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# 1. Introduction to *Comparative Constitution Making*: The state of the field

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In a seminal article more than two decades ago, Jon Elster lamented that despite the large volume of scholarship in related fields, such as comparative constitutional law and constitutional design, there was a severe dearth of work on the process and context of constitution making.<sup>1</sup> Happily, his point no longer holds. Recent years have witnessed a near-explosion of high-quality work on constitution-making processes, across a range of fields including law, political science, and history.<sup>2</sup>

This volume attempts to synthesize and expand upon this literature. It offers a number of different perspectives and methodologies aimed at understanding the contexts in which constitution making takes place, its motivations, the theories and processes that guide it, and its effects. The goal of the contributors is not simply to explain the existing state of the field, but also to provide new research on these key questions.

Our aims in this introduction are relatively modest. First, we seek to set up some of the major questions treated by recent research in order to explain how the chapters in this volume contribute to them. We do not aim to give a complete state of the field, but we do lay out what we see as several of the biggest challenges and questions posed by recent scholarship. Second, we offer a brief outline of the 25 substantive chapters found in the volume.

Part I of this introduction asks two foundational (and surprisingly difficult) questions: how we can define constitution making, and what its motivations are. Part II explores the dominant theory of constitution making, constituent power, and the various challenges to it. Part III looks at several aspects of recent work on the process of constitution making. Part IV examines recent work on the ways in which constitution making can ameliorate or exacerbate differences between groups, while Part V looks at the key issue of globalization versus enduring divergence in constitution-making models. Part VI maps the remainder of this volume, while Part VII briefly concludes.

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<sup>1</sup> Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364, 364.

<sup>2</sup> We cite a number of these contributions throughout this chapter. For overviews of the literature, see Laurel E. Miller (ed.), *Framing the State in Times of Transition* (US Institute of Peace 2009); Mark Tushnet, 'Constitution-Making: An Introduction' (2013) 91 *Texas Law Review* 1983; Gabriel E. Negretto, 'Constitution-Making in Comparative Perspective' *Oxford Research Encyclopedia of Politics* (Oxford University Press 2017); Denis J. Galligan and Mila Versteeg (eds.), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013).

## I. WHAT IS CONSTITUTION MAKING? WHY DO IT?

One of the most perplexing questions in the field is also perhaps its most basic: what is constitution making? This question has received sustained attention in recent work, as scholars have focused renewed attention on theories of constitutional change. Virtually all written constitutions contain some provision for formal constitutional amendment, since amendment plays a number of well-recognized functions like responding to social and technological change and allowing for popular input into constitutional meaning.<sup>3</sup> Constitutional amendment is used to alter the existing constitutional text. Constitution making, in contrast, is generally viewed as the process of replacing the existing constitutional order completely. But relatively few constitutions contain replacement clauses regulating the process of constitution making, and even when they do there is no guarantee that the clauses will actually be followed, since actors may instead step outside of the existing legal order.

As Albert notes in his chapter, an increasing number of courts and commentators have sought to distinguish between amendment and replacement based on the degree of substantive change that is wrought to the existing legal order. Some changes purport to be amendments, but in fact represent sweeping changes that in effect replace the existing constitutional order with a new one. Doctrines of unconstitutional amendment, and related theories of constitutional change, call on courts to police this boundary by assessing the impact of a given change on the current constitution and its core principles.<sup>4</sup> Such doctrines can be viewed as a way of ensuring that actors use the (presumably more demanding) procedures for constitutional replacement when that is effectively what they are doing. But a definition depending on the degree or substantive nature of change may both be too imprecise and ultimately prove under-inclusive for our purposes. Even in cases where constitutions have clearly been replaced, a very high percentage of the content of the old and new texts is often the same. National constitutions are “sticky,” in this sense, not only across amendments but replacements as well.<sup>5</sup>

An alternative, one implicitly adopted by many of the chapters in this volume, is to refer to an event as constitution making when the actors themselves say that is what they are doing. In most cases, at least, constitution making tends to have a shared set of characteristics. Actors enter a constitutional moment where they self-consciously embark on a project of constitutional replacement. The actors themselves recognize that they are engaged in a project that is beyond, and in some sense outside of, ordinary politics or even ordinary forms of constitutional change. These processes tend, at least in the modern world, to share a familiar set of procedures such as elections to special assemblies, referenda, etc. The procedures typically involved in constitution making are a major focus

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<sup>3</sup> Rosalind Dixon, ‘Constitutional Amendment Rules: A Comparative Perspective’ in Rosalind Dixon and Tom Ginsburg (eds.), *Comparative Constitutional Law* (Edward Elgar 2011) 96.

<sup>4</sup> Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017); Rosalind Dixon and David Landau, ‘Tiered Constitutional Design’ (2018) 86 *George Washington University Law Review* 438; Richard Albert, ‘Constitutional Dismemberment’ (2018) 43 *Yale Journal of International Law* 1.

<sup>5</sup> Ozan Varol, ‘Constitutional Stickiness’ (2016) 49 *U.C. Davis Law Review* 899.

of the chapters in this handbook. These processes normally end, if they are successful, with the promulgation of a wholly new constitutional text.

A definition that focuses on the self-professed intent of the actors elides some major definitional issues. For example, it clarifies that constitution making can be carried out either inside or outside the existing legal order. That is, it can be “revolutionary” in the Kelsenian sense of involving a legal break with the existing order, but it need not be. Not uncommonly, constitution making is carried out by using rules found in the existing constitution itself. Likewise, constitution making is most commonly carried out using a set of procedures that are distinct from those involving amendment, but again this need not be the case. A prominent recent example is Hungary, where the 2012 constitution was clearly a wholesale replacement of the existing text, but was drafted and voted upon by the Parliament using the same two-thirds supermajority rule that is needed to amend the text.<sup>6</sup> The Fidesz party, which drafted the text unilaterally, successfully argued that no more exigent procedure was needed to replace the old constitution.

To be sure, some cases will not comfortably meet the core definition. Some constitutional cultures – an example is the Dominican Republic – have the tradition of labelling every constitutional change, no matter how minor, a new constitutional text: many such changes are better labelled amendments than constitution-making episodes. In other contexts, after an episode that includes many of the procedures characteristic of constitution making and a massive overhaul of the existing text, actors may nonetheless seek to call the new text a continuation of the old one. There are also cases that challenge the classic conception of constitution making as occurring within a defined period of time or constitutional moment. One of us in prior work, for example, has drawn attention to cases where constitution making is more iterative and gradual, as in Israel, and highlighted potential advantages as well as dangers of such an incrementalist approach in contexts of deep division.<sup>7</sup> Furthermore, the chapters in this volume take a broad view of a constitution and thus go beyond the typical case of the making of a written document. For example, it includes a chapter on the making of an unwritten constitution (McLean), as well as the making of ancient constitutions (Springborg). So we will simply say, for now, that *most* cases involve a set of actors self-consciously seeking to write an entirely new written constitution in a defined period of time.

Interestingly, the recent scholarly attention on issues of constitutional change indicates a move away from the question of constitution making *ex nihilo*, which has been at the center of constitutional theory for much of the 20th century.<sup>8</sup> This shift may be explained by the mere empirical fact that in recent decades almost all countries already have written constitutional texts. It also signifies a recent and welcoming broadening of the comparative perspective on constitution making, shifting away from a Western-based imagination, which tended to heavily rest on the American “Philadelphia moment” or the French

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<sup>6</sup> Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele, ‘Hungary’s Illiberal Turn: Disabling the Constitution’ (2012) 23 *Journal of Democracy* 138.

<sup>7</sup> Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press 2011).

<sup>8</sup> Claude Klein and Andras Sajó, ‘Constitution-Making: Process and Substance’ in Michel Rosenfeld and Andra Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

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revolution. Such an expansion of the comparative horizons beyond the Western world is reflected in the great variety of cases discussed in this book, encompassing dozens of countries in six continents.

Why write a constitution? Empirical work shows that excluding three famous exceptions, all countries around the world have completed the drafting of a formal constitution at least once.<sup>9</sup> This may be because of the many benefits, such as coordination and credible commitment, that written constitutions are said to provide. Or it may simply be that constitutions, like national flags, are now a nearly mandatory accoutrement of national sovereignty. Regardless, new or decolonizing states generally go through a constitution-making process. States experiencing a regime transition, for example from an authoritarian to a democratic regime or vice versa, also often, although not inevitably, do so. Similarly, constitution making is often perceived as an important component in peace building processes, aiming at ending a violent conflict.<sup>10</sup> Given the major place constitution making had taken in world politics in recent decades, it may even be argued that drafting a new constitution at the foundational stage of the state, or at a moment of major political change, became one of the strongest and most prevalent international norms.<sup>11</sup>

Perhaps most interesting are those cases where countries replace their constitutions without becoming new states or experiencing a change in regime type. As noted by Elkins, Ginsburg, and Melton, the mere endurance of a constitution is not an unmitigated good.<sup>12</sup> Some constitutions deserve to be replaced for functional reasons, for example because their scheme has made governance too difficult, or they have lost popular support. Across countries, deep political, social, and economic crises appear to be correlated with constitution making.<sup>13</sup> Constitutions may also be replaced because of the ambitions of parties and leaders, as an instrument to achieve their goals or consolidate power. For example, the desire for reelection has been a significant factor in explaining constitution making in Latin America.<sup>14</sup>

Similar complexities abound when seeking to assess the success of a constitution-making process. Perhaps most obviously, processes can and do fail to produce new constitutions, a fate that recently met constitution making in Iceland and (at least to date) Chile.<sup>15</sup> Even the failure to produce a constitutional text may not be a clear failure if other goals, such

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<sup>9</sup> The exceptions are the United Kingdom, New Zealand, and Israel. Unwritten constitutions are the focus of Janet McLean's chapter in this volume.

<sup>10</sup> Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan, *Constitution Making and Reform: Options for the Process* (Interpeace 2011). Although some doubt the effectiveness of linking between the two processes. See Hallie Ludsin, 'Peacemaking and Constitution-Drafting: A Dysfunctional Marriage' (2011) 33 *Journal International Law* 239.

<sup>11</sup> Hanna Lerner and Amir Lupovici, 'Constitution Making and International Relations Theory' *International Studies Perspectives* (forthcoming 2019).

<sup>12</sup> Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009).

<sup>13</sup> Gabriel Negretto, 'Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America' (2012) 46 *Law and Society* 749; Gabriel Negretto, *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America* (Cambridge University Press 2013).

<sup>14</sup> *Ibid.*

<sup>15</sup> Helene Landemore, 'Inclusive Constitution-Making: The Icelandic Experiment' (2014) 23 *Journal of Political Philosophy* 166.

as consciousness-raising, have been met. Beyond this, scholars and the contributors to this volume suggest a wide range of approaches for determining whether constitution making has succeeded. Constitution-making projects have a number of different aims, seeking to bridge different types of social divides and achieve different sorts of political goals. As several of the chapters here emphasize, not all constitution making is undertaken during democracy or with a democratic endpoint in mind.

Constitution-making moments, at their best, can help to produce deliberation about the nature of the state, and can build its legitimacy and buy-in from popular and elite groups. Indeed, as Wallis argues in her chapter, constitution making can help to build the state itself. At the same time, some constitution-making episodes have destabilized polities, heightened tensions, and undermined democracy.<sup>16</sup> The design of constitution-making processes thus is an issue with very high stakes. Furthermore, as Klug's chapter in particular reminds us, the relationships between constitution making and social change are extremely complex, and normally only visible by broadening our focus well beyond the narrow confines of the constitutional moment itself.

## II. CONSTITUTION MAKING AND THE PEOPLE

Many of the chapters in this volume look at the different ways in which constitution making can be conceptualized. As many of the chapters note, the dominant theory of constitution making continues to be constituent power theory. Constituent power theory has a complex set of forerunners: it has roots both in proto-liberal democrats such as Sieyès, but also definite critics of liberalism such as Schmitt.

The key underpinning of constituent power theory is that constitution making is a sovereign act of the people to remake their institutional order. The theory is notoriously ambiguous, given particularly the difficulty of defining the term "people."<sup>17</sup> Moreover, and as shown by many of the chapters in this volume, constitution making has often taken place under non-democratic conditions, both historically and today.

One strain of the theory, probably most closely identified with Schmitt, emphasizes its revolutionary nature. Since the forces wielding constituent power stand above the constituted powers that they created, they have the power to remake them, potentially without following the procedures found in the existing constitutional text. Thus, constitution making can potentially be carried out outside of the existing constitutional order, and in a way that marks a clean legal break with that order. Ackerman, for example, has recently written of revolutionary constitutions carried out by charismatic actors, generally acting outside of the existing legal order.<sup>18</sup> Similarly, Tushnet argues that constituent

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<sup>16</sup> William Partlett, 'The Dangers of Popular Constitution-Making' (2012) 38 *Brooklyn Journal of International Law* 193; David Landau, 'Constitution-Making Gone Wrong' (2013) 64 *Alabama Law Review* 923.

<sup>17</sup> Ulrich Preuss, 'Constitutional Powermaking of the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution' in Michael Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (Duke University Press 1994).

<sup>18</sup> Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard University Press 2019).

power is best understood as a construct to legitimate, ex post, constitutions made through revolutionary means.<sup>19</sup> Put this way, the theory has no necessarily democratic meaning, but can potentially be a product of any kind of revolutionary political force with sufficient power to remake the institutional order.

Another aspect of the theory, perhaps more closely identified with Sieyès, focuses on the identification with popular will. Here the argument is that the people, the original constituent power, have the inherent ability to remake their political institutions, or the derivative constituent power. Colón-Ríos goes so far as to argue that only this kind of “weak constitutionalism” can be democratically legitimate.<sup>20</sup> This model tends to envision a “constitution-making moment” in which deliberation about the long-term fate of the polity can partially supplant the ordinary, short-term bargaining of politics. Many recommendations about constitution making follow from this conceptualization, such as the argument that constitutions should be drafted by a Constituent Assembly or other body found outside of the existing legal order, rather than by an ordinary legislature.<sup>21</sup>

The theory has, however, recently come under sharp critique. The most salient risk in recent constitution making is that power wielded in the name of the people can be abused to produce imposed constitutions that result in either failed transitions or authoritarian outcomes. Would-be authoritarians can use constituent power theory to elide constraints found in the existing constitutional order and to use apparent popular support to consolidate power rapidly.<sup>22</sup> Even if this risk does not materialize, constituent power can and has been frequently wielded in a highly partisan way, effectively on behalf of some rather than all of the people.<sup>23</sup> Such uses show that rather than acting as an especially deliberative “constitutional moment,” at times constitution making can be used as an effective tool of ordinary politics, in order to marginalize opposition groups in a durable way. Scholars cognizant of these risks tend to view constitution making not (or at least not merely) as an attempt to reach a higher state of deliberation, but as a risky process that can potentially increase social tensions and erode democracy.

Critics have however struggled to find alternative ways to conceptualize constitution making. Andrew Arato, both in his chapter here and elsewhere, has worked out a conception of “post-sovereign” constitution making, which seeks to restrain the abuses of constituent power while maintaining the potential for a deliberative and legitimate outcome.<sup>24</sup> Arato’s conception is based on a two-stage model, where conflicting political elites first hash out a temporary constitution (or similar agreement) in a series of roundtable talks, which provides mutual guarantees and sets ground-rules and principles for the rest of the process. Then a permanent constitution is drafted in a fully-participatory process by

<sup>19</sup> Mark Tushnet, ‘Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power’ (2015) 13 *International Journal of Constitutional Law* 639.

<sup>20</sup> Joel Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge 2012).

<sup>21</sup> Elster, ‘Forces and Mechanisms.’

<sup>22</sup> Landau, ‘Constitution-Making Gone Wrong.’; Partlett, ‘Dangers of Popular Constitutionalism.’

<sup>23</sup> Gabriel Negretto, ‘Democratic Constitution-Making Bodies: The Perils of a Partisan Convention’ (2018) 16 *International Journal of Constitutional Law* 254.

<sup>24</sup> For two of his most recent major treatments, see Andrew Arato, *Post-Sovereign Constitution-Making: Learning and Legitimacy* (Oxford University Press 2016); Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (Cambridge University Press 2017).

a constituent body, albeit one bound by the rules hashed out in the first stage. In South Africa, which Arato views as the fullest flourishing of the model, the Constitutional Court verified that the permanent constitution complied with the principles found in the temporary one. Such an approach attempts to tame some of the excesses of constituent power theory, even if it does not actually replace it. However, the success of a “post-sovereign” approach, and more generally restraint during constitution making, may depend on social and political preconditions, such as the willingness of actors to compromise at the first stage, and the existence of institutions to uphold the commitments made there.

Perhaps a more radical challenge to the domestic, sovereign-centric model of constitution making is provided by an approach that emphasizes the increasing internationalization of constitution making. Recent years have witnessed the emergence of a transnational network of constitutional advisors and international NGOs that advise constitution-making processes around the world.<sup>25</sup> But international influence on constitution making had not always been voluntary. Imposed constitutional texts by external occupiers are the most extreme version of constitution making under conditions of limited sovereignty, with the prime example of post-World War II Japan.<sup>26</sup> In other cases, external occupiers determined the procedures of drafting or nominated the drafting body, as happened in post-war Germany or in 1945 Indonesia under Japanese occupation. In more recent decades there are an increasing number of cases where international institutions such as the U.N. play a direct role in constitution making, especially in post-conflict scenarios. Indeed, in extreme cases constitutions themselves have been embedded in international agreements, such as in Bosnia-Herzegovina (which was created by NATO as part of the Dayton agreement).<sup>27</sup> In short, international actors are clearly playing an increasing role in constitution-making processes.

The internationalization of constitution making could be viewed as a paradigm shift in the field, where writing a constitution is no longer an act of the will of a domestic constituent power, but now reflects a forcefield of global political and legal interests.<sup>28</sup> Thornhill’s chapter suggests such a move in post-war European constitution making. This view, though, is open to contest. From an empirical perspective, the degree to which a given constitution-making process has been internationalized varies greatly, and is

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<sup>25</sup> Tom Ginsburg, ‘Constitutional Advice and Transnational Legal Order’ (2017) 2 *UC Irvine Journal of International, Transnational, and Comparative Law* 5.

<sup>26</sup> Chaihark Hahm and Sung Ho Kim, *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea* (Cambridge University Press 2015). See also: David Law, ‘The Myth of the Imposed Constitution’ in Denis J. Galligan and Mila Versteeg (eds.), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013) 239–268.

<sup>27</sup> Christine Bell, ‘Introduction: Bargaining on Constitutions – Political Settlements and Constitutional State-Building’ (2017) 6 *Global Constitutionalism* 13.

<sup>28</sup> Particularly, the question of imposed constitutions received emerging attention following the international involvement in the drafting of the Iraqi constitution in 2005. For a few examples see: Philip Dann and Zaid Al-Ali, ‘The Internationalized *Pouvoir Constituant* – Constitution Making under External Influence in Iraq, Sudan and East-Timor’ (2006) 10 *Max Planck Yearbook of United Nations Law* S. 423–463; Noah Feldman, ‘Imposed Constitutionalism’ (2004–2005) 37 *Connecticut Law Review* 857–890; Ulrich Preuss, ‘Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization’ (2006/2007) 51 *New York Law School Law Review* 467–494; Andrew Arato, *Constitution Making Under Occupation* (Columbia University Press 2009).

dependent in part on domestic political choices. Furthermore, while the international and transnational communities dealing with constitution making have thickened over the past several decades, the actual number of international legal norms governing constitution making still appear to be quite slight. The most frequently stated one is a requirement of participation drawn from various sources, which is quite broad and ambiguous. More fundamentally, as Cheryl Saunders argues in this volume, it may be that constitution making processes require a plausible reflection of domestic political and social will in order to be seen as legitimate. If this is true, it again shows the conceptual difficulty of displacing constituent power as the dominant theory of constitution making.

### III. THE PROCESS OF CONSTITUTION MAKING

Much of the recent literature on constitution making focuses on the design of its process. There is now extensive scholarship on questions such as the choice of body for writing a constitution, the electoral or other rules for selecting such a body, forms of public participation in constitution making, the use of referenda for triggering a constitution making process or for ratifying the final product, and the role of courts in constitution making processes. There is also an emergent set of practices that tend to be recommended by international and transnational actors, revolving especially around public participation.

But this is also an area where the prevailing scholarship has tended to urge caution in linking aspects of design to aspects of outcome, such as constitutional durability, democracy, or other metrics. At any rate, the field has not yet succeeded in linking process to outcome in a convincing, cross-national manner. Several large-n quantitative studies have sought, for example, to link higher levels of participation to outcome, with decidedly mixed results.<sup>29</sup> It is possible that the impact of different forms of participation are too heavily dependent on context to be picked up through such methods, or that the effects of the constitution making process are swamped by other variables. A related problem is that process is usually endogenous to many other factors that are likely to determine the success of constitution making, rather than being an exogenous choice by disinterested designers.<sup>30</sup> For example, a more inclusive constitution making process could plausibly lead to increased stability of democracy, but such a procedural choice may also be made in a context where contending forces are more predisposed to compromise (or more evenly matched), which may be more likely to result in success regardless of the process of constitution making. Furthermore, as Nathan Brown recently reminded us, constitution

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<sup>29</sup> Tom Ginsburg, Zachary Elkins, and Justin Blount, 'Does the Process of Constitution-Making Matter?' (2009) *5 Annual Review of Law and Social Science* 201; Todd Eisenstadt, A. Carl LeVan, and Tofigh Maboudi, *Constituents Before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions* (Cambridge University Press 2017); John Carey, 'Does It Matter How a Constitution Is Created?' in Zoltan Barany and Robert G. Moser (eds.), *Is Democracy Exportable?* (Cambridge University Press 2009).

<sup>30</sup> Gabriel L. Negretto, 'Constitution-Making and Constitutionalism in Latin America: The Role of Procedural Rules' in Rosalind Dixon and Tom Ginsburg (eds), *Constitution-Making and Constitutionalism in Latin America: The Role of Procedural Rules* (Edward Elgar 2017) 17.

making can be a messy business. The impact of procedural choices is difficult to predict when private interest, short term bargaining, and political passions are involved in constitutional politics no less than they characterize ordinary political decision making.<sup>31</sup> These issues make it unusually difficult to measure the impact of the constitution-making process in a convincing way using social science.

Be that as it may, the remainder of this section looks at recent trends in the scholarship on three aspects of process, and explains how the chapters in this book contribute to them: (1) the nature and powers of the body drafting the constitution, (2) the level and form of popular participation, and (3) the role of courts in constitution making.

### A. Drafting Bodies

History shows an extraordinary divergence in the bodies charged with drafting constitutions. In the ancient world, for example, as Springborg touches on in this volume, constitutions were sometimes imposed by single individuals, a design choice that has largely disappeared from the modern world. Authoritarian governments and even democracies have also historically drafted and promulgated constitutions using a number of different methods, including the use of unelected commissions.<sup>32</sup>

But modern debates, which have focused largely on constitution making either by democracies or in countries seeking a democratic transition, have largely boiled the debate down to a choice of two forms: specialized constituent assemblies chosen just for the occasion, or ordinary legislatures also serving as constitution makers. Those favoring constituent assemblies argue that extraordinary bodies are less likely to be captured by ordinary political interests, and thus may be better suited to providing long-run deliberation about matters of national interest; they also may be better suited to providing legitimacy to the constitution making process, and they may be less likely to get sidetracked by other tasks.<sup>33</sup> On the other hand, recent experience in regions such as Latin America suggests that specialized assemblies may be at greater risk of being hijacked by narrow interests as a tool to consolidate power, raising risks of authoritarian outcomes.<sup>34</sup>

At any rate, and as many of the chapters in this volume suggest, the broad choice of institutional form is almost certainly less important than the rules through which that body is conformed and acts. Most clearly, the electoral rule conforming a body will determine how inclusive it is. Majoritarian electoral rules like first past the post may produce an assembly that is dominated by the largest electoral force; rules that are closer to pure proportional representation may produce a more diverse body where minority political

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<sup>31</sup> Nathan J. Brown, 'Reason, Interest, Rationality, and Passion in Constitution Drafting' (2008) 6(4) *Perspectives on Politics* 675–689.

<sup>32</sup> Nathan Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press 2002); Tom Ginsburg and Alberto Simpser (eds.), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2013).

<sup>33</sup> Elster, 'Forces and Mechanisms'; Jon Elster, 'Legislatures as Constituent Assemblies' in Richard W. Bauman and Tsvi Kahana (eds.), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press 2006) 181.

<sup>34</sup> Landau, 'Constitution-Making Gone Wrong'; Partlett, 'Dangers of Popular Constitution-Making'.

forces have a greater voice.<sup>35</sup> Not uncommonly, reserved seats and similar devices are used to ensure that significant minority groups which would not otherwise win votes have a seat at the table. Similarly, the voting rules within the body – particularly whether key decisions can be made by a simple majority or some form of super-majority – will obviously impact the relative power of majoritarian and minority political forces.

Some recent work suggests that while the balance between majoritarianism and inclusiveness is a complex issue in ordinary politics, constitution making ought to lean towards inclusiveness in many contexts.<sup>36</sup> This is for a mix of pragmatic and normative reasons: more inclusive processes may be more likely to receive the broad buy-in from powerful actors needed for stability, and inclusiveness also seems fair when setting out the long-run rules and values of a polity. If this widely-held argument is generally correct, then it has important implications for the voting rules under which constitution-making bodies are selected and operate.

The collateral powers of a constitution making body are also an important, but understudied, issue. Ordinary constituent legislatures normally have set rules determining how they carry out other functions, such as legislating and interacting with other bodies of state. But this is often untrue of specialized constituent bodies. As many of the chapters in this volume point out, a surprisingly high number of constituent bodies carry out collateral tasks other than merely drafting the constitution. Sometimes, for example, they acquire some or all lawmaking or decree power for a period of time; in other cases they may organize or even shut down other institutions such as courts and ordinary legislatures.<sup>37</sup> Prevailing ideas of constituent power, which may imbue the constitution-making body with the superior power of the people over and above ordinary political institutions, may encourage these moves. In some contexts, imbuing a constitution maker with some defined collateral powers may help to fill lacunas and to ensure the carrying out of the constitutional vision. On the other hand, a growing literature has suggested that these powers, at least if not carefully circumscribed, may raise risks of consolidation of power. An extreme example of this is the ongoing (since 2017) Constituent Assembly in Venezuela, which has focused most of its time not on constitutional drafting, but instead on legislating and on reorganizing the state, with the aim of consolidating the power of the Maduro regime and on repressing its political opponents.<sup>38</sup>

## **B. Public Participation**

The maxim that constitution making should be participatory has become one of the most prevalent in the field. This is certainly one of the most frequently-stated pieces of advice

<sup>35</sup> Renata Segura and Ana Maria Bejarano, 'Ni una Asamblea mas sin nosotros! Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes' (2004) 11 *Constellations* 217.

<sup>36</sup> *Ibid.*

<sup>37</sup> Joel Colon Rios, 'Constitution-Making and Constituent Power' in Rosalind Dixon and Tom Ginsburg (eds.), *Comparative Constitutional Law in Latin America* (Edward Elgar 2017) 57.

<sup>38</sup> José Ignacio Hernández G., 'Symposium on "Venezuela's 2017 (Authoritarian) National Constituent Assembly" – Pursuing Constitutional Authoritarianism' *Int'l J. Const. L. Blog*, Sept. 1, 2017, at: [www.iconnectblog.com/2017/08/symposium-on-venezuelas-2017-authoritarian-national-constituent-assemblyjose-ignacio-hernandez-g](http://www.iconnectblog.com/2017/08/symposium-on-venezuelas-2017-authoritarian-national-constituent-assemblyjose-ignacio-hernandez-g).

from the transnational network of advisors. Indeed, some recent work has argued that a requirement that constitution making be participatory may be approaching the status of an international legal rule, if it has not reached that status already, perhaps the only (and certainly the clearest) example of an international norm directly treating constitution making processes.<sup>39</sup>

Scholars and policymakers who promote participation during constitution making processes do so for a few major reasons. First, broad popular participation by a range of individuals and civil society groups may enhance the legitimacy of the resulting constitutional text, helping to increase its durability and acceptance by different social groups. Second, participation may impact the content of the final constitution. In his chapter, for example, Yash Ghai argues that popular participation forced elites to pay attention to issues that they otherwise would have ignored.

But recent scholarship has suggested a nuanced and critical perspective on the role of public participation. Participation takes many different forms, including more active options such as providing input into constitutional texts and more passive forms such as voting in referenda.<sup>40</sup> Each of the broad possibilities also includes a large amount of variation. Consultation, for example, can be held at a number of different points in the process, with many different degrees of depth and forms of organization. It can be constructed in ways that provide true public input into the process, or in ways that make it little more than mere window-dressing for choices already made. Likewise, referenda can be held at several different points in the process (for example, in order to trigger the calling of an Assembly or to ratify a final product), and under different kinds of voting rules. As Saati has recently argued, the emergence of a transnational norm in favor of participation may be too ambiguous, given all this variation, to carry much weight.<sup>41</sup> Other political scientists have warned that direct public involvement in the drafting process in conflicted and fragile states may hinder democratization or political secularization, exacerbating, not mitigating, tensions.<sup>42</sup>

The chapter by Elkins and Hudson in this volume shows that the success rate of regimes in referenda connected with constitution making appears to be extremely high, and indeed far higher than those held in relation with constitutional amendment. This may provide some support for a view that certain forms of participation may exercise little influence, at least on the constitutional product. Likewise, Crouch's chapter shows that in Southeast

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<sup>39</sup> Vivien Hart, 'Constitution-Making and the Right to Take Part in a Public Affair' in Laurel E. Miller (ed), *Framing the State in Times of Transition: Case Studies in Constitution Making* (US Institute of Peace 2010).

<sup>40</sup> Abrak Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy* (Umea 2015).

<sup>41</sup> Abrak Saati, 'Participatory Constitution-Making as a Transnational Legal Norm: Why Does It Stick in Some Contexts and Not in Others' (2017) 2 *U.C. Irvine Journal of Transnational and Comparative Law* 113.

<sup>42</sup> Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge University Press 2013); Donald L. Horowitz, 'Constitutional Processes for Severely Divided Societies' (Unpublished manuscript, Paper presented at Tel Aviv University, 2015); Nathan J. Brown, 'Islam and Constitutionalism in the Arab World: The Puzzling Course of Islamic Inflation' in Asli Ü Bâli and Hanna Lerner (eds.), *Constitution Writing, Religion and Democracy* (Cambridge University Press 2017) 289–316.

Asia, constitution making has occurred under a wide variety of different regime types (including both military and democratic regimes), and with incredible variation in intent and overall effectiveness.

More positively, the wide variation of forms of participation has contributed to innovation to deepen and improve public input into constitution-making processes. In his chapter here, Carlos Bernal surveys the ways in which the internet has helped to facilitate novel forms of popular input into, and even crowd-drafting of, constitutional texts in recent episodes such as Iceland and Chile. Joel Colón-Ríos looks at history and theory for inspiration, exploring ways in which highly localized bodies could be given more power to influence Constituent Assemblies.

The question of tradeoffs between popular participation and other aspects of constitution making such as elite inclusion remains underexplored. Of course, the transparency needed for a high level of participation may conflict with the conditions needed for hard bargaining among contending elites needed to reach agreement on text. For this reason, Elster suggests an hour-glass model, with participation playing a significant role at the beginning and end of the process to provide input and then legitimacy, with an emphasis on less participatory, hard bargaining in the middle.<sup>43</sup>

But Elster's framing is only one of various ways in which participation may conflict with other goals and interests. In some contexts, a high level of popular participation may serve as a substitute for elite inclusion: leaders may appear to construct a transparent and open process as a way to provide cover for decisions that exclude political opponents or other minorities. Leaders may thus be able to tout a commitment to openness even as they prevent important groups from exercising any voice over the constitutional process and product. Similarly, some highly participatory processes may exacerbate rather than mitigating tensions between competing groups, for example if they exclude certain groups entirely or maintain separation between contending actors. This may be especially true because constitution making often occurs during moments of high political and social tension. Finally, and ironically, particularly effective forms of popular participation may provoke resistance from political elites precisely because they may move the constitutional text away from their interests. These elites may then place obstacles in the way of the process, or even cause it to fail altogether. Some evidence for this dynamic may exist in the well-studied case of Iceland, where political elites effectively blocked a text produced through highly participatory means, but in which they had little voice,<sup>44</sup> and (in Ghai's telling here) in Kenya.

These potential tradeoffs do not of course undermine the potential benefits of popular participation during constitution making. But they do suggest the need for more work on the ways in which it can be best designed to achieve its benefits while avoiding conflict with other key goals.

### **C. Courts and Constitution Making Processes**

Some recent scholarship has examined the role that courts can or should play during constitution making. As in many other areas of mega-politics, including the control of

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<sup>43</sup> Elster, 'Forces and Mechanisms.'

<sup>44</sup> Landemore, 'Inclusive Constitution Making.'

constitutional amendment, constitution making itself has become judicialized in some cases. The chapters in this volume suggest that courts in fact can and do play a number of different roles during constitution-making episodes. Most obviously, they can restrain constitution makers, either (exceptionally) by blocking an attempted replacement altogether, or by modifying the procedures that drafters intend to use.<sup>45</sup> But in other cases, as in several recent examples in Latin America, courts may catalyze a constitution making process by giving political actors a green light to proceed in an otherwise ambiguous situation.

The activation of courts during constitution making may provide significant benefits, giving clarity and stability to processes that are sometimes badly in need of them. Constitution making often (although not inevitably) occurs in situations where the existing order is badly delegitimized, if it has not broken down entirely. In such situations, a court may be able to play a valuable function by helping to ensure that the process is fair and adequately protects the interests of contending forces. The South African Constitutional Court, which was expressly charged with certifying that the final South African constitution complied with principles found in the interim constitutional text, is widely viewed as having played such a role.<sup>46</sup> In doing so (and indeed, in refusing to certify the first attempt on several points), the Court helped to protect the credibility of the bargain struck by various sides, and to increase the legitimacy of the final constitutional product.

At the same time, judicial interventions may raise very real risks of politicizing or undermining courts, particularly since they draw them into highly politicized situations with highly ambiguous rules. The 2012 post-uprising constitution making process in Egypt (recounted in Nathan Brown's chapter in this volume) is suggestive. There, the judiciary several times made aggressive interventions that attempted to restrain dominant political actors, but these interventions served to further identify the courts as partisan allies of the military and the old regime, and were ultimately defanged when President Morsi issued a decree placing the ill-fated process above judicial review.

This suggests that the ability of courts to intervene during constitution making, especially in ways that restrain actors, likely depends on a number of contextual factors that invite more academic work. These include the timing of the intervention and the underlying pattern of political support for it, whether the court is enforcing a replacement clause or other agreement found in the existing constitutional text, and the preexisting reputation for capacity and independence of the judiciary.

#### IV. CONSTITUTION MAKING AND DIFFERENCE

A central focus of recent work, and the chapters in this volume, is on how constitution making can bridge various kinds of differences, particularly those based on criteria that tend to create deep divisions such as race or ethnicity, nationality, or religion. This is

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<sup>45</sup> For a typology of theories of intervention, see Rosalind Dixon and David Landau, 'Constraining Constitutional Change' (2015) 50 *Wake Forest Law Review* 859.

<sup>46</sup> Arato, *Post-Sovereign Constitution-Making*.

an issue where both the design of the process of constitution making and the content of the constitution may matter a great deal. It is perhaps during the 20th century that constitutional debates over issues of identity became a central concern for drafters. As Kissane and Sitter show in their chapter, before World War I, European constitutions rarely addressed territory or citizenship in national terms. When nationalism became a dominant political ideology, the tension between liberal and nationalist norms became far clearer, and national identity was addressed by constitutional drafters more explicitly. Similarly, religion became a central point of axis in constitutional drafting as the consensus over the relations between religious law and state law had weakened.<sup>47</sup>

Ideally, constitution making can be a useful tool to bridge differences between identity groups by allowing those groups to discuss key issues in a deliberative way and by helping them to design institutions and solutions that protect their key interests. At the same time, constitution making processes can and sometimes do worsen rather than ameliorate differences. In cases of deep division, where distrust between groups is very high, it may be unrealistic to expect anything like a deliberative constitutional moment to be possible, and an attempt may in fact tear apart rather than bringing together a polity. Lerner argues that in such cases, a gradual and incremental approach to constitution making, rather than aiming for a constitutional moment, may allow for the circumvention of potentially explosive conflicts.<sup>48</sup>

In terms of process, O'Leary's chapter points out that there is nothing like a single set of best practices that will work across all contexts; rather, the optimal design will tend to emerge from the type of division and particular context at issue, and the interplay of local and regional powers and bargaining. Constitution-making bodies that are more inclusive, in terms of composition and functioning, may be better-equipped to handle division than those that are majoritarian in nature. Other chapters in the book pointed more generally to possible post-sovereign models of constitution making with multiple stages and limited powers that may do a better job of building trust and bridging divides than fully sovereign assemblies carrying out the entire constitutional project in one stage. Furthermore, a critically difficult issue is figuring out which groups should be represented; as Lerner and Bali's chapter reminds us, in many contexts inter-group tensions tend to be more visible than intra-group tensions, even though the latter may be just as important to deal with. Intra-religious conflicts, in particular, pose a special challenge to the drafting of liberal constitutions, because when the division is between a more secular-progressive camp and a more conservative-orthodox camp within the same religion, liberal constitutional solutions are identified with one side of the debate, rather than as a neutral tool facilitating future deliberations.<sup>49</sup>

Of course, the design of constitutions to deal with difference has spawned a massive literature, which cannot be treated here.<sup>50</sup> The chapters in this volume, however, link

<sup>47</sup> Asli Ü. Bâli and Hanna Lerner (eds.), *Constitution Writing, Religion and Democracy* (Cambridge University Press 2017).

<sup>48</sup> Lerner, *Constitution Making in Divided Societies*.

<sup>49</sup> Asli U. Bali and Hanna Lerner, 'Constitutional Design without a Constitutional Moment: Lessons from Religiously Divided Societies' (2016) 49(2) *Cornell International Law Journal* 227–308.

<sup>50</sup> For some important examples, see Arend Lipjhart, *Democracy in Plural Societies: A*

the constitutional text to the constitution-making process in new ways. One theme that emerges is the benefit of not deciding certain key issues during constitution making. Dixon, for example, develops a typology of forms of deferral, and explores why these might be useful to drafters. Frosini, in examining the drafting of constitutional preambles, notes that their drafting tends to create tension and ambiguity in divided contexts and advises that perhaps preambles ought not be included as often as they are. Finally, Bali and Lerner point out an important lacuna in the literature on bridging religious differences: they note that while there are a number of well-known tools such as consociation and federation to deal with inter-group differences, design for intra-group differences is much less notable, and these differences may be both harder to detect and more difficult to bridge. Moreover, constitutional solutions for inter- or intra-group conflicts, particularly but not exclusively related to religion, they argue, may undermine the same principles that modern constitutions were intended to promote in the first place. For example, mechanisms of legal pluralism, often adopted in order to mitigate religious tensions, challenge the basic tenets of liberal constitutionalism and the idea of legal uniformity standing at the core of the secular modern state.<sup>51</sup>

## V. CONTEXT AND DIFFUSION IN CONSTITUTION MAKING

A final key issue explored extensively in this volume is the extent to which constitution making follows a relatively universal template, or instead is dependent on context. Related to this is the question of how readily models of constitution making diffuse across different countries.

Questions of globalization and diffusion in constitution making are of course not new. In this volume, for example, Updike Toler's chapter explores the ways in which the seminal US model had an (albeit highly imperfect) influence on other constitution-making experiences in early modern Europe. Similarly, the importance of transnational advisors on constitution making is not a wholly new phenomenon: witness the impact of Sir Ivor Jennings on a wide range of constitutions in the British sphere of influence.<sup>52</sup> Still, pressures towards globalization may have increased in recent years, both on design and constitution-making process. Empirical scholarship has highlighted evidence of convergence along some aspects of constitutional design, such as the inclusion of rights.<sup>53</sup> Similarly, we have already noted evidence, recounted by Saunders in this volume, of an increasingly thick network of transnational advisors and international institutions

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*Comparative Exploration* (Yale University Press 1977); Sujit Choudhry (ed.), *Constitutional Design for Divided Societies* (Oxford University Press 2008).

<sup>51</sup> For a defense of post-conflict power-sharing arrangements against dogmatic liberal constitutionalism see Christopher McCrudden and Brendan O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (Oxford University Press 2013)

<sup>52</sup> H. Kumarasingham, 'A Transnational Actor on a Dramatic Stage – Sir Ivor Jennings and the Manipulation of Westminster Style Democracy: The Case of Pakistan' (2017) 2 *UC Irvine Journal of International, Transnational, and Comparative Law* 33; H. Kumarasingham, *Constitution-making in Asia: Decolonisation and State-Building in the Aftermath of the British Empire* (Routledge 2016).

<sup>53</sup> E.g. David S. Law and Mila Versteeg, 'The Declining Influence of the United States Constitution' (2012) 87(3) *New York University Law Review* 762–858.

invested in constitution making around the world. Some of the contributors to this volume have in fact been participants in these networks. As a result, some scholarship has asked whether there is an emerging “transnational legal order,” or new “epistemic community,” with respect to constitution making.<sup>54</sup>

At the same time, there is important evidence of continued differentiation in constitution making, such that it is clearly incorrect to push claims of globalization in constitution making too far.<sup>55</sup> One challenge is the importance of constitution making in non-democratic contexts. Authoritarian regimes write and rely on constitutions to fulfill a number of goals, including coordination, control, internal and external legitimacy, and credibility to the international economic community. Chapters by Brown and Partlett in this volume stress, indeed, that authoritarian constitution making remains the norm in some regions of the world, including the Middle East and post-Soviet regions. Both chapters suggest that constitution makers in those regions approach constitution making with a different set of goals than is often assumed with respect to liberal democratic constitution making, such as the consolidation and centralization of power. Likewise, constitution making is often part of regime transitions, but these transitions are not always unidirectional in favor of democracy; they can also result in regimes that are hybrids between democracy and dictatorship, or even the erosion of liberal democracy towards one of these two regime types.

Such experiences of constitution making generally are not as connected to the transnational and international networks of constitution makers, even as they may borrow some elements of the transnational script, for example using constitutional rights to enhance their legitimacy. In some cases, authoritarian constitution makers may actively resist those transnational networks: an example is the Fijian military’s 2013 burning of a constitutional draft produced under the guidance of Yash Ghai and other international observers. Additionally, as Halmai emphasizes in his chapter, authoritarian actors may rely on their own counter-networks of influence for ideas about constitutional design and process.<sup>56</sup> Authoritarian actors, as well as democratic ones, rely on transnational networks for support and influence.

In addition to regime type, region and language appear to be important determinants of the diffusion of ideas and models of constitution making. The final two parts of this volume, which contain a series of chapters on regional trends and traditions in constitution making, are an attempt to grapple with these regional perspectives, which in our view have been understudied. Seven chapters explore regional influences and similarities among constitutions in Europe (Kissane and Sitter; Thornhill), the Middle East (Brown),

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<sup>54</sup> Ginsburg, ‘Constitutional Advice and Transnational Legal Order’; Hanna Lerner, David Futscher and Nina Schlager, ‘International Constitutional Advising: An Emerging Epistemic Community?’ (unpublished paper).

<sup>55</sup> A recent survey of the Vietnamese constitution-making experience of 2013 argues that it was informed by a complex interplay of domestic and international pressures and influences. Bui Ngoc Son, ‘Contextualizing the Global Constitution-Making Process: The Case of Vietnam’ (2016) 64 *American Journal of Comparative Law* 931.

<sup>56</sup> Kim Lane Scheppele, ‘Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight)’, at [www.law.utoronto.ca/utfl\\_file/count/documents/events/wright-scheppele2016.pdf](http://www.law.utoronto.ca/utfl_file/count/documents/events/wright-scheppele2016.pdf).

South Asia (Guruswamy), Southeast Asia (Crouch), Anglophone Africa (Venter), the post-Soviet region (Partlett) and Latin America (Landau). While it is obviously too simplistic to use a “Latin American” or “post-Soviet” model of constitution making, it is clear from the various chapters that there are ideas and theories about constitution-making process (as well as the motivations for constitution making and constitutional design) that run across countries. In some ways, these ideas seem to move regionally; but as chapters such as Venter’s on Anglophone Africa points out, language may also be an extremely important influence on the movement of ideas in this realm.

## VI. OUTLINE OF THE VOLUME

Part I, “Foundations,” considers some of the foundational issues involved in the study of constitution making. These include the link between constitution making and two key concepts: revolution (Arato) and social transformation (Klug). They also include key questions of international involvement in constitution making, and the extent to which this is displacing purely domestic theories of constituent power (Saunders); as well as the theory of constituent power (Colón-Ríos). Finally, this part grapples with the often-murky line between the making of a new constitution and the amendment of an old one (Albert).

In “Revolutions and constitution making,” Andrew Arato considers the link between constitution making and revolution. While noting that constitution making can and does occur without revolution (defined as both a break in legality and a breakdown in regime legitimacy), he argues that there is an “undeniable” affinity between the two. This affinity, however, is problematic: revolutionary constitution making can have an “affinity” with forms of constitution making (such as unlimited constituent assemblies) that themselves can lead to dictatorial outcomes – an observation that goes back to the French Revolution. In order to avoid falling into this trap, Arato suggests the concept of a self-limiting revolution, drawing off of his well-known “two-stage” model of constitution making extrapolated from cases like South Africa, Spain, and parts of Eastern Europe. Arato argues that a two-stage process, which combines elite bargaining and roundtable compromises in the first stage with an open, participatory process in the second, can bridge the dichotomy between “revolution” and “reform,” allowing constitution makers to gain the legitimacy of a revolutionary break with the old regime while reducing the risk of an authoritarian outcome.

Heinz Klug reflects on the relationship between constitutions and social change in his chapter, “Constitution making and social transformation.” Klug uses a close case study of the negotiations that led to the South African constitution to make two key points. First, constitutions are inevitably products of political agreements and historical circumstances; this makes any assumption that they are fully (or perhaps even largely) products of rational design incorrect. Second, constitution making is generally a drawn-out process, rather than a moment, and one that extends both before and after the time in which the constitution is actually written. These findings mean that constitutions are products of their social context, not simply texts meant to achieve instrumental goals. But, while immediate social transformation is unlikely, one can still observe constitutions having an impact on society, particularly if one takes a broader and longer view of constitutions.

In her chapter on “International involvement in constitution making,” Cheryl Saunders examines recent trends for greater international involvement in constitution making and seeks to probe the practical and normative limits of this involvement. The extent of this international involvement is increasingly dense, due to international bodies like the UN, various regional institutions, and NGO-like actors. But Saunders makes several key points about its limits. First, the amount of international involvement varies substantially across processes, because in practice it is a voluntary decision of constitution makers to allow international actors in (albeit one that they have varying powers to resist). Second, she argues that normative theories of constitution making still depend on claims of “ownership” by domestic communities, and thus any international involvement must fit within these claims of ownership. The legitimization of constitution making has not itself been transformed into an international exercise. Both of these claims suggest a cabining of expectations about the extent to which constitution making will become a primarily international or transnational enterprise in the near future.

Joel Colón-Ríos’s chapter “Constituent power, primary assemblies, and the imperative mandate” provides a historical take on the construction of constituent power, focusing on the fascinating and understudied role of “primary assemblies” convened locally. Colón-Ríos compares the thought of Rousseau and Sieyès on the role of these assemblies, noting that the former viewed them as potentially playing a major role in deliberation about constitution making, while the latter limited their role to electing delegates to a Constituent Assembly. Through a historical trace of the role of primary assemblies in 18th and 19th century Europe and 19th century Latin America, Colón-Ríos shows that the latter view won out. But he argues that this has had important (and problematic) consequences for the theory of constituent power, by moving it further from the participation of ordinary people. He thus proposes (based on contemporary thinkers such as Ackerman and Fishkin) ways in which primary assemblies could be reinvigorated to play a major deliberative role in constitutional replacement and change. For example, he argues that primary assemblies could be used to deliberate about constitutional proposals before and as Constituent Assemblies are going on, and he notes that primary assemblies could give at least “softly” binding proposals to those elected delegates. Thus, as in his other work, Colón-Ríos seeks to construct a version of constituent power and constitution making that strengthens the participation of ordinary citizens, rather than simply serving as a form of elite manipulation.

Finally, in “Amendment and revision in the unmaking of constitutions,” Richard Albert provocatively asks the question of how we know when constitutional replacement is going on. In other words, how do we distinguish amendment from the making of a new constitution? He explores the line between amendment and revision, arguing that the first is a change to the constitution, while the second unmakes it by altering or destroying its core principles. As he points out, some courts around the world actively police this line, striking down purported amendments that undo core commitments. This is the case, for example, in India, Belize, the Czech Republic, and many other courts and constitutional texts around the world. As Albert points out, however, the line between constitutional amendment and replacement is anything but simple to draw, and actively regulating or policing that line raises many difficulties.

Part II, “Techniques and Processes,” considers a set of key topics surrounding the procedure of constitution making, including the role of the referendum in constitution

making (Elkins and Hudson), the participation of civil society groups (Ghai), and the growing phenomenon of direct popular participation in drafting and design (Bernal). We also consider the important role of deferral (or deciding not to decide) in constitution making (Dixon), as well as the range of procedural and design techniques that can be used by local agents and by international advisors to make constitutions in deeply divided places (O'Leary).

In their chapter "The constitutional referendum in historical perspective," Zachary Elkins and Alexander Hudson present and analyze novel data on the role played by referenda during processes of constitution making and constitutional amendment. Elkins and Hudson find a general upward trend in the use of referenda for both processes, although they note important country-specific and regional variation in its use. The core finding of Elkins and Hudson is that there is a significant difference in the likelihood of failure between amendment and replacement referenda: referenda during amendment processes fail 40 percent of the time, while those during replacement processes fail only six percent of the time. This finding is, as Elkins and Hudson note, surely caused by a number of different factors, but it clearly has important implications for the ways in which referenda are viewed during both types of processes. For example, it may suggest that elites have a greater ability to control constitution-making processes as opposed to amendment processes, allowing them to skip referenda when they might lose them. Or it may show that citizens are unable (or just less likely) to develop critical views of an entire constitutional text, as opposed to a more discrete set of changes. In any case, these new findings should influence debates about the utility and impact of referenda during constitution making.

Rosalind Dixon's "Constitutional design deferred," looks at the circumstances under which drafters might "decide not to decide." Dixon explores several techniques of deferral available to constitution makers, including the use of deliberately ambiguous language, by-law clauses allowing or requiring legislative action, and specific but deliberately conflicting constitutional language. She also considers the potential benefits of deferral, including allowing agreement under difficult circumstances and reduced error costs where drafters are uncertain as to the effects of provisions. Using the example of the Kenyan gender quota provision and the Indian personal status law provisions, she also shows a key potential cost of deferral – intentions of drafters can be stymied when the particular pressures of a constitutional moment are lost in the inertia of subsequent ordinary politics. Dixon suggests, however, several ways in which constitution makers might create forms of deferral in constitution making that have more teeth, including hard deadlines and various forms of judicial review.

In "Making constitutions in deeply divided places: maxims from constitutional advisors," Brendan O'Leary considers the challenge of making constitutions in difficult, often post-conflict situations, drawing on recent cases such as Iraq, Northern Ireland, and his role as Senior Advisor on Power-Sharing with the Mediation Support Unit of The United Nations. His chapter highlights the limits of external constitutional advisory roles. As he notes, advisors suffer from biases that at times make their advice ineffective or counterproductive: they may be insufficiently immersed in local constitutional culture, for example, or recommend reforms they wish to see applied in their home countries, without sufficient consideration to whether they are suitable transplants. Advisors should realize that even successful settlements may not hold given the short average duration of constitutions in comparative perspectives and the difficult political environment. Perhaps

most importantly, O’Leary highlights the limits to existing social scientific and legal knowledge – we still know too little about which responses (consociationalism, federalism, and multiculturalism, for example) and permutation of responses will best promote effective power-sharing in a given political environment. These empirical gaps complicate the tasks of advisors, even if a body of knowledge on constitution making in deeply divided societies is slowly emerging.

Yash Ghai studies the role of participation by civil society groups during constitution making in his chapter “Civil society, participation, and the making of Kenya’s constitution,” through carrying out a case study of the complex Kenyan drafting process. He offers a sober-minded but positive assessment of the role that civil society can play in these debates. Ghai notes that the design of the Kenyan process, which allowed the draft constitution to be written by an independent commission rather than a legislature or Constituent Assembly, opened up more space for a variety of different kinds of civil society groups to offer meaningful input into the draft. He also draws out the ways in which the process was designed with meaningful public engagement and input in mind. However, Ghai argues that an outsider-driven process was also opposed by major political forces; this conflict, as well as the fragmentation of civil society along ethnic lines, were major factors behind the failure of the initial process in a popular referendum in 2005. Still, Ghai argues that a participatory process raised popular consciousness, shaped the agenda, and increased the legitimacy of the constitutional draft finally adopted in 2010. He argues, against the thrust of some recent scholarship, that public participation is a crucial ingredient of modern constitution making, given especially modern distrust of ordinary political parties and processes.

In “How Constitutional crowdsourcing can enhance legitimacy in constitution making,” Carlos Bernal analyzes the recent phenomenon of constitutional “crowd-drafting,” focusing on citizen input into the drafts of constitutions in recent constitution-making experiences in Iceland, Egypt, Kenya, Ireland, and Chile, particularly through mechanisms connected to the Internet. Bernal analyses the way that these processes can increase the democratic legitimacy, transparency, and inclusiveness of constitution making, and disentangles different models for “crowd-drafting” at distinct stages of the process: before, during, and after drafting. He finally gives input into the challenges posed in making these processes both authentic and secure.

Part III, “Contexts and Contents,” considers the question of how constitution-making processes function, and can best be designed, in special and challenging situations. These include the need to simultaneously build a state and write a constitution (Wallis) and the challenge of drafting constitutions in contexts of intra- or inter-religious division (Bali and Lerner). McLean tackles the almost paradoxical question of how unwritten constitutions get made. Halmai looks at the currently significant issue of constitution making creating an authoritarian, rather than democratic, regime. Finally, Frosini considers the special challenges associated with the drafting of constitutional preambles.

Aslı Bali and Hanna Lerner’s contribution “Religion and constitution making in comparative perspective” argues that religion poses a distinctive set of challenges for constitution makers, given the many ways in which religion overlaps other divisions and its constitutive place in society. Bali and Lerner also emphasize the different challenges posed by inter-religious divisions between different religious groups and intra-religious tensions within the same religious group, noting that the former – for example between more

and less secular adherents of the same religion – is often overlooked but poses difficult and unique challenges. Bali and Lerner offer a critical review of the major approaches constitutional drafters use to address religious division: federalism, consociationalism, and related institutional designs (mostly for inter-religious divides); deferral, ambiguity, and other incrementalist strategies (mostly for intra-religious divides); and finally various forms of legal pluralism.

Joanne Wallis's chapter "Constitution making and state building," asks whether there is a relationship between participatory constitution making and state building. To carry out her analysis, she draws on a case study of two recent constitution-making episodes, Timor-Leste and Bougainville. Wallis concludes that the more authentically participatory process in Bougainville, where citizens and civil society had genuine input into the constitution, has done a better job of state building than the less participatory process in Timor-Leste, because it has helped to build a sense of political community and to give legitimacy to state institutions. Thus, and while acknowledging the myriad critiques of participation in constitution making, she argues that it has played a positive role along the dimension she studies.

In "The making of 'illiberal constitutionalism' with or without a new constitution: the case of Hungary and Poland," Gábor Halmai considers the relationship between constitution making and change and the undermining of liberal democracy. As the Hungarian case shows, constitution making can be a key tool for attacking (as well as supporting) liberal democracy, although alternative means (as in Poland) can also be used for the same ends. Halmai also explores, although he ultimately finds wanting, explanations that link the erosion of constitutionalism in both countries to weaknesses in the initial constitution-making process and models after the 1989 transitions from communism. He suggests that even a more participatory form of constitutionalism after the fall of communism would likely not have staved off the anti-democratic constitutional projects that subsequently took place, mostly due to the weakness of constitutional culture in both post-communist countries.

In "The case of unwritten constitutions," Janet McLean looks at the peculiar – but in many ways foundational – question of how unwritten constitutions such as those in the UK (and arguably Israel) are made. Her provocation is to think about constitution making outside of the standard context, where there is a deliberate decision by the constituent power to make a constitution on behalf of the people during a "constitutional moment." She focuses on two related issues: (1) how constitutional norms are distinguished from ordinary law within such systems, and (2) how norms in such systems become entrenched against change. In developing answers to these questions, McLean focuses on the various ways in which conventions form, ossify, and change through time. Her point that these conventions explain the inter-temporal durability of unwritten constitutions has resonance well beyond the special context of unwritten constitutions; in fact it helps explain the hidden processes through which all constitutions, to a certain extent, are "made."

In "The making of constitutional preambles," Justin Frosini asks important questions about the making of an often-overlooked part of constitutions – their preambles. He points out that 93 percent of constitutions include preambles, but we still know little about their purpose and impact. Frosini looks at the kind of content that preambles tend to include, and emphasizes through a series of case studies that there is often great ambiguity about their downstream legal effect. Because of their ambiguity and importance,

Frosini makes a compelling case that constitutional drafters and scholars should pay more attention to preambles, especially the issue of what legal status they are intended to have, and he indicates a series of questions that designers and scholars should think about.

Part IV, "Historical Perspectives," contains several takes on how constitution-making processes have evolved through time. These include Updike-Toler's analysis of the influence of US constitution-making processes on processes in early modern Europe, and, even further back, Springborg's explanation of the motives and design of constitution making in the ancient world. Chapters by Kissane and Sitter, as well as Thornhill, illuminate the historical development of constitution making in Europe. The purpose of these chapters is not merely to elucidate core issues in the history of constitution making, but also to illuminate the procedures and motives for constitution making in the modern world.

In "Constitutionalism ancient and oriental," Patricia Springborg takes a fascinating look at the origins of constitution making and constitutions. She argues that the initial impetus for constitution making, in places like Mesopotamia, was essentially economic in nature, arising largely out of the law of contract. She argues that these ancient constitutions also included lists of rights and duties that preview the concerns with concepts of justice and freedom found in modern constitutionalism. Some of these conceptions were lost after the decline of the ancient world, especially in Western Europe. Springborg's argument adds important complexity and nuance to overly simplistic, evolutionary accounts of the origins of constitutionalism.

In "First constitutions: American procedural influence," Lorianne Updike Toler considers the ways in which models of constitution-making process have travelled historically. She considers the influence of the seminal US federal constitution-making process on other constitution-making processes in early modern Europe, especially those carried out during the French Revolution. While she finds that the substance of US constitutional ideas exercised a major influence, she argues that the influence of core elements of US procedure, such as an emphasis on legality, supermajority approval rules, and popular involvement at the grassroots level, were much more attenuated. She attributes this distorted influence, and overall weak influence, of US constitutional procedure, on the nature of the sources, particularly Jefferson, on which French designers drew. At any rate, Updike Toler argues that the failure of key US procedural ideas to travel led constitution making to take a costly "wrong-turn" towards a theory of constituent power that raised risks of instability and authoritarianism. She nonetheless argues that key ideas developed in the US constitution-making process anticipated the inclusiveness and participation found in modern constitution-making processes.

Bill Kissane and Nick Sitter use European constitutional history to explore the complex relationship between constitution making and nationalism in "National identity and constitutions in modern Europe: into the fifth zone." Kissane and Sitter, drawing off of work done by Ernest Gellner, find that the time period in which a constitution was written has a major impact on whether and how it treats national identity. Older constitutions written in two distinct periods before World War I could largely elide questions of national identity, since they were written before the heyday of modern nationalism. Those written in the post-war or post-communist periods have had to deal with questions of national identity, and related issues such as national majorities and minorities, in far more explicit and sometimes divisive ways. Kissane and Sitter also find that there is now a Fifth Zone, where nationalism and constitutionalism have collided with internationalization

(as reflected in the rise of European-level institutions) and globalization. They argue that these developments have created new arenas for what they see as enduring conflicts between liberalism and nationalism, with nationalists for example sometimes using domestic constitutions as shields against international and regional institutions (i.e. Brexit), and national minorities sometimes using international bodies as ways to loosen the grip of domestic constitutional orders (i.e. Catalonia).

In “Constitution making and constitutionalism in Europe,” Chris Thornhill provocatively asks whether there is in fact a unified European tradition of constitutionalism. Based on a historical survey, he answers this question in the negative. Thornhill finds that there was indeed a short-lived model of revolutionary constitutionalism in the late 18th and early 19th centuries based on identification with popular will, separation of powers, and basic rights, but that the moment was quickly lost. He finds several subsequent waves of European constitution making: in the late 19th century, the interwar period, and post-World War II, but he finds that all of these differ from the classical, revolutionary conception in important ways, and in fact were successful because of their deviations. Constitution making was in fact compatible with authoritarianism (late 19th century), organic conceptions of the state (interwar period), and judicial constitutionalism (post-war period). Thornhill thus unsettles core elements of the “Western” model of constitution making by arguing that classical models of constituent power never much coincided with reality, and in fact that constituent power in the region is now better located in transnational understandings rooted in global human rights law rather than domestic popular will.

Finally, and relatedly, in Part VI, “Regional Perspectives,” contributors look at constitution making in a different set of regions: the Arab world (Brown), South Asia (Guruswamy), South East Asia (Crouch), Anglophone Africa (Venter), the post-Soviet World (Partlett), and Latin America (Landau). Each of these chapters asks, explicitly or implicitly, whether there is some distinctive element of constitution making or constitutionalism in the region under study. The part thus raises the important question of whether there are regional models of constitution making. They also serve as a somewhat different way to ask how constitution making has addressed procedural choices, and key challenges, dealt with elsewhere in this volume. At a deeper level, these chapters perhaps challenge the assumption that constitution making aims to achieve a similar set of goals across contexts.

Nathan Brown’s chapter, “The Unsurprising but Distinctive Nature of Constitution Writing in the Arab World,” argues that there are two subtle ways in which constitution making in the region has been distinctive in nature, both historically and in more recent processes such as Iraq and Egypt. The first is process, where Brown argues that for various reasons, constitution-making processes in the region have not usually been successful at reflecting social consensus, but instead the dominance of particular actors or groups. The second is substance, where he finds that regional constitutions reflect a fixation not simply with religion (which is common), but with the relationship between divine and human law. In practice, Brown argues, state officials normally attain a key position in mediating this relationship. Brown’s overarching point is that the politics of constitution-making processes in the region further the regional failure of constitutionalism, with constitutions serving to legitimate the dominance of state actors rather than constraining or sharing power.

Menaka Guruswamy, in “Constitution crafting in South Asia: lessons on accommodation and alienation,” looks at the extent to which three constitutional drafting experiences in the region – India and Pakistan in the post-colonial period, and Nepal over the past two decades – have succeeded in mitigating the religious and ethnic diversity that is so important in the region. She finds some elements of commonality across these three countries, particularly in their common British heritage and the use of dual-purpose, constituent legislatures in each case. But most importantly, she emphasizes the ways in which constitutional process and outcome were endogenous to the goals of the dominant parties and actors who started the constitution-making processes. In India, for example, the Congress party emphasized inclusion and incrementalism, which was a sharp contrast to the more exclusionary values emphasized in the Pakistani Assembly. In Nepal, like India, a drawn-out and incremental constitution-making process has served as a vehicle of (albeit incomplete) inclusion.

“Constitution making and public participation in Southeast Asia,” by Melissa Crouch, asks how different constitution-making and constitutional change processes in the region have fared in terms of encouraging popular participation. She emphasizes that constitution making in the region has taken place under a wide range of different circumstances, including UN administration (Timor Leste; Cambodia); military rule (Thailand; Myanmar); socialist rule (Vietnam; Laos); dominant party rule (Singapore; Malaysia); and democratic transition (Philippines; Indonesia). These circumstances obviously impacted the degree and success of public participation campaigns, often for example mitigating their effectiveness or meaning. Crouch thus calls for a more contextual approach to both designing and evaluating the success of public participation in constitution making.

Francois Venter’s chapter “Voluntary infusion of constitutionalism in anglophone African constitutions” considers the extent to which various waves of constitution making in formerly British Colonial Africa have succeeded in creating an ethos of constitutionalism in the region. Venter finds that on the one hand, global trends have had a deep influence on the region. Constitutional texts themselves differ little from Western models in key particulars. Constitution-making processes have also followed global trends; for example the relatively recent constitution-making processes in countries like South Africa and Kenya have been heavily influenced by global trends towards transparency and popular participation. Nonetheless, he makes a distinction between “constitution writing” and “constitution making,” arguing that the latter is an ongoing process of making constitutions real, where some glimmers of progress (such as judicial and regional enforcement) have emerged, but where much progress still remains. Venter argues that the region lacks clearly-developed indigenous norms of constitutionalism, and thus that the future must be forged out of respect for universal norms.

In “Post-Soviet constitution making,” William Partlett looks at the processes of constitution making, and resultant constitutional design, in an oft-neglected part of the world. Partlett argues that constitution-making across the post-Soviet region is highly contested. A strong thread of the regional tradition emphasizes the centralization of state power. This helps to ensure the continued divergence in obvious and important ways from the theoretical ideals of constitutionalism. Partlett argues that post-soviet constitutions are not mere “shams,” but rather reflections of a particular centralist thread in the post-Soviet constitutional tradition. This tradition is seen in the dominant constitutional positions

of presidents, weak legislatures and sub-national units, and in other institutions such as procurators tasked with large amounts of power to supervise legal and administrative decision-making. Partlett notes that centralism is weakening vis-à-vis a more “western” understanding of constitutionalism across parts of the region, but the tradition remains an important driver of constitutional dynamics.

Finally, in “Constituent power and constitution making in Latin America,” David Landau argues that while there has been a diversity of constitution-making forms across Latin America, a few key common threads stand out. The first is the sheer frequency of constitutional replacement, lately often within democratic orders. The second is the influence of constituent power theory on most (but not all) recent constitution-making processes within the region. Landau argues that the main use of constituent power theory in modern constitution making, in countries such as Peru, Colombia, Venezuela, and Ecuador, has been to legitimate a break with the existing legal order, thus obviating the need for insurgent political forces to negotiate with the opposition. The result has been to sometimes allow constitution-making processes that are unilateral and imposed rather than negotiated, even when constitution making has been undertaken from a democratic starting point. Landau argues that this problem posed by constituent power theory suggests a need to mute its impact, or more radically to move away from the theory entirely, although a full-fledged alternative conception has yet to emerge.

## VII. CONCLUSION

As can be seen from the summaries above, the chapters in this volume speak to a wide range of issues surrounding constitution making around the world. While no one book can hope to encapsulate a field as rich (and rapidly changing) as the study of constitution making, we are hopeful that readers will find much here to enrich their knowledge of the subject. Moreover, while the field of comparative constitution making has advanced significantly in the past two decades, it still remains a promising arena calling for additional research, on both conceptual and empirical levels. The following chapters propose a wide range of avenues and new directions for such exploration.