumed collective or civic purpose.

This starting point also animates constitutional economics. Constitutional economics applies the tools and insights of economic analysis to the choice of constitutional rules. However, the analysis here incorporates a greater mix of behavioral assumptions than the assumption of the pursuit of self-interest that underlies much constitutional economics. This follows a trend in recent economics to try to incorporate a wider variety of assumptions about human behavior beyond material self-interest. The analysis thus employs an extended concept of 'utility' that includes the emotive and the normative as well as the material.

The effect of broadening assumptions about motivation is to open up constitutional economics to a wider range of social science views about what lies behind a constitution. Notably, it allows for a more extended discussion of key constitutional concepts such as 'togetherness' and 'fairness'.

### **Social Diversity**

Any discussion of constitutions fit for contemporary circumstances must draw on the literature dealing with the heterogeneity, or deep diversity, of modern societies. The existence of deep social divisions is long-standing for many societies. So too, unfortunately, is the use of differences in religious beliefs in order to achieve political purposes, or power in the

community. Immigration, combined with Islamic terrorism, has given social, ethnic and religious diversity a new and disturbing edge for many democracies. More generally, the challenge to established patterns of thinking and behavior has stimulated defensive and aggressive behavior by both majorities and minorities.

The analysis makes an assumption that constitutions should not address underlying differences in values and belief systems, such as whether a person is Christian, or Muslim, or Hindu. Constitutions, however, do need to provide ways to address differences in social practice, such as the treatment of women, or future generations, that emanate from underlying beliefs and values.

When cultural distinctions are reflected in territory then their constitutional treatment is relatively straightforward. The constitution can make territorial divisions of power that reflect cultural distinctions. In today's world, however, cultural distinctions are more often encountered in shared urban settings, shared service provision and shared work places. In shared settings this diversity can be experienced as a daily questioning of our preferred way of doing things, of our established preconceptions about the kind of society we want to live in, and of our prior thinking, beliefs and values. Some may welcome the daily challenge. Others do not. Their constitutional treatment becomes correspondingly more difficult.

In discussing how we encounter very different social practices in a shared space, the analysis rejects binary distinctions, such as those employed in much multicultural theory, between values that are 'cultural' and 'other' values. Instead, it distinguishes between three different dimensions of social and cultural diversity. First, there is the spectrum of different social attitudes and practices; secondly, the range of external effects on others of the different practices; and thirdly, the different behavioral responses that can be stirred by these external effects.

Deep social diversity challenges the assumptions behind both constitutional economics and discourse democracy. The analysis therefore adopts an alternative approach. It takes a cognitive perspective and turns to the findings of social psychology in order to discuss the different ways that individuals and groups react when their norms and practices come under challenge from others. The constitutional issue is how to encourage cooperative rather than defensive reactions by individuals and groups.

## **Fairness**

Fairness is a central concept in the encouragement of cooperative behavior. The discussion therefore also gives it a central place in the constitutional framework. In doing so, it departs from a tendency in constitutional

economics to see fairness as something to be treated under the rules rather than something to be embodied in the rules themselves.

The analysis draws on different strands in the social sciences, including game theory, to distinguish between three different concepts of fairness. One is about distributive fairness – sharing. The second is about fairness as equality. The third is about the importance of ‘playing fair’.

Fair play hinges on the concept of reciprocity. Reciprocity highlights ‘relationship values’ and the concern of individuals about how fairly they are treated by others, rather than on the distribution of final rewards and outcomes. It is the operative concept when there is no shared understanding about what is fair distribution – for example, about whether recent immigrants have an immediate claim on social benefits such as housing. Relationship values are key when we rely on constitutions to help guide diversified societies through the uncertainties and anxieties of new and unfamiliar social relationships that provide a continuous challenge to our established beliefs, attitudes and behavior.

The concept of fair play provides a different way of looking at the fairness of a modern constitution. However, there is a connection with both fairness as sharing and fairness as equality. It arises because playing fair is concerned with power relationships and in particular with blind spots in the way power is exercised. Power, in turn, is linked both to distribution and to equality. Concepts of playing fair thus include a role for norms that give weight to these other dimensions of fairness.

The normative guidance offered by constitutions can take two different forms. It can be provided by an ‘additional player’ in the constitutional framework – such as a second legislative chamber. Additional players can make up for blind spots in electoral politics and provide for extra representation, transparency and oversight of relationships. Guidance can also be provided by norms such as rights. Rights provide for rule-based behavior to compensate for biases in judgment. The analysis draws on institutional economics in order to analyse both the need for additional players and the role of rights.

### **Rationality and the Emotive**

The analysis assumes that constitutional choices are rational. But it looks beyond the definition of rationality behind what is known as ‘rational choice’ theory relied upon by much constitutional economics.<sup>10</sup> Instead, it draws on social psychology for a wider account of what is rational. In particular, the discussion makes use of a distinction drawn from social psychology between ‘source’-based rationality and ‘content’-based rationality.<sup>11</sup>

The distinction flows from theories of 'bounded' rationality that recognize that people take short cuts in their everyday decision making. 'Bounded rationality' takes different forms for different actors in different circumstances. In today's world of the social media, the 'tweet', false 'news' stories and mismatched attention spans, short cut methods of communication are particularly relevant to the world of democratic politics.

'Source'-based rationality is about how we use short cut methods of decision taking in politics based on the interdependence of our own decision making with the decision making of others. It draws attention to the way we rely on our social affiliations and the emotive in making political choices and take into account the personality of candidates for political office rather than the detail of their programs. It is about the messenger rather than the detailed content of the message. Thus, electorates can vote for Brexit without debate about what kind of Brexit they want, or vote for 'the Donald' (Trump) without too much concern as to whether he offered a coherent program.

By contrast, 'content'-based rationality involves a search for and assessment of the best information available to society. It involves looking outside politics, largely to the law and to the role of expert and regulatory bodies. It underlies the analysis of decision taking that is conducted in an analytic and methodical way. It involves a deductive and causal logic rather than an associative logic. It is essential for thinking about the ways in which constitutions can provide support for problem management in modern circumstances.

Associative, or 'source'-based rationality provides a means of integrating emotions into the thinking process. It does not assume that emotions necessarily stand in opposition to thought. They may aid it. Early theorists of democracy saw the two going hand in hand. However, associative rationality also leads to obvious weaknesses in the democratic process. It provides a fertile ground for communication failure in politics, both because we associate with those with whom we agree and share a viewpoint, and because we do not pay full attention to the content of what is being proposed. There is a huge potential mismatch between short cut decision taking and carefully considered approaches to problem management. In the worst case, there is a dangerous progression from our receptivity to biased communication in political debate, to populism, and to an undemocratic use of deliberately manipulative messaging and spreading of false stories in order to distort and cut off debate.<sup>12</sup> The constitutional framework itself therefore has to take into account the ways in which short cuts are used, their strengths and their weaknesses.

**Dual processing**

The distinction between content-based rationality and source-based rationality belongs to what are called ‘dual processing’ theories of social cognition. They stand in contrast to one fashionable view that all styles of reasoning can be brought together through the social construction of meaning.<sup>13</sup> Dual processing also stands in contrast to one of the main themes in recent political theory that presents a picture of rational political deliberation unified around a reasoning process culminating in ‘reflective equilibrium’. Reflective equilibrium, as an ideal, involves political decisions taken after all possible descriptions and all philosophically relevant arguments have been given.<sup>14</sup> Even when the concept is adapted to a non-ideal world it stands apart from dualism. The approach adopted thus departs from the assumptions underpinning concepts of deliberative, or discourse, democracy.<sup>15</sup>

Dual processing accounts of the ways in which we make choices and decisions appear to have greater empirical support than accounts of unified rationality – particularly in the context of democratic politics. However, dual processing presents its own challenge. The challenge in constitutional terms is about where it is desirable for the two styles of reasoning to be brought together in order to avoid mismatched decision taking, and how to do so.

The analysis looks at how the two forms of logic can be brought closer together through ‘qualitative analytic’ constitutional rules. These call for sequencing procedures that encourage ‘trade-offs’ between the different prescriptions offered by different rationalities and between conflicting values. They provide a pragmatic form of a ‘logic of consequences’.

**Organization and Chains of Intermediation**

Constitutions have always had to define relationships between different forms of authority. These relationships can be seen along a ‘horizontal’ axis as, for example, expressing the relationship between politics and the law. They can also be seen along a ‘vertical’ axis as, for example, between different bases for representation for different legislative or executive bodies. In recent discussion, concepts in political science such as ‘veto points’ and ‘consociationalism’ attempt to combine important aspects of both horizontal and vertical relationships into a single measure.

The analysis rejects the idea of a single, combined, or composite measure. Instead, it makes a basic distinction between decision making that relies on segmentation, specialization and disaggregation (the world of expert bodies and the law) and decision making that relies on the aggregation of opinion (the world of politics). They involve the underlying

differences in rationality already noted. In organizational terms a related distinction is made between systems that are brought together through 'hierarchy' and those that are 'loosely coupled'.

This broad distinction is crucial for discussing the growth of intermediation in systems of government. We are all aware of how traditional patterns of distribution and delivery in the market have been disrupted by the internet. Similarly, in political systems we can no longer view intermediation as a simple act of delegation between a principal (the voter or citizen) and an agent (an elected representative body, or an expert or regulatory body whose activities are established by an elected body such as Congress). Intermediary bodies provide the key mechanism for connecting hierarchically organized bodies with those that are loosely connected. However, their growth in importance underlies much of the feeling of distance between citizens and those with power. The analysis makes use of theorizing in institutional economics about the structure of intermediation in markets in order to discuss the parallel phenomenon in politics.

## THE KEY CHALLENGES AND RESPONSES

The key challenges arising from the analysis, and the avenues they suggest for the updating of constitutions, are as follows.

### **Common Knowledge of New Actors and the Way We Manage Problems**

The first challenge is about the way problem solving, or problem management, is approached in order to meet the demands of contemporary democratic electorates. Traditional constitutional descriptions of key institutions do not reflect the way authority is now diffused among new players in public life and in civil society. Nor do they reflect the way we call on different forms of rationality to tackle the problems. Any constitutional response must recognize different forms of rationality and the implications for the way in which authority is organized.

The required constitutional response is framed in terms of our approach to the methods of content-based decision making. It is about how constitutions can provide support to ensure that the substantive content of policy is as well considered as possible. Otherwise, democracies will be undermined by their failure to manage the myriad demands confronting systems of government.

The discussion of constitutional treatment hinges on the character of the decision-making setting. In modern circumstances the setting is generally badly structured. Constitutions can provide support for a content-rich

and considered approach to decision taking by better structuring the decision-taking setting. This means recognizing the advantages of specialization and segmentation. It requires thinking about the organizational advantages of segmented, parallel processing and ‘loose connections’ between branches in the ‘horizontal’ arrangement of powers.

Recognizing the new horizontal arrangement of powers involves updating constitutions in order to widen their institutional base. We cannot reduce the scope of constitutional content by wishful thinking about democratic relationships between the old and new actors with authority in public policy making, or by a casual conflation of different organizational principles through the construction of veto points, or through consociationalism. Recognition is not simply a technocratic issue. All citizens and actors in a democratic society need to be able to recognize the new actors with authority, to possess a common understanding of the different arenas where authority is now exercised, to understand how it affects them and to be aware of the avenues of appeal and redress. In today’s world, the everyday encounter of people with authority is not through direct involvement in politics or the law. It is through contact with the new intermediaries.

### **The Way We Think About the Role of Democratic Politics: The Transvaluational and Political Persuasion**

The second challenge is about the role of democratic politics itself. Traditionally, democratic politics has a major role to play in managing potential conflicts within a diverse democratic society. It can be seen as providing the means to achieve accommodation and compromise when there are deep differences in society. It can also be seen as providing the forum where all interests have a place and where, in case of disputes, the final word is said.

There are drawbacks to thinking about democratic politics in terms of providing finality to disputes. Most problems of public policy are never settled with finality. They simply change their shape. In addition, conflict management, taken as an overriding goal, can cement a ‘stand-off’ mentality in heterogeneous societies and lead to accommodation at low levels of agreement.

A different response involves the idea of democratic politics as providing a socially adaptive pathway that moves us towards some temporary ‘better’ position. In this connection the analysis highlights what is later referred to as the ‘transvaluational’ role of democratic politics.<sup>16</sup>

The ‘transvaluational’ role refers to the advantages of democratic politics as a way of organizing social discussion with a breadth that can encompass narrower forms of social affiliation and more limited social valuations. The

challenge is to provide democratic politics with the further support it needs in order to provide a path through conflicting and incommensurate values by encouraging ‘trade-offs’.<sup>17</sup> We cannot assume a world of overlapping social values. Democratic politics cannot find such pathways, or bring conflicting valuations together, unaided.

Central to the constitutional support needed for the transvaluational role of politics is the approach to hierarchy. Hierarchy is about how decisions are to be taken at the highest level in a political association. Many, and possibly most decisions do not have to go to the top. They can be settled at lower levels of government or within loosely connected centers of authority. Nevertheless, hierarchy is crucial for settling unresolved disputes, as well as for correcting perceived errors made at lower levels. It also represents the point at which any prior decisions can be recalled or reversed. Hierarchy is the point at which we may have to select between different styles of reasoning, take into account the widest range of values in our search for an improved position, and make trade-offs.

Hierarchy is critical because it is where people are most likely to feel at the greatest distance from decision taking, where what has to be decided at the highest level is often arbitrary, and where the exclusionary impact of rules for making decisions, such as majority voting, are likely to be felt in an acute form. It is where the consequences of polarization will be most pronounced.

The analysis examines different models of politics and the different models of persuasion that they incorporate. It shows that we cannot rely on normative assumptions about the reflective qualities of democratic discourse to overcome polarization. Such wishful thinking is contradicted on a daily basis by the way politicians actually behave and communicate, and by the way politics is actually practiced. Instead, the analysis points in the direction of the importance of the ‘qualitative analytic’ procedures referred to above. These are procedures that use heuristics, such as sequencing the decision-making process, to supplement the short cuts we use in everyday political debate. They provide procedures or ‘path rules’ that help decision makers to be more attentive to a wider range of thinking about disputes that reach the top and to avoid mismatches between decisions that can be arrived at quickly and those that require greater consideration.

### **Missing Players and Chains of Intermediation**

The third challenge and area for constitutional updating is about the possible need for ‘additional players’ – extra institutions that plug critical gaps in other constitutional arrangements and make up for the blind spots in democratic politics. Traditionally, the need for an additional player has

been recognized in the form of a second legislative chamber. Its task has been to adjust for asymmetries and possible unfairness in the pattern of representation that might arise with just one chamber.

In order to identify where an additional player, or players, might be needed to ensure fair play in modern circumstances, the analysis looks at relationships in contemporary systems of government as chains of intermediation. As mentioned earlier, the analysis avoids any prior assumption, that, in democracies, such chains can be expressed in terms of relationships between voters as principals and governments as agents.<sup>18</sup>

The analysis distinguishes between the forces driving longer chains, greater dispersion and the positioning of intermediaries, including the need for oversight. It discusses how longer and more dispersed chains affect the three basic advantages of democratic politics – the way democratic politics provides for the widest possible span of association, the way it provides for selecting priorities among the many possible collective objectives and the way it offers a means to provide feedback to those with authority. In order to maintain these three basic advantages, the approach identifies where there is a need for additional players at the beginning, middle and end of chains of intermediation.

### **The Principle of Consent: Rights, Benchmarking and Legitimacy**

The final challenge is about the importance of consent to the rules of association. Traditionally, the idea of a democratic constitution rested on a principled foundation of consent. Consent, in turn, rested on the notion of a clear division between the private sphere and the public. In modern circumstances that clear division has been lost. The principle of consent has been reduced to a ‘secondary’ role. We need to consider how far meaning to the principle of consent could and should be restored, even in the absence of the traditional divide between what is private and what is public.

The issue hinges on the role of declarations of rights in constitutions. Assertions of rights have played a key role in the transition between a constitution based on consent to a constitution whose legitimacy rests on the way in which people can identify with its content. The recent constitutions of democratic societies, including the European Union, are characterized by a profusion of claims about rights.

The analysis avoids traditional discussion about the philosophical derivation or standing of rights. The discussion is about their application. It distinguishes between two purposes of declarations of rights. The first is labeled a ‘benchmarking role. In this role rights aim to provide rule-based guidance for decision taking in complex normative settings. They include

both 'substantive' rights, those that are about the content of economic and social choice, and procedural rights, such as a right to vote.<sup>19</sup>

The analysis draws an analogy between rights and the role of financial benchmarks in what are known as 'search markets'. In financial markets, benchmarks, such as financial indices, assist the process of search because they aggregate relevant information, enable comparisons to be made, and draw attention to anomalies in valuations. Rights can potentially achieve the same purpose in the broader social setting. The key question in respect of their constitutional treatment is how far they share the same failings as benchmarks in financial markets.

In addition to their role in providing normative guidance, rights also potentially play a key role in justifying the authority conveyed in constitutions. They direct attention to the fundamental norms that people can unquestioningly associate themselves with.

Constitutional treatment depends on how far we can look to the internal materials of a constitution, and in particular to the fundamental norms expressed in it, in order to ground its underlying authority. If we allow for the possibility that the formation of social norms involves processes that are only partly dependent on constitutional processes, then there is always the possibility that constitutional norms will be challenged. It is important to maintain this possibility and for people, in the last resort, to be able to say 'no' to the system under which they are governed. The updating of democratic constitutions thus requires a reinstatement of the principle of consent and the procedures for making consent a workable reality.

## THE ORGANIZATION OF THE INQUIRY

The book is divided into three main parts following a brief overview of constitutional concepts in relation to democracy (Chapter 2). Part I diagnoses the ways in which constitutions fail to provide the structural support that democracies require in current social, political and economic conditions (Chapters 3–6). The investigation suggests that crucial elements in the structural elements of constitutions have become out-of-date in some fundamental way. The functional foundations do not reflect the importance of new actors and their arenas and there are new sources of instability. Above all there is the need to address the profound social diversity of modern societies. The part concludes on the need to go back and look at the basic underpinnings of a constitution.

Part II goes on to look at the basic underpinnings and to refine the challenges faced by modern constitutions. It selects the key motives and underlying reasons for making a constitution that explain why we look to

constitutions to have a particular content. It discusses in turn each of the material, emotive and normative motivations. It identifies the different ways in which the desired content can be expressed (Chapters 7–10).

Part III takes the further step of developing the constitutional responses that are needed to meet the key challenges (Chapters 11–16). What links the responses together is the need to achieve fairness in relationships in highly diverse modern democratic societies. It is fair play that requires constitutions to provide citizens with a common understanding of the extended arenas where authority is now exercised; it is fair play that requires democratic politics to be supported by additional rules to provide pathways through our differences; it is fair play that requires us to think about the need for additional bodies to correct for blind spots other than through traditional second chambers; and it is fair play that requires us to think more carefully about the uses and misuses of assertions of rights and the extent to which the legitimacy of a constitution can rest on the basis of exemplary content alone.

The final chapter summarizes the conclusions and what they mean for upgrading the content of a constitution that would support contemporary democratic political association.

## NOTES

1. As reported in the *Washington Post*, 12 January 2016.
2. Vernon Bogdanor predicted back in 1988, ‘Precisely because liberal democracy is a particularly open and non-definitive method of government that constitutional change is likely to be a permanent feature of the politics of democratic states well into the twenty first century’ (Bogdanor 1988a: 386).
3. Buchanan and Tullock define a constitution as ‘A set of rules that is agreed upon in advance and within which subsequent action will be conducted’ (1962, Preface, vii). Kiser and Ostrom offer a similar definition: ‘Constitutional decisions are collective choices about rules governing future collective decisions to authorize actions. Constitutional choices, in other words, are about decision rules’ (Kiser and Ostrom 1982: 208). Alec Stone Sweet notes that there is no fixed consensus on how to define a constitution and offers a more comprehensive definition: ‘A constitution is a body of meta-norms, those higher order legal rules and principles that specify how all other legal norms are to be produced, enforced and interpreted’ (Stone Sweet 2008: 219). Krisch also notes the lack of a generally agreed definition and offers, ‘A framework that determines how political actors can pursue their causes’ (Krisch 2010: 27). On the whole the parsimonious definition of Buchanan and Tullock is to be preferred so as to minimize prejudgment about content.
4. Jon Elster noted back in 1995 that ‘there is no body of literature that deals with the constitution-making process in a positive, explanatory perspective . . . Another noteworthy gap in the literature is the absence of normative discussion of the constitution-making process’ (Elster 1995: 364–5). Magalhães observed in 2013 that ‘Almost two decades later, the diagnosis can be somewhat less pessimistic’ (Magalhães 2013: 435).
5. Congleton refers to a ‘third level’ of analysis different from the analysis of the rules themselves or politics under the rules (Congleton 2010: 19).

6. Voigt notes that research contributions are ‘unbalanced’: ‘Only a handful speak to the emergence and modification of constitutional rules’ (Voigt 2011: 206).
7. See, for example, Galligan and Versteeg (2013), Elkins et al. (2009) and Taylor et al. (2014). For an earlier comparative study see Bogdanor (1988b).
8. Sanford Levinson (2012) offers an account of what he sees as the failures of the American constitutional framework in modern circumstances.
9. Organizations can be distinguished from institutions defined as the underlying rules of the game (see Ostrom 2005).
10. Buchanan and Tullock (1962: 33–4) set out the assumptions behind rational choice theory in a constitutional context in terms of an individual who chooses more rather than less, can rank alternatives of collective choice as well as alternatives in the market and can rank bundles of collective goods as well as bundles of private goods. Herbert Simon identifies four key assumptions: a cardinal utility function; an exhaustive set of alternative strategies; a probability distribution of scenarios for the future associated with each strategy; and a policy of maximizing utility (Simon 1983: 13).
11. Chaiken (1980).
12. For a recent discussion see, for example, Stanley (2015).
13. See Berger and Luckman (1966).
14. Rawls (1971: 48) defines reflective equilibrium in ideal terms as ‘the state is reached after a person has weighed various proposed conceptions and he has either revised his judgments to accord with one of them or held fast to his initial convictions’.
15. The assumption adopted, for example, in the constitutional analysis of Sunstein (2001).
16. The organizational concept comes from Lipset (1959 [1983]: 486).
17. This account differs from the ‘epistemic proceduralism’ offered by David Estlund. It does not define epistemic value in a ‘tendency to make correct decisions’ mirroring the unified norms of reasonableness of deliberative democracy. Neither does it contend that decision making by experts is the opposing alternative mode of decision making. See the discussion in Estlund (2009).
18. It thus differs from the assumptions behind the comparative constitutional analysis of Taylor et al. (2014: 85–90).
19. The Charter of Fundamental Rights of the European Union (2000/C 364/01) lists about 20 areas of social rights including right to family life, to education, to work, to collective bargaining, to healthy working conditions, social and housing assistance and to medical treatment.