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Are 'Western' Constitutions Relevant to Anything Other than the Countries they Serve?[1]

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Abstract. This essay argues the universal relevance of the Western constitutional experience. It does so, however, not with reference to the commonalities of historical circumstance or the experience of specific states. Instead, we argue that just as events in the natural world must follow universal laws, the same it true about stable democracy, whether we are concerned with parliamentary or presidential systems, economically developed or undeveloped states, or whatever. We take as given that there necessarily exists universal principles of democratic constitutional design, even if those principles remain largely undiscovered. We argue further that discovery is more likely if we conceptualize constitutions as equilibrium selection devices and if we take as our starting point whatever understanding we possess about coordination and equilibrium selection in complex social processes, including the evolution and character of social norms and conventions.

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1. Introduction

In the most recent period of democratization we have once again come to appreciate the paucity of our knowledge about what we assume is essential to the process of erecting a modern democratic state — designing national constitutions. Anyone participating, however obliquely, in the recent spate of constitutional design enterprises in Central and Eastern Europe, or who has observed the revolving-door nature of those documents in Latin America, appreciates the vast array of questions for which there are no universally accepted answers. To what extent can and should a democratic constitution accommodate a society's history, culture, and uniqueness? Indeed, what features of history, culture and current circumstance are relevant to constitutional design and how precisely, in specific wording and provision, can we accommodate these things? Are there essential components of any democratic constitution, regardless of how that document tries to accommodate local tastes and circumstances; and if so, what are those components? Did the USSR's communist experience yield a constellation of countries that require constitutional documents that differ fundamentally from the Western — in fact, has the general history of the region rendered the West's experience with constitutionalism irrelevant to those who seek to implant democracy there? Can the same be said about Latin America, Africa, or Asia? Should constitutions be drafted as far removed as possible from the day-to-day pressures of political forces and interests; or are they more likely to be stable if there is broad and

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open public participation in their design? Are the documents we deem successes judged so because of the quality of their design or because of a fortuitous combination of circumstances that is unlikely to be repeated elsewhere? And can constitutions encourage political stability or are they mere 'parchment barriers' whose provisions are sustained for wholly exogenous reasons?

Arriving at universally accepted answers to such questions is difficult not because politicians, lawyers, pundits and political scientists fail to address them. Definitive answers elude us because these questions are rarely approached with anything more in mind than a vague or wholly ad hoc *theory of constitutional design*. We may have models and experience, hypotheses and conjectures, ideas and prejudices, but as with any intellectual undertaking, fundamental questions necessarily remain unanswered absent an encompassing paradigm that helps define our concepts and an associated theory that links these things to logically consistent propositions.

The absence of that paradigm and theory is no better illustrated by the fact that even today we continue to debate so basic an issue as the mechanisms of a constitution's enforcement. If a constitution is a contract — a 'social contract' — then who enforces its terms? And if it is something else, then what is that 'something else'? We are advised that a constitution ought to be brief and unencumbered by lengthy provisions and substantive policies. But where is the theoretical structure that allows us to define and measure flexibility, and where are the theoretically grounded principles that allow us to infer brevity as a worthwhile quality? We have arguments that tell us to exclude unsustainable social welfare guarantees, to leave the internal organization of parliaments and legislatures to parliamentarians and legislators, or to keep a constitution silent on those things best treated by more flexible statutory provisions. But we typically label our utterances 'arguments' because there are opposite opinions and no compelling theory for choosing among them.

The question that forms this essay's title is no different than any other we can ask. First, it requires a defensible answer, because much of the advice we might offer those trying to build a democracy is predicated on the presumption that the answer is 'Yes'. Second, like the questions posed earlier, the pursuit of that answer will, hopefully, encourage us to find its theoretical justification. Of course, we are not so bold as to assume that we can fill the gaps in our understanding in the space of this essay. But we pose our question because we believe it can be answered in a way that directs us to the requisite theory. Specifically, we review here the rudiments of that theory — or, more precisely, a conceptualization of democratic constitutions — that allows us to infer some general principles of design with which any successful document must be consistent. And we argue further that Western constitutions and the Western constitutional experience have universal relevance simply because *all* successful democratic constitutions, regardless of culture, history and circumstance, must accomplish the same general purpose and satisfy those same principles in a equivalent theoretically prescribed way. To deny this is to assert that 'Western physics' is something different than 'Eastern physics'; that chemicals mixed in Asia produce different compounds than when mixed elsewhere; and that Galileo's conclusions depended on the fact that he conducted his gravitational experiments in Italy rather than somewhere else. Although the study of Western constitutions may not directly reveal the principles or design we need, our experience with them — both successes and

failures — illustrate the operation of universal principles. It remains to learn what it is that is being illustrated.

This essay is organized thus: In section 2 we offer a conceptualization of a constitution, first introduced by Hardin and elaborated subsequently by others, that differs from the traditional view of constitutions as social contracts.[2] We argue that this conceptualization, which views constitutions in game-theoretic terms as equilibrium selection or, equivalently, coordination devices, is not merely more consistent with commonly accepted guidelines for good design but that it also provides the theoretical underpinning necessary to guide a general understanding of their operation and durability in specific contexts. Next, because this conceptualization is inferred from some of the qualitative lessons of contemporary game theory, in Section 3 we explore the things that theory can teach us about design. Here we argue that although preambles, rights provisions, amendment procedures, definitions of the branches of government, the allocation of powers among branches, and a specification of the ways in which public officials are appointed or elected are essential elements of a constitution, these things need to be conceptualized in common theoretical terms before we can weave them together to accommodate contemporary circumstances and form a sustainable document. More fundamental are the ideas of self-interest, incentive compatibility, expectation, belief, strategy, social norm, and equilibrium. In Section 4 and in the specific context of the Soviet Union's experience, we then confront the argument that various societies are somehow immune to the restrictions a constitution, democratic or otherwise, seeks to establish on the state. In Section 5 we offer an over-arching First Principle of Democratic Constitutional Design, which subsumes all others and which is implied directly by the conceptualization of constitutions this essay offers. Finally, in Section 6 we return to the question that forms the title of this essay.

2. Constitutions as Coordination Devices

Riker vs. Dahl: It is useful to begin our inquiry by comparing Dahl's *Preface to Democratic Theory* and Riker's *Liberalism against Populism* — two seminal essays that posit diametrically opposite preconditions for a stable democracy and offer different conclusions about a constitution's role in that stability.[3] Riker's analysis relies heavily on social choice theory and two facts of that theory. The first is that coherence in majority-governed processes (i.e., a well-defined social preference) requires an unlikely balance of citizen preferences on all issues or a uniformity of tastes such that those preferences map onto a single dimension. The second fact is that in the absence of such coherence, political outcomes depend critically on procedural details and the rhetorical skills of the participants. Riker uses these results to argue that populist institutions, defined as those that allow citizens direct control of policy, exacerbate the problem of democratic instability. Thus, constitutions should not through the institutions they erect allow the direct translation of individual preferences to social policy. Instead, their fundamental purpose is the avoidance of tyranny, which they meet by giving political elites countervailing motives, by guaranteeing citizens the right to replace one set of leaders with another, and

by recognizing that the relationship between individual preferences and public policy will ultimately be mediated by institutional detail. Insofar as the question this essay poses is concerned, Riker clearly believes that his argument applies to any society, if only because the theory upon which it is based is scientifically general. It is also evident that he believes that the philosophy of design of the U.S. Constitution especially holds important lessons for other countries: "the fundamental method to preserve liberty is to preserve ardently our traditional constitutional restraints."[4]

In contrast to this view, Dahl sees the preferences that occasion political instability in a different light, and thus the role of constitutions generally. Here stability requires the instability social choice theory describes to ensure against the possibility of permanent winners and losers. While Riker seeks to control this instability, pluralists such as Dahl prefer to give it 'free play' and perhaps even encourage it. In searching for the sources of political stability and assessing the role of democratic constitutions, pluralists focus on the ability of citizens to participate in politics via a variety of extra-constitutional institutions (parties, trade unions, industrial associations, clubs) that are autonomous of the state but impact its actions. The emphasis here is on the notion of a *Civic Culture* and its constructs. Constitutional provisions may influence that *Culture*, but such influence is not critical to the political system's ultimate survival. Thus, in sharp contrast to Riker, Dahl asserts that "constitutional rules are not crucial, independent factors in maintaining democracy ... Constitutional rules are mainly significant because they help to determine what particular groups are to be given advantages or handicaps in the political struggle."[5] And, in an apparent negation of the argument that the Western constitutional experience tells us much about democratic stability elsewhere, "to assume that this country [the United States] remained democratic because of its Constitution seems to me an obvious reversal of the relation; it is much more plausible to suppose that the Constitution has remained because our society is essentially democratic."[6]

Unfortunately, although both Riker and Dahl offer distinctive answers to the question that forms this essay's title, our problem in choosing between them is that those answers are incomplete. Riker advocates constitutional limits on direct citizen control of policy — a multi-cameral legislature, a separation of powers, federalism, and an independent judiciary. But he fails to address the core issue of the ultimate source of stability of constitutionally mandated institutions — the mechanisms for ensuring that these institutions do not merely inherit the instability that adheres to the policies those institutions imply. And although the pluralist argument requires that there not be any permanent losers, denying any critical role for constitutions denies the fact that the political strategies people choose in pursuing their ends and the very definition of winner and loser depend on the institutional structures constitutions establish.

Constitutions as Contracts: Any satisfactory resolution of this disagreement requires that we move beyond the confines of this debate to a definition of a constitution, to a satisfactory specification of its purposes, and the way it achieves those purposes. And here we begin by noting that constitutions are often viewed as contracts whereby people establish authorities to resolve those inefficiencies occasioned by externalities and public goods and to render coherent the processes whereby society reallocates wealth.[7] But there are difficulties here, the most evident being that a contractual conceptualization cannot

specify how the terms and provisions of such documents are enforced. In the usual economic context, contracts do two things: (1) they specify the actions the various parties to the agreement are required to undertake under varied circumstances and (2) they specify appropriate sanctions in the event that one party or another defects from the terms of the contract. Enforcement, however, typically lies elsewhere — most notably, in the courts. Where, however, is the authority that enforces constitutions as contracts? If, as Madison says, "a mere demarcation on parchment ... is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government" (*Federalist* #48: 254)" then it cannot be words that enforce. But if it is not words, then we are led to a logical conundrum. If enforcement lies in the institutions a constitution establishes such as a national court, then what enforces the provisions that define and limit the judiciary's authority? If those things are other entities a constitution establishes, such as a legislature or an executive, then we must identify the thing that enforces this entire edifice.

We can begin to see our way out of this conundrum by considering the two-person Prisoners' Dilemma. Briefly, we know that this dilemma, played once, can be resolved and an efficient outcome achieved only if both persons contract to allow defections to be sanctioned — presumably by the creation of some new entity, the state. Thus, the essence of a constitution-as-contract must be the creation of a force empowered to coerce that can render cooperation a new equilibrium to the original game. However, the creation of this new entity engenders two new problems. First, the original players must design their creation so that it does not act in its own self-interest and against theirs. This, presumably, they can accomplish with the common constitutional provisions of a separation of powers, regularly scheduled elections, and so on. But there is a second problem. Because the incentives of the two contracting players remain essentially unchanged absent coercion, how can any contract between them ensure that one player cannot collude with or otherwise co-opt their creation to the detriment of the other player? A complete 'solution', then, would seem to require an abdication of sovereignty by the original contracting players, since this is the only mechanism that gives their creation a 'life of its own' and, presumably, an ability and incentive to resist co-optation. However, abrogating sovereignty is at odds with the democratic requirement that sovereignty reside in the citizenry: "In all governments, whatever their form, however they may be construed, there must be a power established from which there is no appeal, and which is therefore called absolute, supreme, and uncontrollable ... [and a democratic state, that supreme power] resides with the people ... they have not parted with it; they have only dispensed such portions of power as were conceived necessary for the public welfare."[8] Thus, "the view that the government can be bound by specific provisions is naive. Something must enforce those provisions, and whatever enforces them is itself unbounded... This problem of the self-enforcing constitution has so far evaded solution."[9]

The difficulty here is especially evident if we consider constitutional secession clauses. The general view of such clauses is that a constitutional right to secede "would increase the risks of ethnic and factional struggle; reduce the prospects for compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into these decisions; create dangers of

blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects for long-terms self-governance."[10] And if, as Sunstein argues further, a constitutional provision prohibiting secession is best interpreted as a contractual agreement whereby federal units pre-commit to strategies that preclude secession, what is the mechanism that in fact sets that precommitment in concrete. Defending such arguments, in fact, takes us to the core of a theory of constitutions, since it requires an answer to such questions as: If a political subunit of a federation chooses whether or not to secede strictly on the basis of self-interest, how can a constitutional clause influence that interest? If, as much of the theory of federalism suggests, people choose to form, maintain or dissolve a federation on the basis of its ability to resolve the economic efficiencies occasioned by Prisoners' Dilemmas among otherwise sovereign states, then why would mere words influence those economic calculations? And if a decision about secession is itself a response to beliefs about the responses of others who also act out of self-interest — a belief about the likelihood that secession will be punished or ignored — then why would a constitutional secession clause influence their self-interest and the likelihood that they will act in accordance with its terms?[11] If we try to answer such questions with the argument that the ongoing nature of the 'game' played by federal subjects renders threats credible and agreements enforceable, we still cannot say that merely setting an agreement to paper influences much of anything. If such an agreement corresponds to an equilibrium, then presumably that outcome would be realized regardless of formal statements.

The Universal Necessity for Coordination: These conceptual issues do draw our attention to a feature of government that our initial discussion of the Prisoners' Dilemma ignores. Specifically, by focusing on a single play of that game we take too narrow a view of the substantive problems with which constitutions must deal. The Framers of the U.S. Constitution, for instance, did not envision solving a defense dilemma or an interstate commerce dilemma that would exist only for a few years. They saw these things as problems of potentially indefinite duration — as dilemmas that must be continually 'resolved'. Thus, the ideas of 'repetition', 'long term', and 'repeated' are central to the discussion of constitutional design and it is here that game theory offers a critical insight. Suppose, then, that the Prisoners' Dilemma is played an indefinite number of times. The game that now confronts the players is changed in a fundamental way. The single-play Prisoners' Dilemma offers each participant only two strategies (e.g., 'cooperate' and 'defect'), one of which ('defect') is dominant. But if played an indefinite number of times, each player is confronted with an infinity of alternative strategies (plans of action), such as "cooperate as long as the other person cooperates, but never cooperate again once the other player defects," none of which is dominant. In addition, however, to expanding the set of strategies, game theory tells us in a wholly general context that this expansion also expands the set of outcomes that can be enforced without exogenous enforcement — the set of outcomes (or, equivalently, strategy n-tuples) that are noncooperative equilibria. In the infinitely repeated Prisoners' Dilemma, for example, if both players give the future sufficient weight in their calculations, then endless cooperation is an equilibrium that is supported by strategies in which each player is prepared to sanction the other for any defection. Indeed, the results that support these conclusions — referred to as the folk

theorems of game theory — tell us, roughly, that in any ongoing complex social process there is the opposite of a paucity of alternative equilibria. There is, in fact, an abundance of them, from inefficient to efficient ones, and from 'unfair' to 'fair' ones.

It appears, then, that the mere fact that all social processes are on-going resolves 'automatically' the problem of endogenous enforcement, since nearly any agreement can correspond to an equilibrium. However, although there are equilibrium strategy pairs that yield cooperation at every stage and give no advantage to one player or the other, there are other equilibria that give asymmetric rewards. Different players, then, will prefer and pursue different equilibria. This fact occasions a new complication. In the single-play Prisoners' Dilemma there is a unique equilibrium and little doubt that it will be realized. But if a game possesses multiple equilibria, there no longer is any guarantee that any equilibrium will be realized. For example, if *(a,b)* is an equilibrium strategy pair in some 2-person repeated game, where both *a* and *b* describe in full detail all contingent actions a player might take as the game is played, and if *(c,d)* is another such equilibrium strategy pair, the problem is that there is no guarantee that either *(a,d)* or *(c,b)* corresponds to an equilibrium. Thus, even if both players choose a strategy that is a part of some equilibrium *n*-tuple, there is no guarantee that the strategies they choose collectively will constitute an equilibrium. Hence, rather than being concerned solely with enforcing an agreement — with ensuring that their agreement corresponds to an equilibrium so that neither of them has an incentive to defect — the players must be concerned also about *coordinating* their actions so as to ensure that they can achieve an equilibrium that is acceptable to each of them.

Simply because players are trying to achieve an equilibrium they prefer to what will prevail if they fail to coordinate does not mean that coordination is straightforward. Again, we emphasize that in most 'interesting' social processes, people will prefer different equilibria. In a constitutional context, for instance, those who see themselves as a chief executive will prefer a presidential system; legislators will prefer a parliamentary one; regional leaders will prefer a decentralized federal system, those who will be part of the national government will prefer a unitary state, and still others may prefer no democracy at all. And each of these governmental forms can constitute a different institutional equilibrium, so agreeing to a specific equilibrium poses problems of its own.

Suppose, nevertheless, that a consensus is reached as to which equilibrium ought to be chosen. Unfortunately, there is one more difficulty that must be overcome. If there is no shared belief beforehand that coordination will be effective — if people continue to believe that most everyone else will act as before — then the presumption of failure will be a self-fulfilling prophesy. For example, suppose that the primary sources of domestic capital invest only on the basis of a high discount rate for future profits and prefer to reap gains immediately because of the supposition that the state is unstable and the future especially risky. Suppose these same investors meet and, recognizing the social and individual advantages of investing with a longer-term perspective, agree to act accordingly. This decision, however, need not change anything. If the current situation is an equilibrium — if it is unprofitable to invest for the long term when everyone else does the opposite — then even if the alternative is an equilibrium as well, it may be difficult to alter a critical mass of actions simultaneously.

Successful coordination requires a change in beliefs — a change in people's expectations about what others believe and how they will act. Hence, society can be trapped in a coordination dilemma in which a change in expectations requires concrete evidence of action, but the requisite action will be forthcoming only after expectations change. In game-theoretic terms, coordination to a specific equilibrium requires that everyone's intent to choose appropriately must be *common knowledge*: Everyone must know that everyone else will choose an appropriate strategy; everyone must know that everyone knows this; everyone must know that everyone knows that everyone knows this, ad infinitum. Knowing that others will choose strategies appropriate to a specific equilibrium dissuades you from defecting; knowing that they know that you know what they will do, dissuades them from defecting and thereby reinforces your initial belief, and so on.

Constitutions as Coordination Devices: The preceding discussion applies to nearly any repeated game, and thereby illustrates the following: (1) *any ongoing social process is characterized by countless alternative equilibria;*(2) *nearly any pattern of outcomes can prevail regardless of the efficiency or fairness of this pattern; (3) different players will prefer different equilibria; (4) some form of pre-play coordination is required if participants seek a guarantee that one equilibrium or another will be realized; and (5) effective coordination requires a common knowledge belief about strategies*. The dilemma of coordination, then, is a problem common to any society, but requires special notice in democratizing countries because in this instance an explicit attempt is being made to establish a different equilibrium. And the problem is that even if everyone prefers to live in a democracy, unless the common knowledge requirement is satisfied, no one will in fact let themselves be constrained thus. If everyone begins with the assumption that their society is unprepared for democracy or their culture inconsistent with it, that assumption is a self-fulfilling prophesy sustained by the actions everyone observes. Game and the imperatives of establishing a democracy, then, compel us to the view, first offered we believe by Hardin, that "a constitution does not depend for its enforcement on external sanctions ... Establishing a constitution is a massive act of coordination that creates a convention that depends for its maintenance on its self-generating incentives and expectations."[12] Indeed, we can make an even stronger assertion: Since all political processes are ongoing, since the realization of efficient, coherent, and even "fair" outcomes is achieved only through coordination, and since the agency of the state is necessarily a part of any of society's coordinative mechanisms, then a 'well-crafted' constitution is (in contrast to Dahl's view but in support of Riker's) essential for democratic stability. What remains, then, is to use this idea of constitutions as coordination mechanisms to specify what we mean by 'well-crafted'.

However, before we explore the meaning of 'well-crafted', there is one last point that needs to be made about the implications of the preceding discussion and constitutional design. Specifically, we need also to understand that coordination is fruitless if we are trying to coordinate to something other than an equilibrium. This is something the framers of the US Constitution knew well, and should keep us attuned to the common and well-known prescriptions of balanced government, etc. — and in particular, to a governmental structure that establishes, in contemporary terms, an incentive-compatible mechanism — a mechanism that (1) is itself an equilibrium in the sense that it is in the self-interest of the

relevant decisions makers to maintain it, and (2) if maintained, yields incentives such that the desired social outcome is a Nash equilibrium to the game it. Thus, returning to the question that forms this essay's title, our answer is 'Yes, Western constitutions are relevant to other countries and societies,' if only because they illustrate both the successful and unsuccessful application of this idea.

3. Some Practical and Universal Implications

It is one thing to assert that the Western experience with constitutional democracy is universally relevant because the theory that allows us to interpret that experience is general; it is another thing to identify the specific lessons for other countries and societies that experience teaches us. Constitutions, after all, consist of specific provisions and institutional choices and the issue to which we must now turn is identifying what can be generalized. We can begin with the fact that every *society*, virtually by definition, possess a great many things that facilitate social coordination in the same way we argue constitutions operate — things we identify as norms, customs, and social convention that also must be self-enforcing.[13] Thus, a political constitution is only one element of society's fabric, and to make its provisions effective, a constitution should parallel the 'design' of those other self-enforcing mechanisms. The first thing to appreciate, then, is that social norms and customs are effective if and only if they are simple and readily understood by nearly everyone. It may be true that the actual application of a norm or convention will require complex individual choices and contingent decisions, but simplicity is required if the general intent of a norm is to be effectively communicated and universally accepted. The ambiguity that accompanies simplicity can be accommodated on a case by case basis — by common sense and, if necessary, the development of additional conventions — in much the same was as a constitution is interpreted and reinterpreted over time by the courts, the other branches of government and by people directly.

This view of constitutional provisions, then, suggests the following universal rules of constitutional design:

Rule 1: *Constitutional provisions ought to be simple and concise, unencumbered by legalistic complexity.* Also, since a constitution, at least in its ideal form, ought to be a part of a social consensus that consists of all the norms and conventions that describe a society, and since, in fact, the demand for a written constitution may be a product of these other norms and conventions,

Rule 2: *If a society has a democratic tradition — even one that lies in the distant past — then any constitution ought to make as few changes in those traditions as possible and link itself to that past as much as possible*.

The US Constitution illustrates the application of this second rule, which requires that constitutions accommodate a society's political traditions and those amorphous things we place under the rubric of political culture. For example, readers of that document will search in vain for any reference to 'majority rule' or 'majority vote'. The only references to voting rules we find there pertain to special cases — amendment, impeachment, and the definition of a legislative quorum. The explanation for this 'omission' is straightforward:

It was unnecessary for the Framers to say otherwise since, once the set of eligible voters is identified, there already existed a socio-political norm that, *unless otherwise stated*, presumed majority rule. Aside from the supposition that an extraordinary action such as impeachment requires a 'special' vote, there was no consensus on how special that vote ought to be. It is only here, then, that the constitution becomes specific, requiring a vote of two thirds in the Senate for conviction (Article 1, Section 3.7). This requirement stands in sharp contrast to Article 1, Section 2.5, which states simply that "The House of Representatives ... shall have the sole power of impeachment." The implication here is that power of impeachment can be exercised by a simple majority, subject to the requirement that a quorum (a majority of members, as specified in Article 1, Section 5.1) exists to consider the matter.

It is also worth noting in this context that the United States would be little changed if the Senate requirement had been set at three fifths, or four fifths, or even some less-obvious fraction like seven tenths. The specific number chosen is of less consequence than is ensuring that everyone is coordinated to the *same* number. Because everyone prefers to avoid ambiguity in so important a matter as conviction of impeachment, because there is a consensus that some number greater than one half is necessary, and because, behind their 'veil of ignorance', people are more concerned with agreeing to some number beforehand than to not agreeing or to arguing what that number ought to be in the heat of political passion, the specification of any number greater than a majority will be an equilibrium. Here, then, the constitution quite explicitly functions as an equilibrium selection device.

The argument for Rule 2 — that a stable constitution is a part of society's structure of norms and conventions — holds another universal implication. Briefly, we can infer that a constitution should not try to rewrite those preexisting norms and conventions insofar as they are consistent with democratic practice, since doing so jeopardizes a constitution's legitimacy and ability to coordinate. Absent a reason for believing otherwise, it is far safer to assume that social norms and customs have more permanency than any newly imposed political document, at least in the domain of custom and everyday social convention. A constitution may choose to restate some of those customs and conventions, but there is always the danger that specific words open the door to a misinterpretation of things and to government meddling in matters best left to less precise social processes. In any event, our argument here is merely a restatement of the idea that a constitution should be molded to the culture it serves. But rather than try to draft a document that *explicitly* satisfies this objective, a far easier approach to implement is the minimization of the document's domain. Here, then, is the rationalization for a rule that is consistent with most of the constitutions we label 'Western':

Rule 3: *Constitutions should focus on the design of those minimal institutions and rights necessary to ensure society's ability to coordinate for the realization of policy goals as expressed through such agencies as democratic elections.*

The preceding three rules stands in sharp contrast to how we might draft a constitution based on a contractual conceptualization. Like our legalistic norm, our instinct would then be to try to "nail down" every detail, to defend against every tyranny, and to make plans for every contingency. But this approach merely pushes the problem back a step. The words we add can only open the door to additional ambiguities and the need for additional

definitions and contingent choices so that the only ''solution'' is to add further administrative, judicial, and legislative directives. The end result is a document that confuses but cannot coordinate. Indeed, because contracts can only be enforced by a higher authority, this view tempts us to begin a futile search for the philosopher-king, to the dangerous creation of the dictator, or to the construction of a governmental structure so mired in countervailing forces that stalemate prevails. Thus:

Rule 4: *The institutional design a constitution offers should be based on the presumption that any need for greater specificity and the resolution of ambiguity will be attended to by the legislative and judicial institutions it establishes and by the evolutionary development of subsidiary social norms and conventions.*

Rule 4 is not an argument for wholesale ambiguity. Great skill and foresight may be required when trying to assess those things that require explicit provision and those things that can be left to evolutionary development. The most evident failure of the US Constitution, for instance, occurred with respect to an issue about which it was largely silent and for which there was no social or political-economic norm that could serve as a substitute — the right of secession. A great many things can be cited as 'causes' of the American Civil War, but certainly an important contributing factor was the fact that the Constitution neither explicitly allowed nor disallowed secession. The Confederacy, then, was free to argue that South Carolina had the right to secede while Lincoln and the Union had the right to see South Carolina as a state in rebellion. The states of the Confederacy might have chosen a different path had the constitution explicitly disallowed secession; and Lincoln might have been unable to rally the Union to war had it allowed it. We cannot, of course, test any hypotheses here, but it is evident that Constitutional ambiguity in this instance, absent a consensus on the legitimacy of one action or another as supplied by some other coordinating mechanism, left the Constitution and the country open to disruption.

One advantage of our interpretation of a constitution now is that it helps identify an *effective constitution* — which is a document that establishes stable and self-generating expectations about peoples' political choices. For instance, asserting that the strategy of tit-for-tat will solve a specific instance of the repeated Prisoners' Dilemma requires more than the supposition that both players intend initially to choose this strategy; it also requires that both players believe that the other will do the same. Moreover, as we note earlier, this expectation must be common knowledge — each player must expect the other to choose that particular strategy, each must believe that the other holds a similar expectation, each must believe that the other believes that this is so, and so on. Little is known, unfortunately, about expectations, their genesis and their evolution. But ''it is clear that communication is critical to the ability to settle on a coordinated outcome when interests conflict'' if only because the condition of common knowledge is not likely to be satisfied otherwise.[14] Thus, a conceptualization of constitutions as a coordination device suggests the following with respect to how they ought to be written and ratified:

Rule 5: *The writing and ratification process of a constitution should be separate enterprises. The preparation of the document should occur outside of public view, while its subsequent ratification should involve as broad a segment of society as possible.*

This rule, of course, merely reiterates the history of the US Constitution. But this rule's logic is wholly general. First, widespread participation in the drafting process need not coordinate society to anything. Indeed, since not everyone is likely to share the view of constitutions as coordination devices as opposed to social contracts, broad participation in drafting is more likely to reveal society's political-economic conflicts in ways that compel drafters to try to incorporate political compromises within it even if those compromises are best left to subsequent legislation or to the gradual evolution of other social conventions. However, once the document is prepared, a way must be found whereby expectations are coordinated and the realization of that coordination rendered common knowledge. And again, the American experience — which entailed widespread discussion, debate within state legislatures and specially organized assemblies, and the writing of the *Federalist Papers*, as well as those editorials and letters of the 'anti-federalists' — is a model for other states to follow.

We will not attempt to assess how that model can be mapped onto 21st century technology, but the principle — the necessity for generating common beliefs and expectations — remains valid today and for society generally. This argument, moreover, is especially relevant with respect to individual constitutional rights. Unlike those provisions that divide power between executive and legislative branches, specify the size of a legislature, the method of selecting judges, or mechanisms of impeachment, little in a constitution is as likely to impact citizens as directly as is the meaning and enforcement of rights. But here we have a profound difficulty: The remaining parts of a constitution define the rules under which political elites operate (as well as specify the rules under which they become 'elites'), and their conflicts there are likely to be with each other over the allocation of power. Rights, however, constrain the state generally and, thereby, all of those elites in the same way. Political elites, then, have a common interest in circumventing rights and, more often than not, will refrain from doing so only when it is part of a strategy of securing power against each other. We are reminded here of the movie *Armistad* in which John Quincy Adams argues before the US Supreme Court for the freedom of Africans following their revolt on a Spanish vessel. Despite the Court's ostensible pro-slavery sentiments, Adam ultimately sways the justices to his position with the argument that to vote against the Africans and to side with the Van Buren administration threatens to leave the Court subservient to the executive in much the same way as the Spanish court was subservient to the crown. The Court, then, certifies the rights of the Africans, but only to defend its authority against another branch of government.

This example, of course, appears to illustrate the traditional mechanism whereby rights are presumed to be enforced — a specific instance of Madison's 'ambition countering ambition.' And if this were the sole mechanism of enforcement — the balance of powers a constitution seeks to establish — then a contractual conceptualization of constitutions might provide sufficient guidance for their design. However, even in this instance we should ask: Why would the executive branch be bound by the Court's ruling? Why didn't the Van Buren administration simply ignore the Court's decision by using its authority over police and military to seize the Africans and, justifying its actions by the imperatives of foreign policy, return them to Spain? On the basis of the conceptualization of

constitutions we offer here, the answer to our question is a societal consensus not merely with respect to the rights a constitution offers, but also about the legitimate exercise of power and who has the authority to interpret those rights in specific substantive instances. Van Buren might have acted to thwart the Court's directive, but if he believed that everyone else outside of his immediate administration was coordinated to sanction such action or ignore his edict on the matter, then it was simply in his self-interest to abide by the Court's ruling. In this way the Court's decision was enforced by a common knowledge belief that the political equilibrium that prevailed would yield sanctions in the event of any defection.

Although we would not argue that widespread public debate, as part of a constitution's ratification process, is sufficient to generate such consensus of beliefs — in the American case, that authority was secured by the Court only over time and in an evolutionary way — we do suggest that such a debate can contribute importantly to it, especially in societies with little experience with a separation of powers and formally expressed rights that constrain the state.

It is at this point that we can address another issue — one that concerns the content of rights. Even when political elites are wholly disingenuous and allow the inclusion of rights they have little intent to enforce or abide by, there is a consensus that certain rights ought to be part of any ostensibly democratic constitution — the right to vote, to trial by jury, to free speech, to peaceful assembly, to protection from unwarranted searches and seizures, to private property, and so on. Debate, though, continues over the advisability of including two additional categories of 'rights' — 'rights' in the form of restrictions on individual citizens when the exercise of one right negatively impacts others, and rights in the form of substantive policy objectives for the state.

The first category of 'rights' — actually obligations — is the easiest to treat. Here we have in mind provisions such as the one found in early drafts of the Russian Federation constitution that "children who have come of age and who are fit for work are required to take care of their parents". Although we might agree that this clause expresses a worthwhile sentiment, it is unlikely that many Western specialists in constitutional design would be sympathetic to its inclusion in any constitutional document. Lawyers would decry its imprecision, economists its feasibility, and political scientists (at least the less liberal of the type) its invitation to unwarranted incursions into private affairs. But what of a clause that prohibits the burning of a national flag (as continues to be debated in the United States), that limits a person's ability to publish pornography, or that prohibits promulgation of Nazi ideas (as in Germany)? Here things seem murkier. However, recall our earlier argument that a constitution is only one of the many things that coordinates people to be a society — a governable polity. We find it easy to reject provisions that require children to care for their aged parents because there already are social norms (and associated statutory legislation) that regulate such things, just as there are norms but no constitutional provisions requiring the young to give up their seats on a bus to the elderly. Moving a constitution into this domain, then, is unnecessary. It is also potentially dangerous, because we are then more likely to succumb to the temptation of trying to use that document to establish and regulate all of society's norms and conventions. Perhaps someday, when we know all that there is to know about political-economic and

social processes, we can write an all encompassing document. But that day exists only in the most fanciful science fiction. Hence:

Rule 6: *Constitutions are necessarily limited documents, and to use them as a tool of social (as opposed to political) engineering can threaten their role as coordinating devices.*

It may be true than in extraordinary circumstances, such as the one Germany found itself in following World War II, when people feared a gap in its social normative structure allowed for the rise of a Nazi dictatorship, that an extraordinary provision limiting the ability of people to pursue certain political acts seemed reasonable (although we suspect that West Germany then and Germany today would function as any other democracy without such provisions, given the institutions the other parts of the constitution establishes). It will remain true, however, that the political elites of some states, as well as the citizens within them, will be unwilling to authorize rights in any pure form. Rule 6, nevertheless, can still be adhered to without violating the idea that constitutional rights can legitimately limit only the state with some deft draftsmanship. For example, a clause such as ''No law shall deny or abridge any Constitutional right. Laws that govern the manner and circumstances in which Constitutional rights are exercised must be essential to the realization of those rights or to the fulfillment of some Constitutional responsibilities of the state that cannot be fulfilled by less restrictive laws, and even then they must leave all persons with some ready and effective means of exercising all their Constitutional rights. If challenged in court, the state shall bear the burden of proving that these conditions have been met.''[15]

Despite the prejudice of political elites to tie their hands with bold statements of individual rights, it is, however, the second category of extended rights that is the more difficult one with which to contend. Examples of this second category in an extreme form are offered again by an early draft of the Russian federation constitution, which among other things provided that (1) ''Each employee is entitled to recreation. Wage workers are guaranteed the working hours, weekly days off, holidays, paid annual leave, and a shorter working day for a number of occupations and industries established by law''; (2) ''Everyone is entitled to qualified medical assistance in state or local systems of health care from the resources of social insurance''; and (3) ''Everyone is entitled to a dwelling place. No one may be arbitrarily deprived of a dwelling place. The state encourages housing construction and creates the conditions for the realization of the right to a dwelling place. Housing is made available to needy citizens free of charge or on preferential terms from the housing of the RF, the republics, the lands, and local housing''.

The argument against the inclusion of such things is the supposition that by promising more than the state can reasonably be expected to deliver ultimately undermines a constitution's authority. Our objection, for instance, to a balanced budget amendment to the US Constitution is not that the federal government should not have the authority to determine whether spending and taxes are in balance, or that institutional mechanisms should not be found to discourage wasteful spending. Rather, it is that such an amendment sets a specific policy goal which may or may not be feasibly met. Despite this fact, however, the problem opponents of such provisions confront is that, following 40, 50 or 70 years of communist rule, large segments of the relevant populations believe that such 'rights' belong in a constitution and that legitimacy is lost if they are not somehow

incorporated into it. This is a serious concern, since if constitutions are coordination devices, the concept of legitimacy — however imperfectly and imprecisely defined by academics — in critically important to political stability. Indeed, we can even define legitimacy as the extent to which a constitution establishes a common knowledge basis of beliefs and expectations, and performs is coordinating function. Our objection to the preceding clauses, then, is not that they are in a constitution, but simply that they are badly stated. Again, creative draftsmanship can solve the problem of imbuing the document with legitimacy (e.g., rather than oblige the state to meet specific policy objectives, when authorizing the state to act in specific policy domains, list things like 'adequate income for all,' 'adequate nutrition for all,' 'medical care for all' and so forth, followed by the provision that 'the state shall not act but in pursuit of these objects.')

4. Lessons from Russia

In questioning the universal relevance of Western constitutions, reference is often made to Russia — to the era of communist rule and also to today when a small cadre of elites, called 'The Family' appear to govern without meaningful constitutional restraint. The USSR's constitution, both it's '36 Stalinist and '77 Brezhnevian versions, offered a full menu of constitutional rights. Chapter X of the 1936 document, for instance, "guaranteed" the right to free speech, a free press, free assembly, equal protection, freedom of religion and thought, equal rights for women, the inviolability of the person and due process, and, conflating negative with "positive" rights, the right to work, rest, material security, and education. The USSR's failure to meet these obligations — in combination with what can best be described as a shaky constitutional foundation today for Russia — is taken by some to indicate a failure either of Western-style constitutionalism in general or of its inapplicability to Russia in particular. Is it possible, in other words, that a coordinating constitution, regardless of how well-crafted, cannot overcome Russia's history, culture, and 'the Russian soul'?

Here, though, we argue that the fault of those documents — old and current — is not that they failed, but rather that they worked precisely as designed. Those who believe they failed owing to the gap between promise and reality are correct to assert that merely setting words to paper about rights and social welfare entitlements did not and, in general, cannot accomplish much. Society may be coordinated initially to accept certain rights and limits on the state as legitimate, but a state also requires appropriately designed institutions that lead to common knowledge acceptance of those rights and limits. Elites in particular must believe that other elites will act in accordance with the rules set down in a constitution, they must believe that others think they will act in this way, and so forth — and the institutions a constitution establishes must encourage everyone to signal their commitment to the new equilibrium.

Looking first at Russia's communist era, though, the presumption of failure is based on a preoccupation with the question: Did the constitution lead to the realization of stated goals? The answer, clearly, is NO, at least insofar as rights and welfare guarantees is concerned. But before we draw any conclusions from this fact, we should consider two

additional questions. First, did Soviet constitutions legitimize or contribute to the stability of the political institutions they prescribed. And second, were those institutions appropriate for the realization of the rights and guarantees it identified as goals? Only if our answers to these questions are NO and YES can we say the constitution failed to operate in its theoretically prescribed way — as a coordinating agent for society. In fact, our answers are exactly the opposite.

First, even if Russia's Soviet-era constitutions failed to guarantee the realization of lofty principles of human rights and civil liberties, those constitutions did succeed in their purpose to the extent that the system and institutions they sanctioned functioned as described for seven decades.[16] Specifically, both the '36 and '77 versions legitimized the dictatorship of the communist party, and thereby rendered its provisions with respect to rights mere window dressing. This is not to say that either constitution coordinated anyone to those political structures: those structures existed before either document was written. At best, the '77 document codified many of the post-Stalinist changes in Soviet law and, by institutionalizing the role of the communist party more forthrightly (§ 6), signaled the transition from Stalin's personal dictatorship to that of the party. Because both documents merely sanctioning what already existed and because they were not designed to be operating law, we cannot judge whether they played any role in strengthening those institutions.

A more relevant example for purposes of assessing the coordinative powers of a constitution and the law in Russia comes from a different Soviet experience. Recall that although both the '36 and '77 versions allowed for secession in principle (§ 17 and § 72, respectively), both documents precluded such action by their failure to offer any procedure for separation. It was evident to every political elite, then, that the true state of affairs was a prohibition on secession. In 1990, though, believing that he could buy time for his reforms, Gorbachev acceded partially to Baltic demands and allowed the passage of implementing legislation that specified a clear, though tortuous, path to secession. The effect was other than what Gorbachev intended. By playing the coordinating role that is the ultimate basis of the enforcement of its provisions, the USSR's constitution (along with its implementing legislation) coordinated expectations so that what was deemed illegal under one set of words became a legitimatized and actively pursued policy by Baltic leaders under a different set.[17]

The flawed Soviet constitution also played a role in its own demise in a different context. Upon the dissolution of the USSR, Russia was left with a constitution that was largely a reprint of the '77 Soviet text. And although it was amended to establish a president, to empower a Constitutional Court, and to proclaim the principle of a separation of powers, little attention was paid to logical consistency. Thus, Article 104, consonant with the revolutionary slogan "all power to the Soviets," remained and gave the Congress of People's Deputies the authority to legislate and govern in all important matters, despite the addition of competing centers of power. As long as there was a communist party to rule and negate all inconsistencies, such inconsistencies mattered little. But once that party ceased to exist in its original form, the document's logical flaws found full play in the conflict between Yeltsin and the Congress, resulting in a mini-civil war that was resolved only by military force. If anything, then, this progeny of a Soviet-

era constitution proved that a logically flawed document can impact events as well as a properly written one.

At this point it is tempting to try to assess the coordinative prospects of Russia's current constitution. There are those, of course, who continue to believe that constitutionalism — at least a democratic form in which a document constrains the state and protects individual rights — is somehow alien to Russia. And as evidence the most cynical among them can point to the growing number of constitutional violations promulgated by a regime that appears to adhere to the law only when it is in its interest to do so. This evidence, however, can be given a different interpretation. Specifically, if the rules we set forth in the preceding section fail to guide a constitution's design, then there is no reason to suppose that a constitution can be an effective coordination mechanism. If, in fact, people begin their democratic constitutional experience with the expectation that their document will not coordinate, and if its design is so fundamentally flawed that it cannot establish a new basis of common knowledge, then that expectation will be realized.

And indeed, the current Russian constitution — both in the method of its creation and in its design — is flawed. First, wholly contrary to Rule 5, its creation involved a confusing mix of drafting by a small inner circle of Yeltsin advisors in combination with a presidentially appointed 400-odd member 'committee' whose ultimate impact on the final document remains unclear. Ratification, in contrast, was swift, entailed little if any public debate, and was performed in the context of a parliamentary election replete with allegations of fraud. Although many of those who participated in the 2-3 year tug-of-war over alternative drafts before Yeltsin chose to dictate the final outcome were familiar with Western practice, the different sides to these disputes were rarely motivated by principled notions of constitutional democracy. Residents of the Kremlin sought a strong presidency; conservatives in the People's Congress argued for a parliamentary system; leaders of the republics argued for a loose federalism because they wished to maximize their autonomy and control of the resources on their territories; politicians in Moscow preferred a unitary state because they sought to maintain control of governmental revenues and because they knew no other governmental form; the original Constitutional Reform Commission argued for an elaborate document since that was the style of their ill-prepared draft and to argue otherwise was to hand the constitutional agenda to competitors; competitors argued the opposite in the attempt to seize the label 'the James Madison of Russia'; and those who argued for extensive welfare entitlements did so because doing otherwise was to reject their heritage of democratic centralism. And again, little of this maneuvering occurred in a context whereby individual citizens or even regional assemblies could contribute much to the debate.

These disputes colored nearly every article of the various draft constitutions, and their final resolution is a document that contradicts many of its loftily stated principles. Despite proclaiming Russia a federation (§ 5), federal subjects are precluded from establishing their own independent judiciaries (§ 118) or from controlling the method whereby deputies to either national legislative branch are elected (§ 96); regional governments posssess few if any exclusive policy jurisdictions (§ 71 and 72) and have no authority over local governments (§ 132 and 133); the president is empowered to overturn those regional executive acts he deems unconstitutional (§ 85); regional governments possess

no independent taxing authority (§ 72); there is no guarantee of the obligation of contracts and no comity clause. And, in perhaps the clearest reincarnation of Lenin's idea of democratic centralism, the constitution provides that "federal executive bodies and the bodies of executive authority of the members of the Russian Federation shall form a single system of executive authority" (§ 77). Despite proclaiming the people as the ultimate sovereign (§ 3) and rights as inalienable (§ 17), citizens have no standing before the Constitutional Court (§ 125), constitutional rights are confused with citizen duties (§ 57–59), and the law can limit rights in order to uphold "the foundations of the constitutional system, morality, or the health, rights and lawful interests of other persons or for ensuring the defense of the country and state security" (§ 55). Despite proclaiming a governmental form based on a separation of powers (§ 10), in addition to the duties and powers normally associated with that office and in addition to being anointed "guarantor of the constitution" (§ 80), the President is empowered to dissolve parliament (§ 84), to appoint ministers without legislative oversight (§ 83), and, as a way of giving the President the power to set the legislative agenda, to issue decrees insofar as the law is silent (§ 90).

5. A First Principle of Design

Russia's current constitution violates many of the ideas we might hold about a balanced institutional design. However, if we review the rules set forth in Section 3, it is possible to conclude that those violations are not so serious as to preclude their ultimate refinement through amendment, judicial interpretation, and evolving tradition. The document is not overly long, it makes few policy promises that a reasonably prosperous society cannot keep, and it refrains from trying to be society's all-encompassing moral authority. Nevertheless, our assessment of Russia remains pessimistic. There is still the problem of expectations — the maintained belief that the document is little more than a meaningless 'parchment barrier' designed to serve a ruling elite. When corruption permeates every branch and level of government, when murder as is sometimes a substitute for electoral defeat, and when a small self-perpetuating inner circle of elites control the important levers of state power, ordinary citizens are unlikely to believe that a new constitution has coordinated them to some new and better equilibrium. The more serious problem is that a poorly drafted document is unlikely to change expectations and beliefs, because of the opportunities they present for manipulation and circumvention of constitutional provisions will otherwise prove irresistible. The flaws in Russia's constitutional design go deeper that a few ill-chosen or badly worded provisions. Specifically, if a constitution is to be a successful mechanism of coordination, then the nexus of institutions to which it seeks to coordinate must itself be an incentive-compatible equilibrium. That is:

Rule 7: *in assessing a constitution's we need to examine whether any 'player' will have the power and incentive to circumvent unilaterally any of the constitutions' provisions.*

Rule 7, of course, is little more than the requirement that a constitution be balanced, but the application of this rule requires another — one that not only in the Russian case is too

often forgotten or ignored. Indeed, so important is this last rule, which derives from the requirement that the constitution as a whole be an equilibrium, we label it the "The First Principle of Design":

Rule 8 (The First Principle of Design): *all parts of the constitution are interconnected We cannot assess the consequences of one part without appreciating the meaning of all other parts — if one part fails, then the ability of the other parts of the constitution to coordinate to an incentive compatible equilibrium is necessarily undermined.*

This is not the place to review the various features of the Russian constitution that illustrate the violation of Rule 8. It is sufficient to note that, with authors poorly schooled in democratic practice and motivated largely by the need to draft something that satisfied Yeltsin's taste for an especially strong presidency, the document is largely a cobbled-together version of the US, French and German constitutions, prepared as if each section — rights, the legislature, federalism, the presidency and the courts — could be treated separately from the others. More important, perhaps, is the fact that Russia is neither the first nor the last aspiring democracy to fail to satisfy or take full cognizance of Rule 8. The great difficulty here lies in the fact that democratic theory is itself too underdeveloped to inform us unambiguously about how to satisfy this rule. Even basic questions are difficult to answer with confidence. How, for instance, does a president's power with respect to the national legislature impact the authority of the courts? What constitutional mechanisms preclude an incoherent sovereignty of federal subjects that negates an effective national government but which at the same time keeps that government from overwhelming federal subjects? If it is true that "political parties created democracy and modern democracy is unthinkable save in terms of political parties."[18], what parts of the constitution most directly impact a state's party system, and how do different systems mediate legislative, judicial and executive powers? If the constitution establishes a supreme or constitutional court, are individual rights more likely to be protected if ordinary citizens are given standing before that court?

Unfortunately, questions of this type form a virtually endless list. Elsewhere we argue, for example, that the structure of the political party system is a critical component of a federation's design, operation, and stability.[19] Nevertheless, the role of parties and the necessity, when designing a federal state, for concerning oneself with the parts of a constitution that impact party systems (e.g., the power of the president or prime minister and his corresponding incentive to cultivate parties, the structure of legislative or parliamentary representation, the structure of regional constitutions, the timing of elections) are things the literature on federalism largely ignores.[20] Our argument here, however, is that conceptualizing constitutions as a social coordination mechanism will not only give us a better theoretical handle on devising the answers we require, but it also increases our incentive to do so. We suspect, in fact, that the absence of a requisite theory of constitutional design and the corresponding absence of a full appreciation of Rule 8 owes much to the earlier incorrect conceptualization of constitutions as contracts. When viewed as contracts with the issue of exogenous enforcement unanswered, rather than as conventions or norms, there are two possible responses to the imbalances occasioned by the failure to write a wholly integrated document. The first is to suppose that those imbalances are not of great consequence, provided only that we avoid logical inconsist-

encies. Contracts can be amended and renegotiated, with details, including bridging gaps between provisions, supplied later. If defects are found, then the same forces that occasioned the document's implementation in the first place will operate to encourage the necessary revisions. A second and closely related response is to see a constitution as little more than a codification of what already exists and, as with Dahl, inessential to the stability and general operation of the state.

In contrast, if a constitution is a self-enforcing mechanism that must move beliefs and expectations to an incentive compatible equilibrium — an equilibrium that must, by definition, include a balance of interests and power among political elites — then such a balance should exist at the outset. We suspect, in fact, that given the complexity of human beliefs and expectations, as well as the information requirements of common knowledge, socio-political coordination is a delicate and difficult enterprise with little margin for error. Rule 8, then, is less a deduction from any theory than it is a commonsense advisory.

6. Conclusion

This essay began with a question to which some scholars, but not all, confidently offer an unqualified answer of Yes. We concur with this answer, but believe it must be qualified in a particular way. The theory of constitutional design we seek is still too underdeveloped to allow us to say that if some nexus of provisions works in one country, it will work in any another, or if some set of 'successful' constitutions all contain provisions of a certain substantive type, those provisions belong in all constitutions. A secular society, for example, may be able to substitute religious law for a bill or rights or a clergy for a supreme judiciary. If norms, social conventions and constitutional rules are all manifestations of the same theoretical thing, then such possibilities cannot be excluded *a priori*. At the same time, our answer of Yes needs to be qualified also by the fact that our understanding of beliefs and expectations is too underdeveloped to give us full confidence in any prescription for how to best integrate a constitution in a new democracy.

Despite these cautions, the West's constitutional experience does have universal relevance, although the basis of our answer here is not much different than why an economist might assert the general relevance of, say, 'American' economic history. Economic history illustrates principles that ARE general. There is, as with physics and chemistry, no Eastern or Western economic theories — there is simply *economic theory*. Parameter values may vary from one society or culture to another, just as the organization of an economy, the structure of firms, and domains of private property vary across states. But economic laws are universal, and what we learn about their operation in China or Indonesia apply in Iowa, Bonn, and Lima. The same is true of constitutions and the West's experience with them. The difference here is that our theory of politics and democracy is far less developed than is that of economics not to mention the natural sciences. Indeed, it is only in the last ten or fifteen years that economics and game theorists have come to appreciate fully the importance of the ideas of coordination, belief, and expectation. In this essay, however, we offer a conceptualization of constitutions grounded in the same

primitives as contemporary economic theory — game theory — with the hope that doing so establishes a base upon which to construct a fully integrated and general theory of democratic design. Unfortunately, that task still lies before us.

Notes

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2. See, Russell Hardin (1989), Stephan Voigt (1999), Peter C. Ordeshook (1992, 1995).
3. Robert Dahl (1956), William H. Riker (1982).
4. Riker, *ibid.* p. 252.
5. Dahl, *ibid*, p. 134.
6. Dahl, *ibid.* p. 153.
7. See, for example, Geoffrey Brennan and James M. Buchanan (1985).
8. James Wilson as quoted in Gordon S. Wood (1969), p. 530.
9. Gordon Tullock, (1987) pp 317-8.
10. Cass Sunstein, (1991) p. 634.
11. Yan Chen and Peter C. Ordeshook, (1994).
12. Hardin, *op cit.* p. 119.
13. See for example James Coleman, (1986); David Lewis (1969); Randall L. Calvert, (1995); and Eric A. Posner (2000).
14. Calvert, *ibid*, p. 252.
15. From Peter C. Ordeshook and Thomas Schwartz, (1993) p16.
16. Our argument here is taken from Peter C. Ordeshook (1997).
17. Robert Sharlet (1992).
18. E.E. Schattschneider (1942) p. 1.
19. Peter C. Ordeshook and Olga Shvetsova (1995, 1997) and Mikhail Filippov, Peter C. Ordeshook and Olga Shvetsova (forthcoming).
20. For two notable exceptions see Larry Kramer (1994) and David McKay (2001).

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