

ABSTRACT

Title of dissertation: **CONSTITUTING REPUBLICS: TOWARD POLITICAL
CONCEPTION OF THE CONSTITUTIONAL
PREDICAMENT**

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How is a good political order constituted? This work is a critical and constructive exploration of the problem of political constitution. Recent contributions to the study of this subject have often failed to adequately recognize its political nature, and have thus fallen short of being able to inform the challenges of actual constitutional development. This thesis argues for a broader conception of constitution that overcomes the limitations imposed by the legalist, formal-institutional, philosophic, and cultural-essentialist perspectives, and one that accounts for the political-ness of the matter more satisfactorily. Correctly understood, constitution of a well-ordered society is a practical, situated, and continuous predicament.

From this broad view of political constitution the dissertation moves on to elaborate a more specific instance of it, the idea of pragmatic republicanism. Pragmatic republicanism is a comprehensive idea of political constitution, comprising four main

elements: a realistic vision of a good polity, a set of thin-normative procedural orientations of constitution, a set of basic empirical conditions of constitution, and the concept of constitutional crafting that is tantamount to the activity of constituting in the midst of the preceding three elements. Once these concepts are outlined, the idea of pragmatic republicanism is applied, by way of illustration, to the case of Kyrgyzstan – an instructive case of a seemingly hopeless constitutional malaise.

This work builds upon a very eclectic range of literature as it makes the case for an interdisciplinary and ‘problem-driven’ understanding of political constitution. Contra some of the conventional criteria of good social science, this work defends the view that a proper understanding of constitution must accept conceptual complexity, deficit of parsimony, analytic uncertainty, and theoretical incompleteness as unavoidable and even necessary.

**CONSTITUTING REPUBLICS: TOWARD POLITICAL CONCEPTION OF
THE CONSTITUTIONAL PREDICAMENT**

by

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So, even if a theorist could provide a theory which specified the exhaustive conditions for the interpretation and application of the general terms of constitutionalism in every case, as modern theorists from Hobbes to Rawls have sought to do, this would not enable us to understand constitutionalism.

– James Tully (A Strange Multiplicity, 1995, 106)

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INTRODUCTION

I

There are some countries in the world among which the United States, Great Britain, and Norway count.¹ These are the countries generally considered to be good polities, or well-ordered constitutional orders. They all certainly have many problems in the ordering of their political life, but on the larger scale, they are the kinds of polities that are desired by peoples who do not enjoy such constitutional orders. Each of the better polities in today's world, including these three countries, have arrived at their current condition through long, arduous, and not nearly linear processes of constitutional development. No single country's path to its current condition is exactly the same – nay, not even merely similar. But however they may have arrived at it, they all now share some general properties that make them attractive for other, less-well ordered societies. They are stable, they have working laws, their governments are checked by laws, institutional design, and the citizens themselves, their social and economic welfare attainment is high as a rule, affording a relatively more comfortable life to its citizens; the citizenry of any of these countries – exercising broad and secure liberties – is able to make sure that over time their political regimes are maintained on the right course, through elections, referenda, regular civic activism, and occasional mass expressions of protest. The citizens see all of these activities as both their duties and entitlements, and generally, there is no danger to their safety or freedom for engaging in these activities.

¹¹ To this roughly the same set of countries, in various contexts and for somewhat differing purposes, concepts such as 'developed countries', 'advanced industrial democracies', 'the First World', or 'zones of peace' – as in Max Singer and Aaron Wildavsky (1996) – are often applied.

There are many more countries of another sort around the world today among which Afghanistan, Egypt, and Kyrgyzstan would count as examples.² These countries are clearly known as not well-ordered currently. They are countries whose citizens view the former sort of countries with admiration, or envy, or simply with a desire that their own countries were more like them. There is much greater diversity among this sort of countries in regards to the degree, quality, and scope of their problems in constitutional order. Some of them are somewhat closer to being well-ordered and some are very far from it. Some of these societies are experiencing interethnic or religious conflicts, some are undergoing severe cycles of hunger, some are overpopulated on a depleting agricultural basis, some are raw materials providers for the well-ordered economies, some are significantly threatened by the epidemic spread of AIDS, and most of them are states and societies with severe levels of corruption.

Many among this sort of countries may safely be said to be in pursuit of better constitution, some for a long time, others since recently. Almost all of them have adopted seemingly good laws, almost all of them have governmental institutions whose only justification in principle is to provide governance, some of them have seen mass-based civic activities demanding better government despite clear and evident danger to their safety, and some have long-standing citizen dissident groups, in exile or in prisons, protesting governmental oppression and domination. Despite all these and many other apparent signs of wanting better political order, most of these countries are not succeeding. Their citizens are more like subjects, not enjoying stable and guaranteed

² This type of countries, as distinct from the former kind, is referred to – variously – as ‘developing countries’, ‘less developed countries’, Singer and Wildavsky’s ‘zones of turmoil’, or ‘the Third World’. In the anachronistic terminology of the latter concept, ‘the Second World’ would also count among this poorly constituted kind of countries.

liberty to pursue legitimate courses of life, not having the rights to oppose or criticize their governments; individuals and groups within these societies do not feel safe vis-à-vis the rest of the citizenry and the government; in times of need, these societies do not have provisions for emergency help, either as individual citizens or as groups within the society; they do not have satisfactory access or rights to education and healthcare.

The sort of countries that includes Afghanistan, Egypt, and Kyrgyzstan need and want to achieve good constitutional order. But for many of them, even when they tried, and even when they applied concerted efforts, the good political order has proven to be too much to ask. These societies generally know the kinds of life they would like to have; they do not know how to achieve such life.

II

Today, constitutionally speaking, the question of ‘what a good political order is’ is not nearly as pressing as that of ‘how to achieve one’;³ the latter is more practically urgent, less clearly understood, and has proven to be more challenging in the experience of the greater part of the world. So this dissertation is primarily an engagement of this latter question.

All peoples around the world want to live in good polities – and the good polities they want are not imagined in some utopian terms, but in the terms and properties of actually existing or historically known polities. In early twenty-first century, it is plausible to say that there exists a more or less universally accepted idea of a good polity - a certain median idea of a *republic* derived from the common features of actually

³ Literature that has dealt with ‘What is a good political order’ is vast, spanning a history from at least Plato’s *Republic* to Rawls’ *A Theory of Justice*. For a very succinct primer on some more recent varieties of work on this question, see Stephen Elkin, “Constitutionalism: Old and New” (1993a).

existing good republics. Those existing republics – concentrated on the northwestern quarter of the conventional world map – arrived at their political condition through highly complex, generally very long and uneven historical paths, and no such republic can claim to have resolved all problems and achieved perfection. At least on this evidence, it can be reminded that no actual political order is ever going to be fully accomplished but always remain a work in progress.

If all peoples want to live in good polities, and if they generally know a realistic model of a good polity, the question that remains is: How is that desirable political order to be realized in societies that do not have it? How is the objective of a good political order – or good polity – to be pursued? Or, which is the same thing, how is a good polity to be *constituted*? The question of realization of a good political order is the question of constitution. Questions just asked are obviously not new, possibly as old as the very idea of a good polity. But by the preponderance of evidence in constitutional achievement in the contemporary world, it is clear that a satisfactory answer to this ultimate question has not been found. There are several distinguishable approaches to answering the question, but they all reveal shortcomings in helping actual constitutional endeavors in places not yet constitutional. Consider a few of such approaches in the form of a stylized story.

One approach to answering the question of ‘how to constitute a good polity’ – the ‘legalist’ approach, as it is referred below – saw the question as a problem of law foremost, and went on to suggest that a good political order is constituted by establishing a proper system of rule of law, including the drafting and adopting of a sound set of constitutional laws, and establishing a constitutional court with power to guard that constitutional law through interpretation and review.

A second sort of an answer came from those who saw the question as one of correct arrangement of offices and powers: they suggested that a good political order is constituted by adopting a good institutional-administrative structure with separation of powers, sound electoral system, and preferably under a parliamentary form of government. To these we refer here as ‘formal institutionalists’.

There was a third approach, ‘philosophic’, where the question was interpreted as essentially about the right understanding, and combination, of political and moral principles upon which a good political order is to be built. So their answers came as various prescriptions of liberty, equality, egalitarianism, justice, rationality, and much else – the different definitions and interpretations of these and their various combinations and discontents.

From a fourth, ‘culturalist’, corner came answers still more perplexing: the problem of constituting a good political order was one of *defining* a nascent culture *as* a good political order – and in cases where many such cultures existed, the problem became one of putting all of them together *and intact*, and defining a good political order in their midst.

Many societies around the world tried to follow these advices – beginning especially around the immediate aftermath of WWII and continuing to the present – in various combinations, with varying thoroughness, but essentially following all four advices. They adopted constitutions that proclaimed freedom and equality of the sovereign constituent peoples, and outlined various sets of protected rights and entitlements as well as underscored the preservation of the people’s cultural heritage, provided for all the main formal institutions of government separated from each other

with distinct sets of authorities and responsibilities, some under a presidential form of government, some under parliamentary, and many in some mixture of these. The resulting regimes most often did not differ much from what preceded such overhauls. It is all too easy to point to examples of countries which exhibit outwardly all of the above ingredients and yet are clearly known to be poor political forms.

Upon reflecting on this dismal record, a decisive problem is revealed: the several approaches to the question of ‘how a good polity is constituted’ seem to have been answers to the question of ‘what a good polity is’. So the former question is still in need of a satisfactory answer. This dissertation is an attempt to face this challenging task: How is a good political order – a republic – to be *constituted*? The question is very big and difficult. What is proposed here may rightly be called a *preface* to a more complete answer, an effort *toward* such an answer, rather than a complete work. What it hopes to accomplish is to set out the main outlines of an alternative approach to facing the challenge, to propose the principal directions and concerns of this alternative view of the problem of constitution. Elaboration of the details of each of these elements, and a restatement of the overall argument in view of such detailed elements, will be left for subsequent work.

In asking “How is a good political order to be constituted?” the two chief terms of the question must be clarified: ‘good political order’ and ‘constitution’. To the first, it has been proposed in the lines above that there exists today an idea of what a good political order is, and that it is a median idea, or model, of a *republic*, based on key common properties of actually existing better political orders of current political civilization. The good political order today is a republic: the kind of order where the people are recognized

as the ultimate sovereign, the government is in the interest of all of the constituent people, is run by the people's representatives, and is exercised according to non-arbitrary laws and institutions.⁴ This proposal may be immediately objected to as indefensible on various grounds; there is certainly no shortage of supply of serious problems that the actually existing better republics have. But the legitimacy of this proposal rests on a careful answer to the question, "What is a good political order, *constitutionally speaking*?" which underscores the empirical, practical, and even somewhat urgent nature of the question. Various, a republican regime is defined as a regime of limited government, of rule of law, of popular sovereignty, of public interest, or even of public virtue, and each of these has its staunch critics. In any actually existing and generally recognized successful republic, all of these various defining criteria are present in some varying degrees. It is not of material importance, *constitutionally speaking*, to engage in *a priori* debates of which definition is a better one, how exactly the various criteria must combine, what exact proportion of each criterion is best to have, and so on. These kinds of concerns must be settled not prior to the actual constitution, through intellectual and academic debates, but in the process of constitution which is itself guided by the already mentioned empirically based median model of a republic.

The concept of 'constitution', the second key term in our main question, thus becomes decisive here. The same assumption of [almost] universal agreement and clarity claimed for the main contents of 'good political order' cannot be granted in the same way to 'constitution'. Hence the main question of the present inquiry must be accompanied with this corollary question, "*What sort of a problem is constitution?*" Answering these

⁴ The content of this model of good polity – republic – is elaborated later in several places.

two questions – or rather, again, working toward an answer to these questions – is what this dissertation undertakes to do.

Constitution of a good polity is a practical, pragmatic task. Essentially, it is concerned with constituting a well-ordered *people*. If so, then constitution is always and necessarily a situated task, *in media res*. To speak of the task of constituting a good polity in the early twenty-first century, therefore, is to situate the task within the obtaining political historical context – wherein that generally agreed and aspired idea of a good polity is said to be found – and to see that the constitutional question is the question of achieving such good polities in societies and places where that is desired. Defining what a good polity is, in the abstract and in spite of existing good orders, is not a constitutional question but rather philosophic. So, *how* to constitute a good polity is the real question.

From the nature of the question, or task, of constitution, derives the answer to the ‘how’ question as well, as that is done in this dissertation. Understanding constitution as a pragmatic, practical *predicament* of approximating the known models of good polity in places where such polity is wanted, the challenge is to propose some practical ways and conditions of such ‘approximating’. To do so, it is necessary first to understand the *political-ness* of constitution, or put another way, to understand political constitution. In juxtaposition to legal, formal-institutional, philosophic, essential-cultural, as well as some existing problematic versions of even political, conceptions of constitution, it is argued that a properly conceived political constitution has to be a broad concept for a situated, practical, empirical idea of constitution.

Political constitution is constitution of a people, not of a set of institutions or laws or ideas. All of the latter are essential attributes of a well-constituted people, its shape,

framework, instruments, criteria, and so on, but are not of themselves the constitution. It is only [misleadingly] possible to think of systems of laws and institutions as the constitution once a constitutional people is agreeably in place. Such a mistake is hard to make regarding a society that claims to have the same institutions – and has them *de jure* – but is obviously a poorly constituted one *de facto*. Some have called such cases ‘sham constitutions’, but it seems more appropriate to recognize that there is no constitution at all in such cases. Any set of laws, institutions, ideals and values may be easily written down for a society, designed elaborately, well chosen from ‘available’ alternatives, but a well-ordered polity will not have been *constituted* by these activities. This is a way of saying that constitution of a well-ordered polity is a task of *political constitution*.

Understanding political constitution properly is thus very important, but it is also a very broad concept difficult to grasp clearly. As a more concrete, specific instance of it, this dissertation proposes the idea of *pragmatic republicanism*. Pragmatic republicanism can be said to be an idea of constitutional crafting. Guided by a sketch of a good polity – vision of a realistic republic – pragmatic republicanism posits constitutional crafting to be a creative process of ever approximating that vision based on given basic empirical conditions and following a set of thinly-normative procedural principles. Thus, four large elements of pragmatic republicanism are involved: the vision, the basic conditions, the procedural principles, and constitutional crafting itself. Crafting is, effectively, the activity of constituting *per se*. It is a particular kind of public engagement, distinct from designing, engineering, choosing, and other epithets that have now and then been used in constitutional talk. Crafting is always and necessarily situated within an empirical world, so awareness of that situated-ness is gained by attention to the basic conditions of

crafting: those of capabilities, context, and continuity. Crafting of a good polity, as well, is not an ethically neutral creative process where ‘the end justifies the means’; the process of crafting is itself part of what a good polity is, and as such, it is guided by a set of procedural norms that are constitutive of the good polity; those procedural norms, also referred to as thin-normative principles, are those of priority of overlapping common goods, the principle of political vigilance, and a culture of political moderation. Thus, constitution of a good political order is this long and gradual process of negotiation of the four elements of pragmatic republicanism: vision of a republic, basic empirical conditions, procedural norms, and constitutional crafting.

As noted above, all peoples want to live in good polities, or to constitute themselves into good polities, and their general ideas of a good polity derive from the examples of good – or better – polities that exist in other parts of the world. The challenge is how the peoples not yet constituted as good polities become ones. Pragmatic republicanism, as an instance of the idea of political constitution, is proposed to help in understanding and dealing with this challenge – which is here called the constitutional predicament. One society that qualifies as an example of the aspiring but not yet succeeding cases is that of Kyrgyzstan⁵ - a case that is only as unique as any random society is from the rest and a rather usual problematic constitutional case otherwise. So this case is picked up for an illustration of the constitutional predicament and of what pragmatic republicanism may propose for its overcoming. A brief preliminary expose is relevant here.

⁵ Kyrgyzstan is the author’s home country.

Upon gaining its independence from the Soviet Union in 1991, the country embarked upon the project⁶ of constituting a good polity, the Kyrgyz Republic. Since then, in an environment of what some have called chronic “institutional instability”, the country changed its Constitution seven times, to count only the major ones involving referenda (Huskey and Iskakova 2011). Within this pronounced constitutional instability, and often with the advice of international friends and donors, Kyrgyzstan embarked on some major processes of privatization, land reform, administrative reforms, numerous tax and electoral system reforms. These still un-terminated processes witnessed two occasions of ‘color revolutions’⁷, one in 2005 and the second in 2010, each ending with the fleeing of a corrupt and authoritarian president, and ushering in even more political instability: the second revolution soon led to the country’s most tragic large-scale inter-ethnic violence yet, claiming many hundreds of lives and thousands of real property.

In part because of this lively political process, and in part despite it, Kyrgyzstan has at various times been dubbed an ‘island of democracy’ by its Western partners, surrounded as it is by three notable authoritarian regimes (China, Kazakhstan, and Uzbekistan) and one poor and mal-functioning authoritarian regime arising in the wake of a civil war (Tajikistan).⁸ This erratic ‘island of democracy’ claims a roster of over a hundred political parties, an opposition that is always vocal despite occasional waves of imprisonment and even killings, and thousands of NGOs – result of an ‘incubation’ project of some USAID programs to engender a modern civil society. However, this

⁶ Constitution is referred to as a “project” in following Soltan (2010 and 2011). It is a project in the sense of a collective and practical engagement in creating something that was not there before.

⁷ Application of the term ‘revolution’ has generally been doubted, often enclosed in quote marks. While the doubt is admitted, for convenience (since reference to these events is frequent), quote marks are generally dropped hereafter.

⁸ In the language of Polity IV for 2011, Kyrgyzstan – a “Democracy” – is surrounded by three “Autocracies” and one “Closed Anocracy”. See “Global Report 2011”, p. 11, at: <http://www.systemicpeace.org/GlobalReport2011.pdf>

democratic arsenal has been generally ‘feckless’, to borrow a term from Thomas Carothers (2002): the quality of governance, representation, and stability have all been meager in a climate of endemic corruption, clientelism, and socio-economic stagnation. As this work is being written,⁹ politics in Kyrgyzstan has been as alive as ever, witnessing the recent fall of yet another Cabinet – the first such fall under the new, more parliamentary version of Constitution, where the president has managed to regain a dominant status – the struggles of a new Cabinet to face imminent challenges, and the race among numerous parties for local assembly elections just ended with mixed results. As a severe economic downturn unfolds, and as the country’s foreign relations have developed in risky directions, with predation on businesses and investors on the rise, and as economic hardship adds on to the ethnic- and region-based antagonisms that are high, Kyrgyzstan may be habitually entering another zone of turbulence – or maybe not. It is ‘dejavu all over again’.

III

In some important senses, it may be said that Kyrgyzstan’s mostly unsuccessful constitutional story has given rise to this dissertation. In trying to see through the thicket of Kyrgyzstan’s maladies, such a consideration willy-nilly enters a conversation with constitutional political theory. Thus, having the case of Kyrgyzstan and similarly struggling and fledgling regimes (e.g. Afghanistan, Iraq, now Egypt, Libya, Tunisia) in the background adds some perspective and urgency to what has been said so far about the problem of constitution and specifically about its political-ness.

⁹ The period concerned is December of 2012.

To say that constitution is of necessity a political undertaking is not to say anything controversial, it would seem. If this definition were heeded, however, one would expect to see a different kind of constitutional theory than what is the commonplace today; one would expect constitutional scholarship to speak with greater urgency, more breadth and correspondence to the actual constitutional endeavors around the world, both developed and developing. So, it is of no small interest that such a seemingly obvious property of constitution – its political-ness – has not adequately informed contemporary constitutional studies. In this light, it is worth frontally asking the question: In what way is constitution a *political* endeavor?

This work is an attempt to grasp this essential property of constitution. It maintains that, with some not wholly articulate exceptions, this property of constitution has not been understood as it should. Even in many works that have appeared in recent times bearing ‘political constitution’ or some variation thereof in their titles, the understanding of politics or the political has been unsatisfactory and misleading in the pursuit of understanding constitution. It further maintains that a variety of constitutionalism literature has rather clearly – if only non-explicitly – ‘elided’ the political-ness of constitution, much like Meili Steele has argued about the elision of history by many contemporary political theorists (Steele 2005). There is, this work proposes, a way of thinking about constitution in a properly political manner.

To begin with, the full political content of constitution has a hope of coming out only if it is seen as *constitution of a people*. Constitution is not, as more commonly goes, all about “the arrangement of offices”, the way Aristotle misleadingly throws out for a cursory reader (*Politics*, Bk IV, Ch 3); even his elaboration that it is “[adopted] for the

distribution of offices, and for the determination of sovereignty in the constitution and for the end which the particular association aims at realizing” does not fully do justice to the actual work of *Politics* (Bk IV, Ch 1). It is certainly not about picking and choosing among a known variety of constitutional forms, as such a cursory reading of most of *Politics* may also suggest. Rather, it is the constituting of a viable political public that is the question – and for that pursuit, the various arrangements of offices and various systems of governing institutions are but the instruments, albeit of prime importance. The arrangements of offices, distribution of authorities and duties among them, the elaboration of complex legal systems, and even issues of political party and representation schemes – all of these are but an operational superstructure crafted by a public, and require a public constitutional culture or outlook that can enable and sustain these operating systems. Thus, thinking of constitution as something to be “adopted” is a misleadingly incomplete idea. This much can be extracted from a more careful reading of, or perhaps listening to, Aristotle – highly preferably by taking up his *Politics* and *Ethics* together.¹⁰ Helpfully, there is a tradition of genuinely political constitutional thought that might be called Aristotelian, or perhaps more preferably, republican: one that includes, among others, Machiavelli, Montesquieu, and Tocqueville. There is also some contemporary scholarship that continues that tradition – or rather, has sought to revive it.

Some of the elements of a proper viewing of this political-ness include keen attention to the contextual and historical situated-ness of any particular constitutional project, the fact of any such undertaking happening *in media res*, and therefore the terminal indeterminacy of such an undertaking – the impossibility of predicting with any

¹⁰ Not to mislead here: this is not a work on Aristotle’s constitutional thought, but a work inspired by some major elements in Aristotelian thought – including many others who share this broadly Aristotelian approach.

precision what will work, how a polity must be ordered, or what should be avoided. Given these considerations, the theorists in this tradition have preferred to leave much of the constitutional detail to be determined by the subject publics – for they are the main authors of constitution. A theorist can at best be an accomplice in the contrivance of a good political order: she can never hope to be its author, unless the constitution is ‘in speech only’. These considerations provide a sense of that political-ness of constitution that is too often elided today.

Given these complications, this work proposes to view constitution as a *predicament*.¹¹ It is not a puzzle, a dilemma or tri-lemma, or a research question. It is not the kind of an intellectual question that modern positive political science is generally trained to address.¹² ‘Predicament’ is comparable to Karol Soltan’s use of ‘impediments’ that constitutionally minded citizens often face and that are distinct from ‘causal determinants’, viewed as something static, by those who approach matters as ‘spectators’ (Soltan 2011: 117), only predicament is broader than impediments. Constitution, thus, is a practical predicament: a society, for better or worse, lives on with its constitutional process ever lingering, and its constitutional success is a matter more of political judgment, art and intelligence than of intellectual acuity (i.e. *phronesis* and *nous* as opposed to *noēsis*). The predicament cannot be neatly reduced into discrete (parsimonious) variables and equations, because whatever gets ‘reduced away’ never

¹¹ The employment of the term ‘predicament’ here is in partial thanks to Dorf and Sabel (1998: 270ff), who write, very relevantly, of the American “constitutional predicament”, and to Ajami (1992), whose book discusses ‘the Arab predicament’, which may also be regarded essentially as the Arab *constitutional predicament*.

¹² Wolin’s (1969) and Oakeshott’s (1969) critiques of the characteristic modern political science apply here.

quite stays away, always affecting the constitutional chances of a given society in some decisive way.

This is not to suggest, obviously, that political theory of constitution is impossible.¹³ It is only to suggest that such work must take its bearings from the predicament at hand; it should not, as it were, come condescendingly *over* the predicament trying to author its meaning. As James Tully has reminded, there is a living and functioning constitutionalism that is out there in the world – which he calls post-imperial contemporary constitutionalism – in spite of all the misleading distortions about it by imperial modern constitutional political theory, (1995).

What such a political theory of constitution – of *political* constitution – may look like is suggested in the second half of this work. Indeed, it is only suggested or proposed, for elaborating a more complete theory appears to be a project for some better (and longer) time; in a strong sense, “theoretical completeness” is in fact argued to be not desirable or even possible (see top of Chapter 4). What is suggested comes under the title of ‘pragmatic republicanism’. Pragmatic republicanism proposes a generic and thin sketch of a good polity, based on the prevailing contemporary understandings and practices of good governance, and then proposes to consider a set of six aspects that attend and make up a constitutional undertaking: three of them stand for normative orientations of an intended polity and three – for its basic empirical conditions. These

¹³ A recent issue of *European Journal Political Theory* (9/4, 2010) was devoted to the emergence of a ‘realist political theory’ – the sort that might be able to meet the constitutional predicament better. Elkin (e.g. 2010: 223-224) is more disconcerting on this account, arguing that constitutional theory “ought to be” equivalent to political science as a whole, rightly understood, and even more than just political science. Ultimately, the present work can be considered an instance of ‘empirical political theory’ or of Elkin-style constitutional study.

aspects are proposed as a workable way for political theory to engage in constitutional thinking without reducing constitution to its inaccurate if simpler images.

With these rather widely encompassing constitutional aspects articulated, political theory can go on to consider the many ways in which the constitutive political process might proceed. Pragmatic republicanism describes this process as crafting – a practical, ongoing, creative engagement of the constituent public in its search for constitutional betterment and preservation. Some discussion is devoted to what crafting is *not*, by reference to examples in literature, and then a number of different crafting strategies are considered in the example of Norway – a well-known good constitutional order chosen advisedly.

In sum, then, this work proposes to make several contributions to political theory of constitution. First, it highlights – more completely than has been done previously – the major strands of scholarship that have evaded, or ‘elided’, the political aspect of constitution. In place of only one foil that political constitutionalists have often tackled – legal constitutionalism – this work identifies three more: institutional, cultural, and philosophic, thereby setting up a broader critical space. Second, this work argues that the perspective of some contemporary scholarship self-defined as political constitutionalist, while a welcome turn, has remained overly narrow in its conception of the political in constitution. A more comprehensive, fuller understanding of the *constitutional political* is elaborated. Third, the dissertation proposes one way in which political constitution properly understood could be expressed (and practiced) – what is here referred to as pragmatic republican constitution.

These contributions to political theory of constitution are not of prime concern in this work, however. There are some more important, more ultimate audiences that the work would ideally be addressed to. In a word, these are the constituents of good polities, the constitutional craftsmen and craftswomen. Here, the implication is not necessarily about the nebulous constitutional populus assumed under the idea of ‘popular constitutionalism’ (Kramer 2004), but more accurately, it is about the plural, changing, and contextually differentiated sets of relevant actors. Obviously, all of the people cannot possibly be actually equal participants in the activity of constituting; there will always be leaders and followers, elites and critical masses, the innovative and reformist few and the more conservative and conformist many. What is important here is not to reify this dividing line between the elites and the masses, as it were, but to recognize the fact – and to capitalize on the possibility – that any such division is tentative, able to move in either direction. In a good political order, such divisions will not be emphasized, their memberships open and shifting, and the dividing gap narrow.

This being recognized, then, the present work is especially an effort to aid the leaders of constitutional activity, the activists of civil society, the political as well as economic elites, in their endeavors to effect positive constitutional development in their societies. It is an effort to explain to them the nature of the problem they have undertaken to tackle and to advise them on how to proceed with it. Along the way, it also points out to them some of the more dubious advice they may have received and tried to apply in the past. In a word, the hope of this work is to inform the practice of constitutional development in actual societies by actual groups of people.

IV

The work may be divided loosely into two parts. In the first part, mainly critical, it first identifies and lays out the scope – in the fashion of a more extended introductory chapter – of constitutional predicament (Chapter One); second, it discusses four different ways of eliding the political nature of constitution (Chapter Two); and then it takes up the task of outlining a more appropriately political understanding of constitution (Chapter Three). The second part is constructive, presenting an elaboration of the idea of *pragmatic republicanism*. First, it outlines conceptually three of the main components of pragmatic republicanism: a generic sketch of a good polity – a realistic vision of a republic, a set of three key normative orientations, or procedural norms, of constitution, and another set of three basic empirical conditions thereof (Chapter Four). Then it discusses how these components come into motion under the fourth component, *constitutional crafting* – the constitutive activity. Here, instead of mechanically adding the various elements into one, crafting is discussed in several stylized ways: by use of the analogy of saddle-making craft, by specifying some of what crafting is not, and by referring to examples of constitutional crafting in Norway (Chapter Five). Last, the work considers a particular case of constitution – the already mentioned country of Kyrgyzstan. From the properly political constitutional perspective outlined above, it presents a constructive critique of the relevant literature on Kyrgyzstan to date and proposes an alternative view and set of strategies that would be better to adopt (Chapter Six).

Now before proceeding on, three general remarks would be good to make on some conceptual uses, in the form of caveats, even though these usage issues will be addressed more fully in later stages within the text.

The first point concerns the term ‘pragmatic’. In speaking of *pragmatic* republicanism, a question is sure to arise. This essay is not an argument about pragmatism as the specific – and often problematic – school in philosophy. While benefiting from some of its propagators, including Dewey as well as Rorty, this essay settles on an agreeable and limited meaning of pragmatism – a meaning in which the word is often used in casual and practical political parlance – and sticks to that. In that meaning, ‘pragmatic’ stands for close linkage of thinking and doing, of ideas and deeds, and in that linkage, looks for the outer reaches of the possible. Put otherwise, pragmatic republicanism is about the *possible* constitution, or the possible republic. In a comparable non-philosophic, practical sense, this descriptor has been used in at least two other works on ‘pragmatic liberalism’ (Anderson 1995; Hunter and Milofsky 2007).

The second point concerns the term ‘constitution’. This essay, for the most part, deals with constitution with a small ‘c’, as it is often referred. While Constitutions as texts are not argued to be wrong or unnecessary, it is argued that preoccupation with the drafting of singularly correct and best fitting Constitution is a wrong start – and one that has been entertained too often. Small ‘c’ constitution has also, however, been defined at least in two different ways – as ‘constitutional functionality’ (which is essentially the functionality of the written Constitution), (see Elkins et al 2009; Breslin 2009), and as the constitutional – or constitutive – process. The former is potentially problematic, since ‘functionality’ often comes close in meaning to ‘agency’ (esp. Breslin 2009), in which

case it should be not the Constitution but the constituent public that acts out the written document for various functions. It is the latter – constitutional or constitutive process – that is adopted here. Also, attention is drawn to the difference between constitution and constitutionalism. While pragmatic republicanism does engage a normative ‘sketch’ and what are referred to as ‘thin normative orientations’ that fall more toward constitutionalism (a clearly normative concept), the broader and overall concern in this work is with constitution (a thin-normative and more practical concept). Thus, the presence or absence of the suffix ‘-ism’ within the text should be viewed as intended.

The third remark concerns the first two and a whole lot more: Works of this kind are impossible – are difficult to imagine, at least – if not conceptual. In the plenitude of discussion of the relationships and differences between various concepts, and introduction of new or “renovated” concepts, there is always a looming danger of drowning in a conceptual muddle. That danger is kept in view in this work. Still, for some the work can come out to be exactly that, a conceptual muddle. My reason for engaging in this work at all is a practical problem – that of constituting good politics, in Kyrgyzstan and anywhere else – and my suspicion is that the constitutional failures all around are in good part due to mistaken understandings, mis-conceived notions about constitution. Therefore, conceptual discussion is unavoidable, and the only remedy here is for the author to try and be as clear and as conceptually economical as he can be.

Chapter 1

Meeting the Constitutional Predicament

What is a well-ordered constitutional polity¹⁴ today? It is possible to construct a broad outline of it based on some common characteristics of presently functioning constitutional regimes – much like Montesquieu did on the basis of the British model in *The Spirit of Laws* – with awareness of their own imperfections. Such a polity would be a stable political order animated by some [set of] values and aspirations shared and pursued by (most of) its members, providing security – to its constituent public in their capacities as individuals and groups, and to their property – based on legal and legitimate authority that also guarantees broad but not unlimited freedoms and dignity of citizens and precludes arbitrary use of political power upon citizenry; the polity is of the citizen body as a whole, a ‘body politic’, and as such, in maintenance of such an order, the participation of all citizens would be expected, although not absolutely, directly or in any dogmatic sense. More descriptive details can be elaborated into a much longer list but no virtue seems present in doing so. The above outline is sufficient to suggest the kind of a polity in view – republic.¹⁵ Suffice it only to add, however, that well-ordered constitutional polity, or a republic, cannot be thought of as an instant, or a still-image; it

¹⁴ “Polity” is used in this work to designate “association which we call the state, the association which is ‘political’”, and which is “the most sovereign of them all” (Aristotle 1981: 54); or, “collective and artificial body” or “public person” which “takes the name of *republic* or *body politic*” (Rousseau 1988: 93). The various commonly used terms are problematic: “state” is used in different meanings equally often, “country” is very imprecise, “regime” is too narrow, “society” is too broad, and “body politic” is awkward for systematic use. While “polity” is also used in narrower meanings (as the third element of a whole, next to ‘economy’ and ‘society’), it is less frequent in such use. It is often used to designate the whole of a politically organized society, the state in its broader meaning; it has the advantage of conveying the right normative idea, too, as in Aristotle’s designation by it of a good regime. “Republic”, as in Rousseau’s use in the above quote, could also be used, but it is a more specific term – especially as it has come to be used in contemporary vocabulary – and it is employed below in its proper place.

¹⁵ More on what would be a good, desirable polity (and on how to go about it) is presented in a ‘sketch’ in Chapter 4.

is rather an objective of ongoing common life of a community within the actual world – with its blessings and vicissitudes, with better times and less good – never attained to a fully satisfactory, terminal degree.

Good polity is a universal desideratum – all societies everywhere want to live as good polities, but realizing that wish has not been easy. Now, with polities that are already constitutional, well-established, stable, and tolerable – the ones based on which the above outline itself is sketched – almost any explanation and rationalization of how the good polity is constituted, if it has some sound logic and argumentation, can be plausible: because of their long histories and current state, such polities make it difficult to persuasively argue the faultiness of such explanations. To really appreciate the scope and the difficulty of constituting a good polity, one needs to turn to countries around the world that are far from counting as constitutional while they fight their ways to becoming ones.

There is one such country in Central Asia, one of Soviet Union’s successors, officially calling itself the Kyrgyz Republic and more widely known as Kyrgyzstan. The story of the country’s recent history might be seen, to play on these two names, as one of a struggle between becoming a genuine republic and remaining one of the cliché-ed ‘-stan’ countries. A more extended constitutional story of this country will be helpful to put the present work in a clearer perspective.

Case in point: Kyrgyzstan’s Constitutional Malaise

Kyrgyzstan is one of the fifteen countries that gained a somewhat ‘windfall’ independence in 1991 following the breakup of the Soviet Union. In the last referendum

of the Union conducted in March of 1991, where the question posed to Soviet citizens was, essentially, whether they wished to preserve the union, almost 96% of Kyrgyzstanis answered ‘yes’. This datum, often cited as an indication of how much these citizens did not welcome independence, should certainly be read with caution. At that point, even against the background of highly embattled state, citizens throughout the union were still finding it hard to even imagine such a breakup or the very idea of independence. With some leeway, the situation may be compared to, say, asking Californians during the Great Depression of the 1930s, whether they wanted the United States to stay or to have California take independence. That caveat observed, however, this return is indicative of Kyrgyzstanis’ identification with the Soviet Union, their extremely weak understanding of, let alone wish for, independent statehood. It was that highly unformed, indeterminate citizenry that was to make up within a year the independent modern state of the Kyrgyz Republic. The journey that this society has undergone since then has been difficult.

If there is one rubric that renders the constitutional plight of the country, it ought to be that of chronic instability. Often talked of as about to become a ‘failed state’, Kyrgyzstan has continually struggled to keep itself together as a functioning political unit, (see Engvall 2011b, Wilkinson 2011, McGlinchey 2011 and 2010).¹⁶ Within less than twenty years of independence, it was possible to speak of a ‘third restart’, or as some politicians have preferred, of Kyrgyzstan’s ‘Third Republic’, (Juraev 2010). The third restart was launched with the second revolution (which remains nameless) of April 2010, which ousted the insatiably corrupt and violent regime of President Kurmanbek Bakiev. The first, ‘the Tulip Revolution’, had taken place in March 2005, when Bakiev’s

¹⁶ In 2012 rankings of Failed States Index (by Fund for Peace), Kyrgyzstan was noted as ‘the most improved’ case from last year, its new score moving it from 31 up to 41 out of 177 countries, where the best five, predictably, includes Norway. See: <http://www.fundforpeace.org/global/?q=node/237>

predecessor and the first president of the country Askar Akaev was expelled after about fifteen years in office. President Akaev's unusual arrival to leadership – very different from all other emergent ex-Soviet states – was the beginning of Kyrgyzstan's independent constitutional story.

It was a rather promising start, especially considered in light of the disheartening 1991 referendum results concerning independence. Due to several special circumstances in early fall of 1990 – two major ones being the serious North-South elite competition, and the experience of the first major inter-ethnic bloodshed for Kyrgyzstan less than two months earlier – the parliament of then-Soviet republic failed to award a majority vote to any of three contenders to become the republic's president, including the embattled incumbent party first secretary hailing from the south.¹⁷ A new parliamentary vote was scheduled with new candidates – according to constitutional rules then, which were unbelievably abided, the initial candidates could not stand again – and the previously unknown candidacy of a physicist, head of the Kyrgyzstan Academy of Sciences at the time, Askar Akaev won. An intellectual, often citing Jefferson, Milton Friedman, Schumpeter and Hayek – unheard of from Soviet leaders – he was credibly democratic and stood up resolutely against the failed communist putsch of August 1991 as one of only a few republican leaders.

What followed was a steady evolution of his presidency from a weak position, ever resisted by the parliament and the ex-communist apparatchiks, toward an increasingly centralized office, managed through repeated constitutional changes, all through national referenda, and increasing silencing of opposition. Under dire political and economic

¹⁷ The gradual crumbling of the USSR was under way then, and the fifteen republics were declared – with Moscow's support – 'sovereign republics' within the union, eligible to have their own presidents. That was, in hindsight, just a short episode in the highly unclear ad hoc developments of that period.

circumstances of early 1990s, he pushed through rapid and widespread reforms, especially accentuated by economic liberalization, privatization of state-owned assets, in close cooperation with international financial and monetary institutions. This process soon led to ‘insider privatization’, increasing economic disparity among the people, insecurity of private property and business activity, and severe lack of coordination among branches of government, (esp. Engvall 2011b: 26 ff).

Faced with persistent recalcitrance from large swaths of the elite against the reforms, haunted by corruption allegations against him already in 1993, and hampered by the highly disorganized government system – where there seemed to be “as many governments as there were ministries and committees” (ibid: 28) – Akaev centralized power in the office of the president in a total of four constitutional referenda (1994, 1996, 1998, 2003) (Huskey and Iskakova 2011: 3). In the fifteen years of his presidency, he replaced close to a dozen heads of government, almost every such replacement precipitating replacements of many cabinet ministers, restructuring of the cabinet (ministries created, merged, abolished, etc). Public dissent was tolerated ever less, press freedom ever more suppressed, the judiciary ever used as a weapon, opposition ever more persecuted, and the ‘inner circle’ ever tighter, eventually fully dominated by his family and a few clansmen. By early 2005, President Akaev is thought to have had little personal control over his ‘inner circle’: under the orchestration of his wife, his two elder children and a few others had set the country’s course down an unabashed road of universal corruption.

As a lasting aftermath of police shooting of six people dead during a protest march in a remote area in March 2002, after which low-intensity protests never stopped, as an

echo of the revolutions in Georgia (2003) and Ukraine (2004), and in an opportunity caught by the opposition following a parliamentary election mobilization in February and mid-March, President Akaev's long rule came to an end on March 24, 2005. Started as localized protests against allegedly botched election outcomes throughout the country, the process culminated in the capital, Bishkek, in less than two weeks, taking the government down within a few hours of protesting that ran quickly out of control (due to regime's inept efforts to counteract).

After brief haggling behind doors, the 'revolutionary' opposition gave leadership to Kurmanbek Bakiev. A former prime minister and almost complete opposite of Akaev, Bakiev was almost proudly a non-intellectual, unceremonious, and full of gaffes and blunders by any Western standards every time he spoke. Coming from the south, he formed a leadership 'tandem' with a popular northerner, Felix Kulov, making him prime minister and thereby getting himself easily elected as president in a national vote in July 2005. The five years of Bakiev's rule were marred initially by high political instability, and then by great corruption, brutality and family rule. Following the revolution of 2005, the popular protest activities did not cease for over two years, among chief claims being property disputes, illegal land seizures, public office appointment disputes, and rallies for or against particular 'political' figures. In the process of power and influence redistribution, with and without Bakiev team involvement, half a dozen major criminal-cum-political figures were assassinated within two subsequent years. Two more prominent and particularly brutal killings of non-criminals took place in Bakiev's latter years, widely believed to be organized by his brother, chief of presidential security guard.

After resisting demands for quick constitutional changes following the revolution, Bakiev was forced to sign a new Constitution in a protest escalation in late 2006 when he was almost ousted from office. He then managed to change and re-sign the constitution with support of a new parliamentary majority that he managed to buy off within less than two months. By late 2007, he was in shape for a major showdown: he orchestrated scrapping of the constitution in both its November 2006 and January 2007 versions, which were adopted in sequence by the parliament, announced a referendum on a new constitution drafted largely behind curtains, then disbanded the parliament – which had generally been a thorn for him all along – and announced elections for a new, 100% party-based PR legislature with less than two months’ warning. The presidential party specially formed for the elections was made to win close to 50% of the vote, for which it was allotted close to 80% of seats, whereas a prominent opposition party that fulfilled all threshold requirements and came in second was denied any seats.

The leadership tandem was dissolved following one of the constitutional do-overs, in early 2007. After that, four different prime ministers served under the regime’s remaining three years, numerous changes were continually made in the structure of the cabinet. Economic life was highlighted by property rights disputes over several major enterprises, and in last few years, by unceremonious grabbing of them by president’s son, Maxim. Several months before the fall of the regime, Maxim was appointed to head a super-agency to oversee economic development, established as many believe specially for him under the Presidential Administration (that is, a non-cabinet structure).¹⁸ That

¹⁸ See “Kyrgyz President Entrusts the Country’s Economy to His Son” for a brief description and some ‘expert’ opinions on the agency and appointment. Accessible at: <http://www.cacianalyst.org/?q=node/5220>

would have been the prelude for the son to replace his father, who had already then largely succumbed to the son's – and a brother's – diktat.

It was this rapid growth of a highly predatory regime, catapulted by several economic decisions that would now predate directly on the population at large, that brought the regime down on April 7, 2010, in a bloody showdown resulting in close to 90 people being killed in front of the Government House (usually referred as 'the White House'). Given the much more tightly controlled political environment on its eve compared to pre-March 2005, and the relative acquiescence with the obtaining order among parts of the south of the country, it was an unlikely – and largely unpredicted – uprising of much smaller scale than five years ago, with questions still lingering about the methods of mobilizing the several thousand people. When shooting did not work, the occupants of the 'White House' fled, with president temporarily taking refuge in his southern home village before being flown out – with mediation of Presidents Obama, Medvedev and Nazarbaev of Kazakhstan – and eventually calling Belarus home.

What remained was a country in severe trouble, yet again. The new wave of illegal land and property seizures, carousel of new appointments from ministerial level down to high school principals, was now accompanied by increasing ethnic-based targeting. The Provisional Government, a self-appointed collegial leadership consisting of fourteen 'revolutionary' members, with a head – Roza Otunbaeva – and three deputies, was caught, besides their internal disagreements, in a limbo of institutional illegitimacy. With ouster of the regime, its pocket parliament had self-dissolved, and soon after, the rubber stamp Constitutional Court was abolished by a decree. There was no institution left to grant legitimacy to the Provisional Government, and it ruled as it could by stamping

decrees. This legitimacy deficit handicapped its capacities both at home and abroad. In a process of mal-governance that unraveled from its first days, its inability of law enforcement – especially in the south of the country – was the most pronounced as the situation steadily devolved, imploding on the night of June 10-11 2010 in the second major inter-ethnic bloodshed.¹⁹

The violence took place in the city of Osh – second largest in Kyrgyzstan – and its surroundings, continuing for three days. In the end, it claimed more than 400 officially recorded lives, close to 2000 homes and businesses, saw more than 100,000 short-term refugees into neighboring Uzbekistan, who were sent back by Uzbek authorities under questionable circumstances within days of calm. Reasons for the conflict are many, and no singular explanation – such as deep-seated ethnic animosity, or economic inequality, or other structural problems in politics or economy – is acceptable as solely accurate. What it has left in its wake is a population much more deeply divided along the Kyrgyz-Uzbek ethnic line, much greater and intolerant nationalism, wounded and for the time being suppressed feelings among many thousands who directly suffered. This conflict may be the singular most sobering evidence of the constitutional failures of Kyrgyzstan.

The country has been slowly recovering from the tragedy in the past two years. A referendum held two weeks after the bloody events – as it was scheduled previously – introduced a new Constitution which changed Kyrgyzstan's form of government from a highly presidential system into one where power is shared roughly equally between the

¹⁹There have now been published at least four authoritative (official, that is) reports on the causes, consequences, and implications of the conflict, but generally all investigations have been disputed and lacking in credible information. The most comprehensive but also disputed international investigation report is Kyrgyzstan Inquiry Commission ('Kiljunen Commission') report of 2011, accessible at: http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_490.pdf More recently (February 2012), a more extensively researched and possibly least biased report has been prepared by a Russian human rights advocate Vitaliy Ponomarev and his Norwegian colleague Ivar Dale, "A Chronicle of Violence"; accessible at: http://www.freedomhouse.org/sites/default/files/Report_2_12_ENG_net.pdf

president, the parliament, and the prime minister. The referendum also confirmed Roza Otunbaeva, a woman, to note, as a transitional president of the country until the end of 2011. The parliamentary elections held in October 2010 were rather well conducted and democratic, against much worse expectations, producing a five-party legislature, with a ‘revanchist’ opposition party winning the greatest plurality of seats, and formation of a government requiring at least three parties to coalesce.²⁰ President Otunbaeva served for another year – until a new president was elected in October, 2011 – taking mostly the backseat, letting the cabinet and the parliament do most of the driving, and preferring more symbolic speeches and appearances. Her prime minister handily, albeit not entirely cleanly, won the presidential election, and is now President Almazbek Atambaev – another gaffe-prone former businessman, philologist by education, who has been able to assert more power than his predecessor but far less than the first two – just as one should expect if the new Constitution has any bearing on reality.

This generalized climate of instability has been accompanied, or even shaped and produced, by several notable socio-political phenomena, which are already suggested in the above story. One is the alarming level of corruption that quickly spread after the gaining of independence and was catapulted in the process of privatization that was begun soon. In a post-Soviet culture that had regularized hypocrisy, when a public official with any responsibilities would resort to lying about their work both to the higher authorities and to the people, it was easy for mostly the same people in new positions in charge of considerable public assets to see wide open opportunities. As time went on, more and more opportunities for gainful abuse were discovered and employed, such as

²⁰ An article in *The Guardian*, in a characteristic coverage of the elections, begins thus: “Foreign observers say poll in troubled former Soviet republic is first genuinely competitive contest in central Asia”. October 11, 2010.

selling governmental posts, introducing schemes for embezzling international grant and loan funds, and then schemes for siphoning more genuinely public, locally collected revenues such as utilities payments. In 2011, Corruption Perceptions Index (of Transparency International) had it ranked 164th out of 183 countries, and in all recent years, it has remained stably among the most corrupt 20-25 countries in the world.²¹ Johan Engvall, in his dissertation, describes the many varieties, evolution, and functioning of corruption in politics and bureaucracy, suggesting that public service in Kyrgyzstan became just another – and the biggest of all – business, and more specifically, ‘an investment market’, (Engvall 2011a).²² Fight against corruption has been the battle cry ever since the mid-1990s, and with every new such cry, the hypocrisy of it was louder than the words. The current president’s key theme in the inaugural speech was, again, a total war on corruption, but in the wake of several rather high level arrests on corruption charges, and given that the entire public service corps is corrupt anyway, suspicions are high that this is yet another round of political score-settling than anything else.²³

Another very evident theme in the above story is the level of political divisiveness in the country, where the North-South cleavage has been the longest running prominent problem, but the two bloody conflicts between the Kyrgyz and the Uzbeks indicate the inter-ethnic cleavage to be the more dangerous. However, neither has been *always* a standing problem, and usually they have risen with major political upheavals, and then receded somewhat in the intervals. There have been more lines of cleavage, including

²¹ See: <http://www.transparency.org/country#KGZ>

²² See also his interview where he describes this research. “In Kyrgyzstan, corruption of not a problem for the state, it IS the state”. At: <http://enews.fergananews.com/article.php?id=2735>

²³ See a recent report by Chris Rickleton in an analytic news website, “Kyrgyzstan: Is corruption controversy a sign of political trouble ahead?”. At: <http://www.eurasianet.org/node/65715>

‘clans’, regions, religious differences, and other. More on this theme is discussed below, as it especially relates to the country’s constitutional problems.

Not of least importance has been the problem of economic mal-governance. While it is part-and-parcel of the problem of corruption, the poor state of the country’s economy and government’s consistently poor policies have been a problem on their own. A small and land-locked country with few attractive resources, Kyrgyzstan has had to rely on several unsustainable lines of national income: international grants and loans, remittance money from Kyrgyz workers abroad, mainly from Russia, and earnings from the major gold mine operated by a Canadian investor. The country’s foreign debt is currently at nearly 2.5 times the annual state budget, more than 60% of GDP, and debt servicing has been increasingly a strain on government. Of industries, the single most crucial enterprise has been a gold mining company, Kumtor, proceeds from which have accounted on average for 5-7% of GDP and for about 1/3 of annual exports ever since it started to produce gold in 1997. The Canadian-run company never had a respite from government encroachments ever since its operation began. Because of rampant corruption, political instability, unattractive climate and location, foreign direct investment has been very weak whereas local private sector has been small, patronized, and/or stifled.

Thus, Kyrgyzstan can be seen as a highly inhospitable country for constitutional development. However, some relatively positive signs may also be noted. In a word, it is about the persistent capability among the people to resist bad rule and to resent curtailment of their freedom beyond a certain level. Even in the worst oppressive periods of both toppled regimes, there was courage among people to protest, among the press to be critical, and among civil society organizations to carry on their politically

inconvenient work. Kyrgyzstan was dubbed an ‘island of democracy’ at some points, usually not lasting for very long, but the epithet has usually tended to return. The country’s current Constitution provides for a system that should not easily become centralized, unless the balance of political powers is tilted in a significant way. If the current status quo, shaky though it is, persists for one or two election cycles, there might be some light at the end of the tunnel.

This painful constitutional story has been suggested above to be a story of a struggle between realizing the desideratum of a republic, according to the country’s formal name, and remaining with the constitutionally problematic pattern of the region’s other ‘-stan’ countries. It is warranted to call it a struggle and not a wholly foregone case (very few cases, if any, are ever describable as totally hopeless): as observed above, sometimes dubbed Central Asia’s “island of democracy”, the country has repeatedly gone against the regional pattern and expectations, even though succumbing each time back to the grips of the regionally more common authoritarianism, corruption, and clientelism. In reflecting on these processes, two opposed narratives have recently been identifiable.

On the one hand, there are voices of hope and inexorable progress. A prominent voice in this camp was, predictably, the former president, Roza Otunbaeva, who soon after April 2010 (second) ‘revolution’ wrote in an op-ed for *The Washington Post* that “democracy was the only way forward”, that Kyrgyzstan “had firmly chosen its path” toward democracy, and so on.²⁴ In an article of no less optimistic mood, Kathleen Collins (2011), a scholar of Central Asian politics more famous for her work on the ever

²⁴ Otunbaeva, “After the revolution, establishing democracy”, op-ed. *The Washington Post*, March 8, 2011.

subversive ‘clans’²⁵, speaks of a democratic opposition aided by an active and potent civil society to overturn the repressive regime of Kurmanbek Bakiev in a second ‘revolution’ within five years, and how democracy is almost inevitably won for Kyrgyzstan.

Many more voices, however, take the opposite view. In one of the more sophisticated analyses, a student of Kyrgyzstani politics Scott Radnitz (2006; see also 2005), following the first – 2005 – revolution, wrote about the explanatory phenomenon of *localism* – multiple clientelistic networks of local communities organized around “own” businessmen and ‘strongmen’ – and how, catapulted by such localist mobilization, the revolution held little hope of engendering an all-inclusive nationwide constructive agenda. Radnitz’ argument about the subversive power of localism could later be held up as a sound prediction of the fate of the post-2005 regime and of the second revolution in 2010. Another commentator compared Kyrgyzstan in 2010 to a small airplane without a pilot and Kyrgyzstani politics to ‘running in circles’²⁶.

A more accurate position on Kyrgyzstan’s chances, predictably, will need to be found somewhere in the middle of the two opposed narratives. It is a difficult thing – building and keeping a democratic constitutional regime. The many details and instances, some of them quite hilarious, of trying to install a good constitutional regime in Kyrgyzstan will be left to be told in their proper place below, but suffice to note that the search has been active. The country’s trials and failures are illustrations of several more general problematic approaches to constitution – four of which are identified in the following chapter. The simple moral of Kyrgyzstan’s – and many other comparable places’ – story is that constitution of a good polity is a lengthy, uneven, and complex

²⁵ See for example, her *The Logic of Clan Politics in Central Asia* (2006) and “Clans, Pacts, and Politics in Central Asia” (2002).

²⁶ McGlinchey, “Running in Circles in Kyrgyzstan”, op-ed. *The New York Times*, April 9, 2010.

task. It concerns the whole of a society's life – not just some elements or parts thereof; it concerns a continuous and non-linear process, not a one-time or short-run event; and it encompasses a society that is always already somehow preexisting and pre-constituted, with a view to how that society might change into a better constituted one. This is a challenging order; Stephen Elkin – in a critical take on [ideal] theories of deliberative democracy and in proposing how better to think about constitution – referred to this rather simply as ‘thinking constitutionally’ (2004). In a similar vein, one may call the challenge itself ‘the constitutional predicament’.²⁷

A few specific meanings are stipulated in calling it so. First, it is about a non-trivial puzzle or tight-spot to which resolution is wanted and can be achieved –that is, there is no objective reason terminally precluding its positive resolution. Second, the puzzle is not of a mysterious type – the issue is somewhat known, perhaps all too familiar, and the puzzle is in effect a persisting unsatisfactory condition (a tight-spot) where plausibly workable ways out persist in failing. Third, constitutional predicament stipulates a specific kind – or class – of predicament, which is to say that it is both identifiable and its solution is contained in its class – in its constitutionality. The resolution to the predicament thus described cannot be expected to be an ‘eureka’ or ‘bingo’ moment; it is likely to come as a prolonged process. Having specified it in these terms, the constitutional predicament at hand may be restated once more in the form of a simple question:

How does Kyrgyzstan change from being the traditional ‘-stan’ country into a republic recognizable as such by an impartial but knowledgeable observer? Or more

²⁷ This choice is in part suggested by Fouad Ajami's book, *The Arab Predicament* (1992), where ‘predicament’ stands to congeal the whole complex of difficulties that the Arab societies – Egypt being the main case – have met in building normal, functional modern states. Another origin of this choice is a lengthy article by Michael Dorf and Charles Sabel, “A Constitution of Democratic Experimentalism” (1998), where they refer to the ‘constitutional predicament’ in America.

generally, how to transform a poorly-ordered political regime, *taking it the way it is*, into a better-ordered polity that it can *realistically* become?

The question is quite common-sense and unremarkable, except for qualifiers, “taking it the way it is” and “that it can realistically become”. These qualifiers make up the heart of the predicament, and so far, a satisfactory answer to it has not been provided. To do so, then, is the ambition of the present work. As suggested above, the present answer will not be in any way miraculous or wholly new. Much like the culmination of the search for justice by Socrates and his young friends in Plato’s *Republic* (118-119 [432d-433b]), the resolution of the constitutional predicament will have been ‘rolling around our feet’ all along and only needed to be pointed at. But to get started, a brief introduction is next in order. Let us call this part ‘meet the constitutional predicament’,²⁸ and that – in three ways. First, ‘meet’ as in ‘be introduced to’ – get a brief overview of the constitutional predicament as it has been observed in recent times. Second, ‘meet’ as in ‘comprehend it’ – a short introduction to the non-eureka way out of the predicament, which will come by way of restoring the idea of *political* constitution, an instance of which is proposed in the third meaning of ‘meeting’ – that of ‘finding a solution’, namely, a proposal for a pragmatic republican approach to constitution.

Meeting the Constitutional Predicament I: The Problem

“In Kyrgyzstan, corruption is not a problem of the state; corruption IS the state.”²⁹ Thus declares Johan Engvall, a young political scientist who recently completed a very interesting and critical study of political development of Kyrgyzstan (Engvall 2011c).

²⁸ To play on the title of Robert De Niro/Ben Stiller comedy, “Meet the Parents”.

²⁹ An interview with Engvall under this title initially appeared on Ferghana News site. It is reposted here: <http://www.turkishweekly.net/news/129152/-in-kyrgyzstan-corruption-is-not-a-problem-for-the-state-it-is-the-state-.html>

Rather than a condescending diagnosis from a happy Swede about the hapless Kyrgyz state (although it does sound like one), the statement is a prelude for a serious critique of the concept of state in general, and applications of the modular ‘Weberian’ state in places like Kyrgyzstan in particular. In this, he is in agreement with Lisa Anderson, who based on the ‘failed’ or ‘weak’ state problems of the Middle East writes thus: “the imposition of [European, Weberian-style] states often disorganized the local social and political structures, but the new arrangements equally failed to take root effectively, leaving many populations with neither authoritative local institutions nor robust Weberian-style states,” (Anderson 2004: 10). Present-day Afghanistan might be the epitome of problems of getting Western-style state machinery to work (see Worden 2010). In searching for more workable avenues toward better governance there, Barfield and Nojumi speak very interestingly about local informal institutions of governance, reflecting this unease:

“[T]hey need to be viewed as the Afghan equivalent of civil society and treated accordingly. Government officials should seek their opinions in advance of implementing policy directives from Kabul... Their resolutions of disputes should have legal standing in the formal court system as long as they do not violate fundamental individual rights. They should not be asked to impose state law or to be used (sic) as agents of social change. (They only reflect community values; they do not have the authority to change them by diktat.) Because such bodies can only be effective when they retain their flexible ad hoc character, they will fail if they are made permanent, given appointed leaders or put on the government payroll,” (Barfield and Nojumi 2010: pp. 47-48).

It is not the suggestion here that the ‘Weberian-style’ state model is to be abandoned and some sui generis models to be sought for each particular society – the respective authors do not suggest that, and if they did, they would have to be confronted. The broad outlines of a good polity proposed at the beginning still hold. Rather, the point of these vignettes is to highlight the profound difficulties and conundrums involved in

establishing good political order in societies that do not have it and are at early stages of the pursuit. They illustrate the constitutional predicament par excellence.

So, how have the 193 (as per UN membership) independent polities been coping with the constitutional predicament? Unfortunately, there is no single and comprehensive data available about the actual (de facto) success or failure of states in their constitutional endeavors. The fairly recent – and still growing – rich dataset produced by the Comparative Constitutions Project (CCP), which has collected data on literally all national constitutions that have ever been in force, is concerned not with actual implementation of written constitutions, but with de jure information such as existence, adoption, change, and suspension of constitutions.³⁰ There is no dataset that answers such questions as “Which countries in the world are constitutional? How many? For how long has each country been constitutional? To what extent is each country constitutional?” and so on. The reason is, foremost, the difficulty in operationalizing the measure of *de facto* constitutionality of any country: too many variables can stand for very different understandings of constitutionalism, defying any effort at quantitative expression of general data if such data hopes to go beyond formalistic checkmarks. Still, such a project must be in the making. In the meantime, some other available data can be used as proxy measures of constitutionalism, with awareness that there are some discrepancies between what we are interested in and what they measure.

³⁰ <http://www.comparativeconstitutionsproject.org/theoreticalmotivations.htm>. Investigators write: “In order to investigate the correspondence between de jure and de facto law, one needs an accounting of both. Our interest, we remind, is in measuring the former.”

One of the more popular datasets is Freedom House annual reports on the state of freedom³¹ – not quite constitutionalism but an important element of it. While very informative of the world picture regarding freedom, these survey data also conceal as much as they reveal. Thus, according to *Freedom in the World 2012* data, out of 195 countries surveyed, 48 (24%) were ‘not free’, 60 (31%) ‘Partly free’ and 87 (45%) ‘Free’ in 2011.³² A breakdown by regions reflects a predictable pattern of difficulties with living up to the ‘Weberian-style’ modern state, with 21% of Asia-Pacific countries, 24% of Central and Eastern Europe/Eurasia countries, 72% of countries in Middle East and North Africa, and 39% of countries in Sub-Saharan Africa rated “not free”. By contrast, only 3% and 0% of countries in the Americas and Western Europe, respectively, were “not free”. These simple statistics – essentially, that is what these percentages are – provide an ambivalent snapshot: based on the numbers and distributions, it is not possible clearly to say that there is too little or pretty good amount of freedom around the world today. Considered within the trend-line over the Freedom House ratings years (beginning 1972), the glass is half-full: there is a suggestion that freedom has been steadily growing. One is almost tempted to abandon any pessimistic wonderment about any ‘predicament’ and simply go on with democracy- and freedom-promotion.

However, such rankings (Freedom House is not the only one; Polity, Bertelsmann Transformations Index, and Heritage Foundation are some other sources), are only informative to a degree. There remain big black boxes of freedom and good governance

³¹ ‘Freedom’ in this survey comprises two main measures, political rights and civil liberties – the measure leaves out important questions such as economic inequality, welfare provisions, and various dimensions of stability, and it may be overlooking possible other ways of ‘consultation’ (Tilly 2007) in some cultures that would not count as conventional ‘rights and liberties’. These probably left out issues can seriously affect de facto constitutionality of a regime.

³² Find this report at: http://www.freedomhouse.org/sites/default/files/FIW%202012%20Booklet_0.pdf

when the actual, lived processes of political development are compressed into a single digit with a decimal. Thus, a score of, say, “6.2” for political rights on Freedom House scale suggests a country has a pretty bad record. On which day it was 6.2, for how long it lasted at 6.2, does a 6.2 tell more about political participation or about political party system or about a president’s legitimacy – such questions of course cannot penetrate the box. Even with the country essay and with other countries’ and past years’ scores at hand, this is precious little as a way of knowing how the country’s political and constitutional development is proceeding. The Middle East and North Africa (MENA) region’s stubborn inhospitality to democracy and freedom, for example, is one big black-box. The very mixed and gradually disappointing outcomes of the recent long ‘Arab Spring’, if anyone wanted to have a good perception about their chances, are hidden tightly in that black box. So, based on the scores that Egypt received in 2011 – and with all other scores that may give a context to Egypt’s freedom score – it would be impossible to decide what President Morsi should do when he got elected and faced the Supreme Council of the Armed Forces who on the eve of elections had drastically cut down a president’s constitutional authorities and dissolved the parliament: go against SCAF and risk further turmoil? Play by SCAF rules and become a puppet of the military? Call on Muslim Brotherhood support and further entrench his ‘Islamist’ credentials that Western media were quick to stress before even saying his name?

A somewhat different picture is found in Polity IV data in its *Global Report 2011*, also very relevant for constitutionalism.³³ Here, Kyrgyzstan’s record under fragility ratings is a very curious case. It is defined as an “institutionalized democracy” – along with India, Timor Leste, and Sweden – with a State Fragility Index (SFI) of 14 (out of 25 –

³³ Find this report at: <http://www.systemicpeace.org/GlobalReport2011.pdf>

most fragile). Notably, at that high index of fragility, Kyrgyzstan is the only country whose State Effectiveness is scored as more than twice more fragile (10) than its State Legitimacy score (4) – the two components of SFI. Polity considers two groups of countries as particularly fragile, Muslim and sub-Saharan African, and Kyrgyzstan is tagged as Muslim – it having precious little commonality with, say, Saudi Arabia, an ‘institutionalized autocracy’, which is much more resilient with an SFI of 10: a score of 2 for Effectiveness and four times greater fragility (8) for Legitimacy – another rare case of such drastic discrepancy. Most notable of all, it is never quite clear how, based on what sources, Polity assigns all of these scores on eight discrete component criteria for all of 164 countries each year. The moral of this wonderment being: with this reputable and widely used political stability dataset – very relevant to constitutional development – one is again baffled with many more questions than before looking at them. It is a great effort ending with a tendentious caricature of the world political outlook and quite frugal with insight.

So, we do not understand *how* well-constituted polities emerge. The world may increasingly consist of better and better governed societies over the years, but there is nearly half of the world (by number of countries) that are not well-governed, and the distance from being well-governed is widely varied among them. One legitimate position may be simply to follow the developments, counting more and more democracies year after year, and even conduct large-n studies of correlates of democratization and good governance, producing (or rather more often, corroborating previously determined) sets of independent and causal factors that seem to be responsible for both democratization

and failures thereof. But such manipulations do not lead to real confronting of problems of political development in the actually existing polities; they are destined to stay at a level of generalizable abstractions. They do not tell how, in what order, with what relative weights, at what speed, all of those causal variables and correlates fall in place for a country X to make it a viable constitutional polity.

One example might be helpful here. In one article of a series of related studies of ‘electoral revolutions’, Bunce and Wolchik (2010) try to understand why in a group of comparable countries, all classified as ‘competitive authoritarian regimes’, one half (six countries, six elections) experienced a successful electoral revolution and the other half (three countries, five elections) did not. After failing to corroborate a wealth of what they describe as institutional and structural hypotheses, their data suggest that a set of ‘agency’ hypotheses – more specifically, electoral dynamics – are in better position to explain the variation of interest.

Now, the wonderment is that those “electoral dynamics” hypotheses, almost fully shared among the successful cases and almost entirely absent in the ‘failed’ cases, can barely scratch the surface of the actual political processes surrounding the Tulip Revolution in Kyrgyzstan, for example. One of the prominent arguments about recent Kyrgyzstani ‘revolutionary’ disease, coming from Scott Radnitz (2006), highlights the phenomenon of localism – a narrow and personalistic pattern of mobilization – playing a key role, and one that is quite ill-fitted for enabling robust democratization. Anything like this is wholly absent from Bunce and Wolchik’s discussion. One could also note that Georgia, which is often noted (in the article) as a less democratic case along with Kyrgyzstan, is now clearly more democratic than Ukraine (under President Yanukovich)

– one of the more clearly democratizing cases discussed. While the latter – the posterior developments – are not properly the concern of the article by Bunce and Wolchik³⁴, the general point here is that such larger-n, generalization-oriented studies are almost inevitably going to suppress the longer-term processes and the more idiosyncratic phenomena at work, resulting in findings that are neither good explanations of why something happened, nor good guidelines for making something happen in the future. If Bunce and Wolchik’s 9-country, 11-election sample is too generalizing, then the much larger-n studies such as the Elkins et al comparative constitutions project, the Freedom House and Polity rankings, and others are even more so.

The constitutional predicament, the way it looks, is about the inscrutable ways in which some societies are somewhat more successful than some others. Political science can go on with its efforts of coming up with good measurements of constitutionalism, or democracy, or stability, and so on, in the hope that the predicament will be cracked open – for after all, political science is not concerned simply with description for its own sake, but with understanding how better regimes, better governance are possible.

Meeting the Constitutional Predicament II: In Search of Remedy

A way of entering this theme is by considering briefly some issues in state theory. It may be claimed that modern state theory has featured three main schools: the liberal pluralist, the organic, and the Marxist theories of state (see, e.g, Stepan 2001: Ch. 2). Putting the latter at rest for reasons easy to guess, it is the former two that seem of interest presently. While state theory as such has been somewhat sidelined in recent

³⁴ Albeit, if what happens after a brief period following the electoral revolution is not of interest, then it ought to be all the more uninteresting – it seems – to conduct a study of “successful” and “unsuccessful” cases in the first place.

political science, and is rarely invoked in constitutional theory (alas), it can be safely claimed that the greater bulk of contemporary political science sympathizes with the overall spirit of pluralist state theory; organic state theory or its guiding philosophy have long been out of favor in the mainstream. Without delving deep into this ‘side discussion’, the point is that quite possibly the organic approach might hold a promise for grasping the constitutional predicament.

In an interesting essay, Grzymala-Busse and Luong (2002) argue that state theory’s main problem in general has been its static character, its inability to embrace the dynamic processes that make up and sustain the state. Based on the experience of the post-communist state-building, these authors propose a dynamic conceptualization of the state as a *process of elite competition*: punctured by the influences of civil society – to the extent the latter has any strength, and shaped by the extant institutional frameworks – to the extent they exist, the process is nonetheless and unavoidably one of intra-elite competition for power. If this openly elitist dynamic theory is to be linked to one of the above state theory schools, it appears to be most accurately an outgrowth of the liberal pluralist theory whose elitism was noted in E. E. Schattschneider’s famous aphorism: “the flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent”. While elite focus by itself ought not to be a disqualifier for any theory – especially in speaking of state and state-building where the predominant role and prerogatives of elite groups is undeniable – what is troubling in this tendency is the reduction of the constitutional process of a state as a whole to processes within a narrow part of the society (to believe critics such as Domhoff (2009), such elites may make up as little as 1% or less of a population). For state theory and constitutional thought, it is an

unnecessary, probably empirically inaccurate, and certainly normatively an unwelcome move to base a theory in its entirety on the category of elites.

Such elitism or narrowness is characteristic of some of the prevailing approaches in contemporary constitutional theory. Thus, two major approaches – identified in this work as the legal and the formal-institutional – are similarly elitist. By focusing on higher institutions of law and government, respectively, their guiding logic can be characterized as one of a ‘tipping point’: they suggest that as long as (and as soon as) an emergent regime’s top – its high court and its powers, or the national level institutions and their balances – is arranged properly, the rest of society would magically fall in place to complete a constitutional project. The two other approaches identified in this work – philosophic and (cultural) essentialist – do not readily suggest a similar elitism, however its elements are to be found in them as well. (These four approaches to constitution are the subject of the next chapter.) Such narrow and mechanistic suggestions are problematic on their face, and they easily reveal un-sustainability in practice – as could be observed in the preceding section above.

To back up a bit, then, while their ‘elite competition’ theory of state is thus deemed unsatisfactory for its narrowness and unjustified resignation to elitism, Grzymala-Busse and Luong nonetheless open up an interesting route. If pluralist theory’s dynamic counterpart is ‘elite competition’ theory, what might be the organic state theory in a dynamic restatement? It ought to be *political constitution*.

Organic theory describes the state as a complex organism where all parts are necessary for the whole, no part is extraneous or superfluous, and the whole is unable to be reduced to some simpler, smaller, more easily discernible version of itself. There is a

problem of static-ness with this view: the image of the organism-like complex state is proposed as already accomplished and destined to remain that way. Any actual organism goes through cycles of birth, growth, development, maturity, and decay. If a state is an organism, then its dynamic rendering would be the process of political constitution – the ever ongoing process by which an organism that we call state is constituted. Political constitution, hence, is interested in understanding and explaining the processes involved in constituting a well-functioning polity as a whole.

Entering the discussion of a remedy for the constitutional predicament via state theory and, specifically, organic state theory in this manner is gainful for several reasons. First, it makes salient the fact that in speaking about constitution, we are speaking about constitution of a state as such, not a mere set of distinct institutions, not a regime in some narrow sense, and certainly not a written document. In other words, constitution is equivalent to state-building (or, as preferred in this work, polity-building). Second, invocation of organic theory introduces what has arguably been in short supply in recent constitutional thought, a holistic perspective. Third, by proposing political constitution as the *dynamic* counterpart of organic theory, we have also underlined the proper usage of the term ‘constitution’ in this work – it is about the process (and activity) of constituting rather than a static thing or an instant. Fourth and last, by invoking political constitution in this setting, we have also highlighted *political*: in being juxtaposed to the narrowness of ‘elite competition’ of Grzymala-Busse and Luong (2002), ‘political constitution’ is offered as a broadly encompassing concept, where political derives from the noun ‘polity’ – that is, the politically organized society as a whole. Instead of circumscribing *a priori* all the decisive action to a particular segment, as elite theories do, the perspective

of *political* constitution leaves the entry open to a much wider scope of potentially decisive actors and sites – and, as it will become obvious in this work, it encourages such widening of the constitutional playing field.

Of old, just as of now, people came together into political communities in pursuit of some shared good. That was the first premise from which Aristotle began his investigations into politics (*Politics*, p. 54) and ethics (*Nicomachean Ethics*, p. 3). That is also the premise in contemporary thinking, such as exemplified in corresponding arguments by J. A. G. Griffith (1978) and more recently, by Richard Bellamy (2007)³⁵. Much the same premise, expressed in its negative, stands at the origin of Hobbes' commonwealth through social contract (the common desire to overcome the dangers of the state of nature), and now underlies its version by Rawls (but here, with 'veil of ignorance' applied to representatives rather to the whole society, the reduction of the true political has already begun). It is difficult to properly and veritably examine the truth of this premise – if nothing else, because of a lack of any variation on the dependent variable. What may partially corroborate its truth is what can be plainly observed in contemporary world.

There are now 193 member-states in the United Nations – recognized sovereign states in the world. By their claim to sovereignty, they – as collective entities, bodies politic – have declared to themselves and to the rest of the world, implicitly and often explicitly (in declarations of independence, in preambles of national constitutional texts),

³⁵ While the latter two do not explicitly say it – which is a problem in their respective works – this is a necessary, cornerstone assumption in order to hold on to a belief that a particular human society is not in danger of falling into warring with each other or collapsing altogether the moment courts and lawyers step aside. Only with the assumption of this underlying political goal is it possible to make the kind of arguments in favor of political constitutionalism that they have made.

that they have formed each a community to pursue the common, shared good of its members. Notably, a far greater half of these sovereign countries became such after previously being subjects of other sovereigns – colonial powers, empires, or earlier larger nation-states that included them. Many of them gained their independence through costly and bloody paths of struggle. Whatever else they can be thought to have desired in aspiring for and now claiming independence, it is undeniable that among their highest wishes was the wish to form each a community that governed itself in the best and shared interests of all its members. That collective wish is perpetuated in the very names of about 140 of these states³⁶ who officially define themselves as either Republics or Commonwealths.

Alas, all too many of these aspired republics have persisted in not materializing. That sad fact raises one more point that underscores the nuance of political constitution – as compared to four alternative perspectives on constitution – and the point is about the permanent indeterminacy, or uncertainty, of the constitutional endeavor. Constitution is ever a matter of forging agreement, shoring up support, dealing with differences, recovering from setbacks, taming radicalism and not falling into apathy. There is no Leviathan to do all this single-handedly – not for societies aspiring for good polity; constitutional indeterminacy involves all of its members and is generated because it is so broadly inclusive. This uncertainty is greatest during early stages of constitutionalizing – when a society embarks upon the project following the gaining of independence, or ridding itself of a dictator, or undergoing other kinds of systemic renewal. The uncertainty is less intensive but persists nonetheless once a country may be called a

³⁶ Based on a rough conservative count by the author.

‘resilient’³⁷, consolidated constitutional state, meaning that the United States, the United Kingdom, Japan, and many similarly developed countries are not immune to constitutional crises and problems, albeit not to the same degree as, say, Kyrgyzstan.

Steering this indeterminacy of constitution – which is, differently put, open-endedness – in the preferred directions and keeping it in check is entirely up to the political life of the given society. Not the written Constitution, not a high court, not a president or a parliament or their particular conjuncture, but the whole citizen body is the ultimate agent that keeps a constitutional order afloat – or fails. The more successful societies at this task will be those that exhibit – given their circumstances and history – the most robust capabilities for constitutional stewardship – capabilities to cooperate, to judge, to keep responsibility, to maintain moderation, to resist abuse, and so on.

The fact of constitutional uncertainty and the issue of citizen constitutional capabilities lie at the heart of the concept of political constitution. There are no clear-cut solutions to the problem of uncertainty, and there is no definitive recipe for ascertaining the needed capabilities: a constitution succeeds and stays put as a result of ever-active, ever-ongoing political crafting – some may call it a function of political balance of powers (Bellamy 2007), some may call it “shipbuilding on uncharted sea” (Elkin 2006: 107), and some may even suggest it is “whatever happens” (Griffith 1978) – the point of these all is that a constitution is never “once and for all”. This is the irreducibly political nature of the constitutional project.

³⁷ ‘Resilience’ is the term used in Polity IV vocabulary as the opposite of ‘State Fragility’. Resilience is also in Pettit (2009) as a concept denoting capacity to withstand contingent shocks (*fortuna*) in politics.

To restate what has been said up to this point: all societies in the world wish to live in well-constituted polities, in genuine republics, but very many of them have persisted in failing to achieve that goal. Constituting a good polity is a complex, precarious, and long-term challenge, and it may be called a predicament. There is no magic-pill for this predicament, and many constitutional theories that suggest such solutions must be taken with great suspicion. There is only one way to deal with the predicament – to understand, control and eventually to overcome it – and that is to realize that its solution is contained in the midst of the irreducibly political society itself. Such a realization directs attention – and efforts – to the permanent uncertainty of the constitutional project, and to the key to managing that uncertainty – civic constitutional capabilities. Without proper understanding of political constitution, the constitutional predicament cannot be ever remedied.

Now, political constitution is a very general idea; the fact that it stands for most of what mainstream modern social science rejects, such as parsimony, generalizability, certainty and measurability, and embraces holism, contextualism, and more – all of this only complicates the matter further. This is no mistake: this is how it must be approached. A more specific formulation of conceptions of constitution from a political perspective is what needs to follow from this sobering recognition. Next follows one such form of expressing and elaborating political constitution: pragmatic republicanism.

Meeting the Constitutional Predicament III: Pragmatic Republicanism

Pragmatic republicanism is proposed here as one possible way of elaborating the idea of political constitution. Relying on the broad stock of republican political ideas,

this proposal is an attempt to specify to a certain degree (but only to a certain degree) some ways in which political constitution may be practically grasped and put to work. Specifically, it first outlines a generic sketch of a good polity as understood in contemporary political world, a realistic vision of a good polity, as it were. Then it attends to six different aspects of constitutional project: three of them the formative and guiding procedural norms of such a project (or, thin-normative orientations), three – the key empirical realities thereof; and then it considers the general manner of practicing – realizing – the project, referred here as *crafting*. Thus, pragmatic republicanism can be viewed as consisting of these four main elements, with constitutional crafting as the core term of constitution. To conceive constitutional crafting as a collective process geared toward a realistic vision of a good polity, proceeding in observance of three key thin-normative principles, and always robustly grounded on its three basic empirical conditions – this is the challenge that pragmatic republicanism undertakes to tackle.

It should be probably no wonder and easily acceptable that constitutional theory relates most closely with the republican tradition in political theory (pace Goodin 2003). All of the firmly established canon of republican thought, from Aristotle to Machiavelli (pace, now, McCormick 2003 on Machiavelli), to Montesquieu, to a score of English neo-Roman theorists (see Skinner 1998), to *The Federalist Papers*, to Burke, and de Tocqueville – some or another blend of these and other republicans adorn the pedestal of most important references in contemporary constitutional scholarship. The canon is of course not uniform, and all major and minor differences among them make up the decisive bases for allegiance of today's constitutionalists to one or another great thinker. Thus, while the self-described republican constitutionalists of recent times have

particularly staked their arguments on Machiavelli, other politically-attuned constitutionalists have embraced, say, Aristotle, or Burke and de Tocqueville, and many theorists of more liberal leanings have found parentage in James Madison (in addition to, of course, John Locke, who has also been at times identified as republican).

This is not the place to discuss the differences among this canon, justification for such differentiations, and accuracy of republican identification of any in particular. (More on why such a discussion is unimportant for this project appears in Chapter Three.) Suffice it to state at this point that for the argument of this work and the ideas of republican kind it adopts, the long heritage of republicanism is in fact largely internally in agreement – their differences are not of the kind that can make or break republican thought. This position about a common “great tradition” of political theory in general, reportedly, was held with much conviction by Carl Friedrich, one of the earlier and more notable constitutionalists of the twentieth century, (see Germino 1979). There appears to be much to recommend in such an approach for a constitutional thinker: prioritization of the subject matter (constitution) and consideration of big themes, rather than preoccupation with fine details, wordings, and other exegetic material – these are best left for works on “the political thought of ...”.

In its general outlines, republican thought (in the thoughts of Aristotle, Montesquieu, Burke, and de Tocqueville, among others) presents the most compellingly rich, complete, and careful realization of the irreducibly political nature of the work of constitution. From a sober definition of constitution as a matter of collective public concern, to a disciplined concern for the realizable, *possible* constitutional perspective, to elaboration of a core of central norms and values of constitutionalism without being

dogmatic about them, and to strong emphasis on constitution being an ever-unfinished, ever uncertain project of public creativity, these thinkers make constitution unthinkable without its political-ness. It is on this central import of republican theory that the present proposition capitalizes.

Pragmatic republicanism, however, is not automatically ‘any republicanism’. In specifying it as pragmatic, the idea is to distinguish this proposition from a variety of recent versions of the theory that elicit very limiting, stiffening, and ultimately disabling strictures. A prominent recent republicanism of this sort has been proposed by Philip Pettit (1999), (with its slight variations embraced by his collaborators such as Skinner 1998, and Viroli 2002). Pettit’s republicanism is defined by a particular definition of freedom – as *non-domination* – as distinct from its two other previously enunciated kinds. It is in resentment of these inflexible, narrow theories, often hostage to not wholly defensible definitions, that Robert Goodin offered a critique of what he called the “republican follies” (2003). That observed, Goodin is incorrect in throwing the baby out with the bathwater. Republican thought is, on the one hand, all of the different particular republicanism taken together, and on the other hand, more than all of them. It is that broader republican idea to which pragmatic republicanism appeals. To underscore the nuance, it may be advisable to refer here to a republican ‘outlook’ or ‘perspective’ rather than ‘theory’.³⁸

Based on this broad reading of the republican perspective, as well as *practice*, it is possible to identify some of the key elements of what a good polity comprises today, to

³⁸ *Pragmatic* republicanism is, in part, to do just that underscoring, for truly, ‘pragmatism’ cannot be a theory in a political sense – it can only be an approach, an outlook, a perspective. Charles Anderson relevantly writes: “when applied to politics, pragmatism needs liberalism if it is not to become a vague and indeterminate counsel, perhaps, in the end, a doctrine of sheer expediency” (Anderson 1990: 2).

construct a 'sketch' of a good polity, that is. To be stressed, these several elements are neither bound to a particular theory of constitution, nor claimed to be derived from some timeless and general metaphysic of good government. Rather, they are the key components of good polities that today's political civilization has elicited, and that are therefore realistic aspirations for the numerous self-declared republics to become ones.

Five such key elements appear to constitute the core of a good polity, a republic, today: that it be committed to public good, maintain a mixed-regime government, embrace and defend social pluralism, uphold the principle of popular sovereignty, and nurture constitutional resilience. If a republic complies with all of these five criteria, then it would be identifiable as an established good polity. 'Compliance' here is of course a highly tenuous notion; as difficult as it is, however, it is the constituent public's perception that ought to be the most important measure of compliance. Such compliance is admittedly also not a constant: no constitutional order remains good once it is good, and none of the five criteria is ever secure by itself, or 'self-enforcing'. The achievement of compliance and then the maintenance of a good polity are what the further, dynamic components of pragmatic republicanism address. The five elements are neither exhaustive (more attributes may be thought of), nor fully unambiguous. However, they are maintained here to be both necessary and sufficient for an envisioning of a *possible* good polity. Given the view of political constitution being proposed here, all of these claims are relevant: conception of a good polity cannot be exhaustive but can only be sufficient – only the actual constitutional process is able to fill out all remaining contents of a republic; such a conception does need to aim at identifying the minimum necessary contents of a republic; the minimally necessary criteria are themselves liable to be

conceptually ambiguous (or even, in this case, contested). Such ambiguity or contestedness, however, is itself a product of political practice and history, and can only be ultimately settled in the process of constitutional practice – and even then, always subject to revision. These five criteria effectively form the normative foundation (or telos) of political constitution – notably, a *practical, empirically-derived* normative foundation.

Envisioning a desirable polity in terms of these criteria, a constitutional project must be concerned with three broad dynamic concerns: the normative, the empirical, and the practical elements of the task, all at once. The normative concern is effectively about dynamic normative orientations, or procedural norms, that would guide the practical constitutional project toward the envisioned sketch. Pragmatic republicanism proposes three key normative orientations that a project toward good polity would have to be guided by. Note: these are normative ‘orientations’, or procedures, and not substantive norms or values.³⁹ First, the polity to be constituted will be one that aims at achieving and sustaining common (overlapping) goods of its public. The distinction of common or overlapping goods from the more familiar ‘common good’ is important: there is no presupposition of a unitary public all concerned with a singular common good (which, if taken up, inevitably ends up being a highly abstract notion), and there is an invitation, instead, to consider the possibility of a public sustaining amongst it a set of less abstract goods that need not all be shared by all with equal intensity at all times. This is, on the one hand, the realization of the ultimately politically decided nature of the goods, and therefore, on the other hand, the provision of a permanent opening for democratic political action.

³⁹ For this reason, it would be preferable to call this dimension ‘thin-normative’ as opposed to plain normative.

Second, the polity envisioned in a constitutional project will be centrally interested in preventing arbitrary use of political power, also referred to as the principle of political vigilance. This normative orientation (again, not a concrete value) encompasses a wide array of more commonly discussed themes, from limited government, to rule of law, to Pettit's 'freedom as non-domination'. Pragmatic republicanism asserts – with all constitutionalists – that a key threat to good polity is the abuse of the entrusted powers by those in government. Furthermore, it underscores that the opportunities for such abuse are many, and that, therefore, guarding against any instance of such dangers and attempts is a matter best left open for the daily life of the republic, not for a theory to predetermine. Equally importantly, this normative orientation leaves it open for the public to determine the levels of vigilance, the amount of power to be left with the government, and thereby, leave the chance that the limited government can, at the same time, be a strong one, not castrated.

Third, pragmatic republicanism proposes that a well-constituted polity will adopt – and continually uphold and nurture – a political culture of moderation. Political moderation – again, a general public outlook – is an essential bulwark that enables a polity to survive, to steer clear of internal strife, of revolutionary instability, of intolerance. What kills a republic – and what has killed long-living stable republics in human history – is loss of a culture of moderation, allowance of excess in numerous respects of public life. Here, a pure logician would retort, that a moderate would need to be immoderate toward shows of immoderation – and the answer from pragmatic republicanism, which is a perspective suspicious of purely logical thinking in constitutionalism, is a yes: moderation will need to include the quality of 'militantism' to

be viable at all, (Soltan 2008a). These three thin-normative orientations are the sufficient (but may not be exhaustive) procedural principles to guide constitutional crafting toward the envisioned constitutional polity. They are, to be noted, not ephemeral, not fitted only for starting a constitution, but relevant and decisive indefinitely – just as any project of constitution is a long-term process lasting indefinitely – for they are also constitutive principles: they are not mere means to an end, but are themselves part of that end being pursued.

Moving on, pragmatic republicanism turns to what are called the basic empirical conditions of a constitutional project – the ‘site’, as it were, where the constitution is to be embarked upon. Again, three key categories are proposed as of central importance, without claim to being exhaustive. The most important of them – and for which the other two are definitive circumstances – is the category of constitutional capabilities. Human capabilities are many, of course, and the capabilities approach has recently been richly discussed in the wake of Amartya Sen’s and Martha Nussbaum’s works (see Nussbaum 2010, bibliography). Here, constitutional or political capabilities (also referred to as civic capabilities) is a slightly different idea. Without the necessary civic constitutional capabilities found within a public, a particular constitutional vision is most likely to fail. Conversely, the constitution that will succeed will be the one most in agreement with extant capabilities – and the still better constitution is the one that *realistically* challenges those extant capabilities upwards. Thus, instead of capabilities being used as a measure of the success of a constitution or a policy, here, the capabilities are the category that *makes* a constitution or a policy realistic or fails it.

The second empirical condition is the context of a constitutional project. Civic capabilities are significantly (but not absolutely) shaped by the obtaining political context. While it is not an agency category, and is therefore not involved in the activity of constituting, context is quite literally the constitutional site. Admittedly, it is a broad – and potentially way too broad – category. PR, it is here argued, need not spell out the strict limits of this category, but does need it to be highlighted nonetheless. A constitutional context may encompass issues of cultural context, socio-economic context, geopolitical context, and political-historic context, to suggest a few. The point that can be clear from this, regardless of the breadth of ‘context’, is the *situated-ness* of a constitutional endeavor. Given that, therefore, a constitutional project may not granted-ly orient itself to some ‘universal’ goals, or Western-centric arrangements, or operate on assumptions that are valid for certain societies, or be guided by values and norms of great republics of history – all of these witnessed all too often. That observed, the constitutional context is not static – it is capable of, and inevitably does undergo, change; only at any given point, it is nonetheless a specific context, not just the same as anywhere else.

The third empirical condition of constitution is that of continuity. Continuity is neither an agency category, nor a structural one; it is rather – for want of a better way of saying it – a dimension of political reality itself. Let us make several statements by way of building up to an explanation of what continuity means here. (1) A polity to be constituted never comes out of non-being – the public, the site, the society will have always preexisted, never a ‘clean board’ – and this means that, however dramatic a change, a constitutional project is still a continuation of a preexisting political life. (2)

The difference between evolution and revolution is one of degrees, not of kind. No revolution is ever a completely new start – in fact, strictly speaking, such a notion about political life is unimaginable at all. When a revolution takes place – be it in 1776 in America (see Levy 2009), 1789 in France (see Tocqueville’s *Ancien Regime and the French Revolution*), or on the Tahrir Square – what follows is a life to be continued on by a people who has lived before the fact, led by possibly new leaders who have lived and been formed before the fact, under institutions most of which will have preexisted the fact and will only gradually change from there on. (3) To say that any constitution is a continuation of preexisting social life is not to say that no change happens; it is also not to say that change is undesirable – far be it from this work. However, it is to say that a successful constitutional project must be keenly cognizant of the inescapable fact of continuity and be crafted in such a way that it aspires to realistic, *possible* transformations, and not the impossible kinds.

The continuity meant here, then, is not equivalent to ‘permanence’, but rather to ‘uninterruptibility’: life does and can change, but it cannot be interrupted, taken from one track and put on another, as a toy train can be. Thus understood, continuity is consonant with the thrust of political conservatism, and specifically, with the Burke-an concept of constitutional inheritance (or “prescriptive constitution”), (see Burke 1987; see also Jacobsohn 2006), but only to a degree: they part ways where the conservatives embrace continuity as a normatively recommendable, substantive choice, and PR asserts the fact of continuity as a disciplining, inescapable empirical reality facing constitution without necessary normative import. For PR, continuity is essential because a disregard for it – as

has been and continues to be seen around the world – leads to failures, setbacks, and at worst, to full reversals of the project.

These three categories, referred here as the basic empirical conditions of continuity, are what PR argues make up the ‘construction site and material’: the constitutional project can only hope to succeed insofar as it adequately corresponds to the ‘site and material’. Not to overstretch the metaphor, let it be noted that both the site and the material here are capable of evolving, not static (or permanent).

Having covered the normative orientations and the empirical conditions of constitution, pragmatic republicanism proceeds to discussing the manner of constituting, or the practical mode of it. And that is crafting. While the semantic and symbolic aspects of this term are to be taken up in its proper place, it may be now enough to say that constitutional crafting means a public’s engagement in practical political creativity – a process that is continuous, free from pre-scripted technique, open to learning while doing, and - all the while – purposive (in the sense of pragmatic – task- or problem-driven – as opposed to teleological or dogmatic). It is not exceedingly useful to belabor any definition of constitutional crafting. A more useful explanation of the concept will come by discussing actual examples of such activity, especially using the example of Norway (Chapter 5). For any specific constitutional project to be tried, crafting will feature an unpredictable amalgamation of particular experiences, experiments, strategies and, definitely, mistakes that may not be possibly outlined in a work like this. While difficult and in this sense inadvisable to define constitutional crafting, it should be obvious and so recognized that of all four components of pragmatic republicanism – a vision, procedural

norms, basic conditions, and crafting – this last is the one most directly tantamount to constitutional activity, to constitution in its verb form.

The four components of pragmatic republicanism make up a whole, which one might call a constitutional project, and they together in the way they have been specified, represent the political-ness of the constitution project. As is clear by now, no element of the above is strictly defined although each opens a particular perspective, or puts a particular emphasis. The logic – not a ‘pure’ but rather a simple and pragmatic logic – is that constituting a good polity takes place in the mode of collective crafting, where the thing being crafted is oriented through shared normative goals toward a realistic vision and is based on available empirical reality. Since it is a continuous project, all of these elements almost necessarily evolve – the goals evolve, the capabilities grow, the context changes, and crafting features ever evolving sets of activities and approaches. While the tone and some remarks above suggest that pragmatic republicanism is all about the beginning of constitutional projects, that is not necessary: all of the above applies with equal relevance to both the United States and the Kyrgyz Republic. Admittedly, however, constitutional problems are more pressing among the latter type of cases, and so pragmatic republicanism is geared more toward them.

This, in brief, is the outline of a particular conception of political constitution – pragmatic republicanism. In the relevant chapters below (especially 4 and 5) that discuss all of the above in much greater length, attention will be drawn to explaining how pragmatic republicanism always maintains the political-ness of the constitutional endeavor in sight.

TO conclude, good polity does not simply happen by itself – those that already exist were achieved and have been kept by people, and those that are yet to come will have to be achieved by people – under conditions not entirely chosen by themselves but whose favorable conjuncture is significantly dependent on them. The place of human agency in attainment of good polity is not erasable. Human agency itself, however, is neither an abstract nor a constant category. It is something that exists and is exercised in complex ways within a society, and a better term that conveys its socio-political situated-ness would be civic capabilities. Civic capabilities, being the term for agency of people who make up a political society and strive toward better governance in their midst, then suggest a historically and contextually situated and evolving category. Thus, the ambition of this work is to grasp the real and possible process of developing political societies, or good polities, by peoples given their circumstances and opportunities – an ever-prescient, complex, but not impossible task – what has been here described as the constitutional predicament.

This task, or predicament that the constituents face, is historical in the sense that Paul Pierson identifies in saying that “important aspects of social reality can best be comprehended as *temporal* processes. It is not the past per se but the unfolding of the processes over time that is theoretically central,” – and not just theoretically, one may add, (2000: 264, *italic added*). But whereas Pierson’s wise point about history is related to ‘path dependence’ and ‘increasing returns’ arguments that come out as overly stressing the self-entrenching and self-regenerating socio-political phenomena, the present work aims at locating human agency on that map of path dependent mechanisms. To go on with it, Pierson himself notes “a sensible and useful challenge”, which is that “to many,

the significance of path dependence is belied by the evident dynamism of social life,” and responds essentially by saying that path dependence argument is not a determinist, categorical claim. Fair as that may be, the better rejoinder to that challenge, it seems, is to note the presence and (punctuated, maybe) effect of capabilities: after all, in any path-dependent political process, there is still some degree of capability, and depending on the degree of entrenchment of the path, the degree of salience of the concerned issue, and the level or strength of civic capabilities, ‘critical junctures’ or greater or lesser dynamism in a society are to be observed. That is the matter the present work proposes to discuss in relation to the greatest of all processes, political constitution.

Chapter 2

Avoiding Politics in Constitution

As it is made obvious in the preceding pages, a proper political grasping of the problem of constitution is a highly methodologically unfriendly, inconvenient task. It is difficult to keep its entirety under control, let alone arriving at clear, testable causal propositions about it without analytically dissecting it into simpler and smaller parts – it is difficult to produce good science about political constitution, in the mainstream, positivist sense of ‘science’. The remedy to this situation among constitutional scholarship, quite logically but very problematically, has often been apparently to avoid the political aspects of constitution.

This chapter is an extended discussion of the four unsatisfactory approaches to answering the question of ‘how to constitute a good political order’ suggested in short stylized form in the Introduction. This is not an inquiry into the probable origins of the twilight of a *political* understanding of constitution in a historical sense – even though the argument is made, in the next chapter, that constitution was understood in a proper political sense by earlier constitutional thinkers traceable back at least to Aristotle, and including Tocqueville, Montesquieu, and Machiavelli, in particular. Instead, this is a discussion of several – four, without claiming this to be exhaustive – analytic ways of avoiding the encounter with the political in contemporary political theory of constitution. Let these four approaches be called the legal, the institutional, the philosophic, and the cultural versions of constitutionalism (LC, IC, PC, and CC, respectively).⁴⁰ With this

⁴⁰ This ‘taxonomy’ is *sui generis* here, although somewhat comparable and at least partially corresponding conceptualizations can be seen in: Elkin (2006), Lutz (2000), McIlwain (1947), Jackson and Tushnet (1999: 190). A rather different set of four meanings of constitution is suggested by Castiglione (1996).

kind of terminology, there is always a ‘want of a better way of saying it’, especially concerning the three less usual categories: by IC, what is primarily meant here is the tendency to focus on *formal* institutions and structures of government, while fully embracing the argument about the key place of institutions in general in any constitutional project (as in Elkin 2006); by PC, the focus is on *ideal* constitutional theory and not on any and all philosophy pertaining to constitutionalism (because, for example, Machiavelli’s is also a philosophy of constitution), and under CC, the point of interest is cultural *essentialism* which very often plagues discussions of culture in general (see Wedeen 2002); the important place of more dynamic conceptions of culture (as in ‘cultivation’) in political constitution is, to the contrary, keenly recognized and stressed here. Thus, for want of better but un-cumbersome ways of saying them, these particular four names will need to be adopted. These nuances will be kept in sight as discussion of each unfolds below.

Identifying and critiquing the various un-political kinds of constitutional scholarship is not the core of the present work, but it has an important heuristic value: it leads to clarifying the concept of political constitution by discussing alternatives that have lacked the political in them. The eventual argument concerning these four foils is not that they are wrong and need be abandoned; rather, the argument is that they are unsatisfactory as stand-alone conceptions of constitution because they are severely partial treatments of the question. Political constitution is not put up to displace all others but rather to sketch the larger, more holistic constitutional canvass where all these alternative but partial approaches can fit if adequately revised – not as autonomous, self-sufficient views, but as integral and interdependent parts of the overall fabric of constitution.

Thinking of the heuristic moment of this exercise raises one important observation that can now be mentioned, but will be left for further discussion in the next chapter. The observation is that of the four variants listed here, legal constitutionalism has been rather well identified and has figured as the central foil in a number of recent works on political constitutionalism. There is a good suspicion here that in most of such works, legal constitutionalism has figured not only as a foil but also as a formative framework. The political constitutionalism defended in those works (e.g., Bellamy 2007, Thomas 2004, Griffith 1978) seems to be noticeably shaped by its very opposition to legal constitutionalism. If the suspicion is at all accurate, such a procedure had an unfortunate effect on those formulations of political constitution – the resulting conceptions were just as partial and narrow as the foil, only focusing on actors and processes slightly other than the ones held up by the legalists. In opposing legal constitutionalism, in other words, these authors seem to have had a problem much more with *legal* and much less, if at all, with *constitution* therein implicated.

The four distinct kinds of un-political constitutional approaches should help overcome the trap: by discussing the legalism, the formal-institutionalism, the philosophic idealism, and the essentialist culturalism of these approaches, the hope is ultimately to underscore the misunderstandings of *constitution itself* that they engender, both individually and collectively. In doing so, then, this exercise will help not only to note the variety of un-political constitutionalism but also to open up some previously proposed ideas of political constitutionalism to critique and revision.

Next, the four ways of eliding the political in constitution will be taken up one by one: their core ideas and concerns will be outlined with references to representative

literature. With each of them, of course, the claim is not that some author or group of scholars represent it in a pure form; nor is it the claim here that all four together exhaust the variety of un-political constitutional thinking. As already said, they are invoked here rather for heuristic purposes, not for a comprehensive diagnosis of the field of constitutional theory. Once each of the four has been outlined, their partly shared and partly distinct ways of avoiding the political will be discussed next.

Legal Constitutionalism

Legal constitutionalism is by far the most prominent – and for many, the only – problematic way in which constitution has been conceived (Bellamy 2007, Thomas 2004, Issacharoff 2004, Griffith 1978, Balme and Dowdle 2009). With major authors in this tradition including Friedrich Hayek, Ronald Dworkin, Richard Epstein, Frederick Shauer, and many more, legal constitutionalism may be said to be a negative constitutional variety (see Elkin 1993: 21ff): a perspective that prioritizes limitation of government power by encapsulating public life, and especially the capacities of government, within confines of law; or as Dworkin eloquently put it, by creating a *Law's Empire* (Dworkin 1986; see also Lowi 1969). Such limitation/encapsulation is made possible, for one, by adopting and entrenching a bill of rights or its equivalent, deriving those rights from the doctrine of natural right, for another, by elevating a constitutional court and its power of judicial review – staked on the promise of legal reasoning – above more clearly political institutions of power, and for a third, by codifying all law and especially constitution itself into an (increasingly detailed) written Constitution (see Quint 2007). In all these ways, the overarching concern under legal constitutionalism is with making sure that the government does not overstep its limited territory, that the rights of citizens are

sacrosanct, and law – with its certainty, logic, predictability – maximally dominates over the uncertainties of the political sphere. In this view then constitution is essentially about law, and constitutionalism – about government by law.

A number of more specific mechanisms and instruments are invoked to give this conception of constitutionalism life. Perhaps the most encompassing of such elements is the doctrine of rule of law (see Stimson 2008). As ambitious as it is, the noble maxim of “rule of law, not men” in public life is a difficult concept, which at every attempt of its disambiguation quickly tends to hit upon problems. Thus, Shklar’s objection in her critical essay on four contemporary ‘rule of law’ scholars (Hayek, Dworkin, Fuller, and Unger) is the various ways in which each has failed to account for the political-ness of the setting where rule of law is supposed to work (Shklar 1998, Ch. 2). In a similar critique of ‘rule of law’ scholars, Elkin offers an interesting discussion – among others – of Friedrich Hayek’s contribution, critiquing it (and the work of his intellectual kin) as an attempt to override, or even to suppress, the more prior issues of democratic citizenry and political institutions, (Elkin 2006: 81-84). Not unimportantly, some recent republican theorists can be accounted among the rule of law camp. In their respective relevant works, Quentin Skinner (1998) and Philipp Pettit (1997) come to find the defining republican principle to be essentially the principle of rule of law. Pettit in particular is notable: for him, the distinctive republican conception of freedom as non-domination, when imagined practically, is primarily if not exclusively a function of government (or rule) by law (1997).

More practically, legal constitutionalism, anchored on the doctrine of rule of law, is particularly interested in two interrelated mechanisms: on the one hand, the reliance on a

constitutional court endowed with the power of judicial review, where the court plays the role of a constitutional gate-keeper by subjecting more political processes – especially ones produced in the legislature – to the scrutiny of legal reasoning that is itself guided by the standard of a written Constitution; on the other hand, the reliance on constitutionally entrenched – and therefore, not subject to further political debate – set of citizen rights. The logic of the former is captured in a critical passage from Elkin on American legalism:

“the courts, and especially the Supreme Court, are the custodians of legal reasoning and the law; the Constitution is a form of law, that is, the higher law; the courts in their exercise of legal reasoning are the custodians of interpretations of the Constitution; the Constitution defines the basic structure of the American regime; and thus the courts, again especially the Supreme Court, are the interpreter, and, given the relative open-endedness of much of the Constitution, the definer of that basic structure” (Elkin, *ibid*: 98).

What results from such a logic (which is, of course, admittedly somewhat exaggerated for a succinct formulation) is a noticeable diminution of the political side of constitution. In an argument sympathetic with Elkin’s, George Thomas argues for a need to revive the political constitution that Madison and colleagues had originally envisioned (Thomas 2004). This un-political aspect of legal constitutionalism is reinforced by the even more depoliticized doctrine of rights. Mary Anne Glendon (1991) and more recently Sonu Bedi (2009) offer critiques of LC: on account of these legally defined and protected civil rights – and their unavoidable reliance on the judiciary for adjudication and enforcement. Still earlier, a criticism of propositions for written and judicially enforced bills of rights, though on somewhat different grounds and in the context of British constitution, was made by J. A. G. Griffith (1978). Griffith, not mincing words in his provocative essay, referred to the idea of codifying a bill of rights

as ‘nonsense of stilts’. On LC’s over-reliance on judicial review and ‘rights talk’, and a wide variety of other manifestations, Richard Bellamy offers a comprehensive critique based on the cases of US and, to lesser extent, UK constitutionalism (2007).

While most of LC scholarship has focused on the American and British experiences (and a limited number of other cases), which by itself is a big part of its problems, the shortcomings of LC have not been missed on scholars interested in younger and therefore brittle constitutional attempts in other parts of the world. Samuel Issacharoff critically invokes legal constitutionalism in his discussion of problems attending the Dayton Accords settlement of the Bosnian conflict (2004); besides raising some of the same subjects as many scholars of Western constitutionalism, Issacharoff particularly notes the problems of reliance on a written constitution – and the Bosnian ‘Dayton Constitution’ has been a particularly notorious one – for a severely divided post-conflict society. In a bold if precarious attempt to talk about constitutionalism in China, the editors of a volume similarly raise concerns about the Western LC tradition that is singularly focused on “judicial power”, which they contend is an “actually incomplete” view of constitutionalism, (Balme 2009: 2). They express legal constitutionalism in a succinct syllogistic proposition similar to Elkin’s: “constitutions are phenomena that are regarded as laws; law is a phenomenon that is enforceable by courts; therefore constitutions must be phenomena that are enforced by courts; and therefore constitutionalism is principally a product of judicial power,” (ibid). This conception of constitutionalism, the authors warn, “presumes a constitutional system that is already relatively mature”, and while possibly valid for cases like the United States, “it does not by itself provide an accurate description

of what happens in younger and more emergent constitutional cultures, like that of China” or Kyrgyzstan, (ibid).

Such “younger and more emergent constitutional cultures” have much more to lose with a misleading conception of political constitution. Predictably, in most such cases courts have little, if at all, role to play in constitution and politics, so an excessive court-reliance, except in corrupt ways, may not be a problem that applies to them. However, adopting the constitutional language of established polities, these ‘cultures’ insist nonetheless on seeing constitution as a matter primarily of getting the law right. Practically, that usually boils down to the written Constitution: the writing, adopting, amending, or replacing, of it. While some may see it as a “political paradox”, it seems rather very natural and predictable that “constitutions without constitutionalism” should arise aplenty when around the world constitutionalism becomes equated to the adoption of a written legal document, (see Okoth-Ogendo 1993). Precisely that has been the gist, and the tragedy, of Kyrgyzstan’s constitutional malaise: it has gone to seven national constitutional referenda, in addition to a few parliament-based constitutional changes, in the matter of twenty years. The opposition always demanded “constitutional reforms”, and the government – whichever happened to be in office – kept “responding” with “constitutional reforms” that only served its own purposes. Thus, legal constitutionalism, to the extent that it was the guiding perspective on the challenge, became its own victim: the preoccupation with law in a narrow sense led to the ultimate corruption and hijacking of it by politics of a narrow kind.

Institutional Constitutionalism

If legal constitutionalism – in the narrow, problematic applications of it seen in Western scholarship and non-Western practice – does not work, formalistically-minded versions of institutionalism in constitutional scholarship fare no better. This second of the heuristic quartet refers rather narrowly to formal and positive institutional structures of a polity, and to “institutional design writ large” that Adrian Vermeule has pointed out (2007). A word of caution needs to be inserted here. Institutions, rightfully, lie at the core of any constitutional polity – and the very pointed arguments in Elkin (2006 and 2010) and Elkin and Soltan (1999) to this effect make the matter very clear as far as they go. Thus, when Elkin states that “[c]onstitutional theory is strongly institutional in focus” (2010: 224), that is very broad; saying “institutions are then simultaneously ends and means; ... they are constitutive” (Elkin 2006: 111) gives some more direction, but is still rather open ended. Grasping the scope of institutions meant in his work, one requires to put it together with concern for capable citizenship (ibid: 83, 95) and the idea of public interest politics, and with “mores, virtues, social divisions and statesmanship” (Elkin 2010: 224). Thus, within the vast and difficult language of institutionalism it is all too easy to dress up constitution in the skimpy but strait-jacket clothing of “official” and formal institutions.

Harry Boyte resolves this complication rather lucidly, offering a more preferable way of understanding institutions: “Rather than seeing institutions as defined by structures, procedures, rules and regulations, the conventional way of looking at them, it was necessary to reconceive institutions as living and dynamic *communities*, with norms,

values, leadership, and cultural identities,” (Boyte 2011: 94; italic in original).⁴¹ It is only understood in a manner like this that institutions can fully carry out their proper part in the project of political constitution. ‘Structures, procedures, rules and regulations’ are only meaningful and effective viewed as decisions and outputs of institutions rightly understood. To give this understanding of institutions a firmer foothold, it is worthwhile to speak of a ‘capabilities institutionalism’ as contrasted to a proliferation of “new institutionalist theories” in recent political science.⁴² But our institutionalist constitutionalism (IC) pushes in the opposite direction.

It is when constitutionalism is understood (or defined) as ‘limiting the power of government’, or limited government, that institutionalist constitutionalism is readily invoked. At its origin stands the doctrine of separation of powers, with its resulting mechanism of checks and balances that is commonly attributed to Montesquieu and most successfully contrived and put to work in the American constitution as understood through the *Federalist Papers*. Both the British and the American cases of separation of powers have, willy-nilly, worked out (but here, see, e.g., Elkin 2009 and Levinson 2006) – and only because they worked could James McIlwain complain about the doctrine. “Among all modern fallacies that have obscured the true teachings of constitutional history, few are worse than the extreme doctrine of the separation of powers and the indiscriminate use of the phrase “checks and balances”. ... Political balances have no institutional background whatever except in the imaginations of closet philosophers like Montesquieu,” (McIlwain, 1947: 132). That is, only when separation of powers worked was it plausible for McIlwain to observe its “weakening” effect on *gubernaculum* (the

⁴¹ Elkin’s (1993b) definition of a third aspect of institutions – as formative of civic character – is close to this understanding of institutions.

⁴² A separate work in the form of an article on ‘capabilities institutionalism’ is in progress.

realm of the executive) vis-à-vis *jurisdictio* (the realm of law and adjudication) – the point of his complaint.

The British separation of powers does not owe its working to Montesquieu; even the Publius cannot be quite fully credited for the success of the American case. But they were all superb constitutional thinkers – and that is why their names got so strongly attached to the idea of separation of powers, and checks and balances. Contemporary institutionalist constitutional scholars, alas, lack the abilities of Montesquieu and the Publius. McIlwain’s complaints about “the extreme doctrine” and “the indiscriminate use” may have only now become deserved if addressed to today’s culprits.

Today, it is hardly possible to come across any voice arguing against separation of powers; it is a *sine qua non* of contemporary constitutionalism. Yet just as unquestioned its validity, so formalistic and positivist its application has become. Lacking the contextual depth of both Montesquieu and the American Founding Fathers, the issue has become just another item to be check-marked in the writing of constitutions. Thus, one can see an article that begins by equating constitutionalism to “[adopting] a written constitution” to go on to specify “three fundamental constitutional inquiries”: into human nature, into institutions of government, and into individual rights to be protected, (Epstein 2011: 290 on)⁴³. Epstein is a good representative of contemporary positivist optimism, as he proclaims that “conscious design ... is a necessity, not an option”, and bravely puts the question thus: “...what institutional features a [written - *mine*] constitution can put into place – legislatures, executives, judges, administrative agencies – to help constrain the

⁴³ Not entirely coincidentally, one might note that Epstein’s three ‘inquiries’ quite closely correspond to our philosophical (PC), institutionalist (IC), and, a bit less obviously, legal-slash-essentialist cultural (LC/CC), respectively. Overall, Epstein is, however, a recognized legal constitutionalist (LC), (see Elkin 2006: 84-86).

manifest and pervasive imperfections in both the governed and the governors,” (ibid: 290 and 291-2). The language of constitutional *design* and *choice* has indeed become ubiquitous among institutionalists. Thus, we witness the prominent debate about “constitutional design for divided societies” between Arend Lijphart and Donald Horowitz, (see Choudhry 2007: 15ff; O’Flynn 2007: 734-738 for brief reviews), where each proposes a competing alternative, focusing on electoral-representational systems, that should make the divided societies of the world - the Sunnis and Shiites of Iraq, the Hutus and Tutsis of Rwanda, the Bosniacs, Croats and Serbs in Bosnia, the Pashtuns, Tajiks, and everyone else in Afghanistan – somehow able to share a workable constitutional system.

Possibly the most troubling, if occasionally comical, is the prolific literature in comparative politics about choice of forms of government, and especially, one based on a parliamentary-presidential spectrum (see, e.g., Stepan and Skach 1993; Cheibub and Limongi 2002; Fish 2006). In a popular-scholarly article, one author scolded the Ukrainians for not knowing recent political science research, which has already established parliamentary system to be the better choice for democracy, contrary to their stubborn insistence on variations of presidentialism (Umland 2010). The author proudly cites a rich variety of constitutional choice that comparativists have identified, including “super-presidentialism”, “semi-presidentialism”, “highly presidentialized semi-presidentialism”, and maybe most ingenuously, “balanced presidential-prime ministerial semi-presidentialism,” (ibid).

Given such ‘advice’ from political scientists, it is no wonder that strange and curious things happen in actual constitution-making. A memorable debate took place in

Kyrgyzstan following the March 2005 ‘Tulip revolution’ – the first of the recent two forced changes of government. The president, the parliament, political parties, and anyone else who cared, took sides on which choice would be best for Kyrgyzstan’s new constitution: presidentialism or parliamentarism. At one point, then-President Bakiyev tasked a working group to design (meaning “write up”) three drafts of a constitution: one with parliamentary, one with presidential, and one with a mixed system of government. That the experiment went nowhere need not be a surprise. The same debate, however, took a more serious turn when following the second ‘revolution’ of April 2010 Kyrgyzstan’s new interim leadership opted for a more parliamentary option. The many critics of the move included then-President Medvedev of Russia who thought it would be a “catastrophe”, and the supporters included some in the US government who thought the move would usher in a viable democracy.

The point here is not to unreasonably reject all such options, but to ask the good “policy question” which is “whether one can stick any institutions into some particular conditions and expect that they would function in the same way as they have functioned elsewhere,” to quote Adam Przeworski (2004). The obverse of Przeworski’s question is equally important: whether a state is locked into its existing institutional system and no serious change is thinkable – as Medvedev’s opinion about Kyrgyzstan would suggest. The answer has to be somewhere in the middle, though surely not a mathematically-arrived middle: it must be that institutions are exportable to some degree, and that they are changeable and not permanent to some degree. The question is where and how these two propositions meet.

Cultural Constitutionalism

The less explored member of our constitutional quartet, but again mostly problematic even in the limited scope of attention to it, is cultural constitutionalism. When it is not conflated with ordinary ethno-nationalism, the cultural constitutionalist approach is usually an appendage to the primarily legal and institutional discussions, not a thing on its own. In such conventional constitutionalism parlance, cultural factors have been construed mostly in very essentialist, parochial, and primordialist ways. To remind of an earlier warning, it is precisely such essentialist, static notions of culture that are targeted here. Similar to the point about institutions, culture – as in constitutional/civic/political culture (or its more active kin, *cultivation*) – has a central place in constitution. But that potential – necessity, even – is cut short when culture is sold short for certain myopic, static ideas. In its problematic meanings, predictably, culture in the context of constitutional theory is liable to the same important criticism that the idea of civic culture, or political culture, was subjected to in political science in the wake of Almond and Verba's *Civic Culture*: the liabilities of parochialism, ethnocentrism, determinism, and so on (see Sabetti 2007). A concept of culture that defines a society into a still-life – either homogeneous or heterogeneous [as might be applicable to multiculturalist as distinguished from inter-culturalist arguments (see Tully 1995)]⁴⁴ – once and forever in the most decisive aspects of that society is, indeed, neither accurate nor helpful for a political science, constitutional or not.

⁴⁴ The rhetoric about multiculturalism having failed by Angela Merkel and some others in recent times, much criticized in the media, can be seen as arising precisely from this problematic conception and application of the idea. See, e.g.: <http://www.dailymail.co.uk/news/article-1355961/Nicolas-Sarkozy-joins-David-Cameron-Angela-Merkel-view-multiculturalism-failed.html>

Take the already noted essay by Donald Lutz (2000), where he defines a version of a constitutional triad, culture-power-justice. Of culture, he writes: “[the] term is here used in a more formal, anthropological sense to refer to a shared set of symbols, [...], that is passed from generation to generation.” He goes on to say that “cultures” are “historically pre-political because they were used long before the creation of the formalized political systems of any type,” (128). Predictably, he suggests that “the cultural element is generally found in long preambles, opening declarations, and more recently in bills of rights. The definition of citizenship and/or characterization of who belongs to the people or nation ... is also a fundamental expression of the cultural element,” (ibid). All of these quotes clearly indicate a very essentialist and reified meaning of culture: it is a body of fixed ideas and notions particular to a self-defining nation, unique and timeless. Similarly concrete, reifying cultural elements are found in modern constitutional preambles as discussed in a recent article by Sanford Levinson (2011), where he cites many examples from around the world, including Ireland, Pakistan, Poland, and South Africa, as he wonders whether preambles – the often overlooked or passingly regarded item – have a meaningful role. If all such attributes are what truly defines a constitutionally relevant meaning of culture, then it is a short step to arguing that some cultures are unfit for constitutionalism (see Kedourie 1994), and other cultures, already luckily constitutional, are fixed so as to preclude constitutional development, evolution or change.

A compelling critique of cultural constitutionalism is found in James Tully’s already mentioned book, *A Strange Multiplicity* (1995). Tully writes about the problems of cultural recognition, about the incapacity of reigning conceptions of what he calls ‘imperial modern constitutionalism’ to recognize cultural diversity. Essentially, the

‘modern constitutionalism’ that Tully outlines and critiques – for its being anti-cultural – can be taken as an example of our cultural constitutionalism. It is an understanding of constitutionalism constructed after the image of European civilization’s historical development, from imperial times to today, expressible only in the language of that civilization, and therefore, only able to entertain ‘others’ insofar as they fit in its own world and language. While cultural recognition as such has not been resented in contemporary constitutional theories – after all, for example, Kymlicka’s [whom Tully mentions critically] multiculturalism is about the search for cultural recognition (e.g. Kymlicka 1996) – Tully objects to the essentializing, totalizing language of such theories. Modern constitutionalists operate on a “shared concept of identity” which comprises such concepts as “culture, citizen, society, community, association, nation or people”. “The concept of identity”, Tully objects in agreement with post-modern critics, “... is unable to account for a crucial feature of contemporary identity: that it is always different from itself, as well as from others,” (p. 45). Opposed to the problematic narratives of modern constitutionalism in regards of cultural diversity, Tully finds a living contemporary constitutionalism where cultural recognition takes place through an ongoing constitutive negotiation. He writes: “Constitutions are not fixed unchangeable agreements reached at some foundational moment, but chains of continual intercultural negotiations and agreements in accord with, and violation of the conventions of mutual recognition, continuity and consent, (183-4). Tully spells out in some detail how contemporary constitutionalism works in the actual constitutional world. One may have some reservations as to the validity of the somewhat overly optimistic depiction here by the author. However, the more important point about the problems of cultural essentialism in

political theory – and often in political practice, too – is made amply clear in this brilliant book.

The world of constitutional practice, predictably, plentifully complements the failings of academics to articulate – and to locate within constitutions – a more workable and helpful conception of culture (but see Wedeen 2002; Jacobsohn 2006); problematic insertions of ‘cultural element’ into written constitutions of course owe primarily to their authors: the drafting commissions, politicians, and mobilized groups of citizens, (for a recent difficult drafting occasion, see Barnett Rubin (2004) on “crafting a constitution for Afghanistan”). Kyrgyzstan provides some telling illustration. For example, a staunch opponent of the parliamentary form of government, prominent politician Adahan Madumarov made it a key argument of his party’s recent (2010) election campaign, that Kyrgyzstan needed a single ‘strong hand’ in the office of a president, a version of an ‘oriental despotism’ argument; a similar point was often made by many pundits in Russia – rather literally wondering whether parliamentary rule befit an Asian society. The opposite side, on the other hand, appealed to similarly superficial cultural arguments that because the Kyrgyz in the past had a nomadic culture that defied strong central authorities and featured a sort of warrior democracy, and because the Kyrgyz were traditionally organized along primordial tribal groups, parliamentary government could work much better than presidential rule. On the question of secularism, one side argued that secularism was a cornerstone of the universal culture of recognition and human rights and was properly spelled out in the Constitution, whereas the other side argued that it was an alien Western imposition upon the Islamic culture of Kyrgyzstan in which secularism has no place. And of course, as noted by constitutional scholars, the preamble

of the constitution was always a site of ‘culturalist’ contestations: the current version of the document, heeding to greater cultural sensitivity among its drafters, avoids openly Kyrgyz-centric declarations, whereas most of the older versions had very explicit references to ethnic Kyrgyz privilege.

Philosophic Constitutionalism

The last of the quartet of problematic constitutional approaches is philosophical constitutionalism (PC) – or ideal constitutionalism. While philosophical, or even ideal, constitutionalism is not a term seen anywhere before (at least by this author), the inclusion of it presently is warranted on several grounds. First, if constitutional thought had an origin ever, it is undoubtedly in political philosophy – it is too big an elephant in the room to be overlooked. Second, a number of critics of un-political constitutional thought have specifically taken issue with ideal philosophic thought for its avoiding the political (e.g. Elkin 2006, 2010; Barber 1988; Mouffe 1993). Third, in considering it in relation to the other three culprits – and to political constitutionalism – PC cannot be included or subsumed under any of them. In fact, at a basic level, all of the preceding three conceptions of constitution owe to PC: some of the core underlying principles and logic behind all of them is the fruit of philosophical inquiries into constitutional issues. So, what is PC, and why is it problematic?

This version of constitutional thinking is *prima facie* the least able of accommodating the messy political-ness of the matter: it is interested in the ideals of constitution. Instantiations of PC in both old and contemporary literature are numerous; they do not neatly fall under a single organizing logic and theme. What unites them all –

per definition of PC in the present work – is operation at a necessary (and very high) level of abstraction from the empirical life. PC is impossible without caveats such as *ceteris paribus*, *assumptions* such as equality and especially equal rationality among all humans.

Possibly the earliest known example of PC is *The Republic* of Plato. Socrates and his interlocutors, sitting in Piraeus near Athens in the period of the long Peloponnesian War, and arguing about the meaning and worth of justice, end up building a city in speech, an ideal republic where they could see justice and see why it was better to be just. *The Republic* is probably the clearest instance of an *architectonic* work, as Wolin describes Plato's political philosophy, as distinguished from political thinkers who took political life more as a problem of management, manipulation, dealing with, e.g., Machiavelli (Wolin 2004: chapters on Plato and Machiavelli, *passim*). That is, the work re-imagines the entirety of political life from A to Z, or, re-constitutes the society 'from scratch', as it were. For the ominous implications of the city in speech for actual social life, if ever imagined as so applicable, and especially for its effect on posterior political thought, Karl Popper counted Plato as the first of the enemies of open society (Popper 1971). Popper's conclusion may only be defensible on very circumscribed and slim grounds, and for the present purposes, Plato's other important constitutional works, *The Laws* and *The Statesman*, for example, may be better choices to pick. The limited point here is only that *The Republic*, taken as it is, represents a very good instance of PC.

Possibly the most important contemporary PC thinker is, predictably, the late John Rawls. Between his two most eminent works, *A Theory of Justice* and *Political Liberalism*, Rawls offers an impressive idea of political constitution – nearly as

architectonic as any work of earlier times. Without elaborating on Rawls' overall project – given the plentiful supply of such literature by extremely more capable students (e.g. Barry 1973 on *A Theory of Justice*) – it may be excusable presently to simply indicate a number of key elements of his constitutional thought – elements that are, of course, philosophic and are, ultimately, problematic for being incapable of accommodating the political. Such problems start from the very beginning – and here, of course, all contractarian theories join: Rawls' original position and veil of ignorance resolve for him the inconveniences of 'circumstances of politics' (Bellamy 2007: 5). No such instruments are available to resolve such predicament for any aspiring (or mature) constitutionalists. From that moment, Rawls has almost irrevocably parted ways with the irreducible and unavoidable political-ness of constitution. The entire rich constitutional vocabulary that Rawls subsequently works up – from the two principles of justice, to assumptions about the critical human capabilities, to overlapping consensus, to the idea of public reason (and the curious notion of background culture), to deliberation and its exemplars, and numerous other fine concepts – all of them are destined to remain the thing of PC, and incapable of informing actual political constitution in any material, practical way. Given that Rawls maintained that his work was 'political, not metaphysical' (1985), this complaint against his monumental work is not entirely misplaced. A more thorough critique of ideal theory (of Rawls, mainly) from a constitutionalist perspective can be found in Elkin (2004).

From a somewhat different – and somewhat unexpected – corner, Philip Pettit can also count as a contributor to PC also (after contributing to LC), albeit not his entire work. His signature conceptual achievement, the idea of freedom as non-domination, is

again the case in point (Pettit 1997). He offers a critique of two existing conceptions of freedom – non-interference (negative) and development (positive) – by use of some interesting examples (slaves and spouses) and references to some close reading of various sources (e.g. Hobbes). In place of these problematic conceptions of freedom, he proposes the idea of non-domination – and elaborates it with similarly interesting fine work. At the end of this critique and construction, a constitutionally-minded reader (and Pettit is, of course, a highly constitutionally minded thinker) is left wondering how the fine differences actually play out in political life, to what extent one kind of un-freedom is worse than another, and to what extent a general public is likely to share along distinguishable lines particular conceptualizations of their freedom so as to correspondingly form their political attitudes and claims. Ultimately, it appears, Pettit’s fine work in this regard is largely of relevance for philosophers.

Avoiding politics in constitutional theory

All of the above approaches to thinking about constitution, in their different and shared ways, have avoided the necessarily political nature of the task. *That* is the problem. Law, institutions, culture, and values and norms are not to be rejected as wrong themes for constitutional theory; in fact, they are arguably all that constitutionalism is. A sound constitutional thinking will have all of these categories in the center of consideration.⁴⁵ But there is a great difference between considering each and any of these

⁴⁵ Bringing all of these categories together is obviously not easy; these dense lines are some indication: “[Constitutional theory’s] strong institutional focus includes the politics that are given form by the workings of institutions including those that animate it, surround it, and operate within it. But constitutional theory cannot solely be concerned with institutions if it is to meet its obligations to provide guidance for the

categories discretely, as definite, clear, and constant concepts, and considering them all as partaking in a *comprehensive political process* that is constitution. The prevailing constitutional scholarship in the four described perspectives is clearly more identifiable with the former, more problematic approach.

All of the four approaches seriously overlook the dynamic factor of civic capabilities. If there is any implicit – and therein, idealized – capability being assumed in any of these four perspectives, it will have to be a capability to strictly and uniformly obey the structural and regulatory arrangements that the theory proposes. Admission of the productive, creative, resisting, critical and other more active aspects of civic capabilities will inevitably render the theories unsustainable. This disregard for capabilities may as well be no wonder since the greater part of contemporary constitutional thought – especially LC and IC – is guided by the interest in taming human behavior, be it in terms of ‘limiting the government’ or producing of ‘law-obeying citizens’. The problem is that the desired outcome of these theories is only achieved by assuming the problem away. Capabilities, of course, are not all positive and conducive to constitutional order, and taming – or better said, cultivating and ‘ennobling’ – their negative effects into positive ones is a key concern of constitution; only doing so requires working *from* that messy reality of capabilities, not past or around it.

To the emphasis on civic capabilities, it may be retorted that the more constitutionally urgent ‘capability’ is usually called power, by which it is usually meant

creation and maintenance of good regimes and related matters. It must also concern itself at a minimum with mores, virtues, social divisions, and statesmanship. The institutions that are constitutional theory’s principal concern are ones directly involved in lawmaking. In good regimes, law forms much of the substance of what might be called the norms of the people whose institutions these are...”, (Elkin 2010: 224).

competitive elite power, and when such elite power is housed in an office, then it often turns to coercive power. Hence, it may be further remarked, that it is more appropriate to speak about ‘taming’ of power, of ‘limiting governmental power’, or the power of those who attain governmental authority, rather than about an unspecific, nebulous notion of civic capabilities. After all, in its so many varieties, both obvious and latent, it is power that both enables political life and at the same time endangers and corrupts it, it may be asserted with reference to numerous literature.⁴⁶

The answer to these retorts might be simply ‘but, of course!’. Of course, power is the cornerstone and most ubiquitous problem of constitution. But precisely because of its ubiquity, and if more narrowly conceived, then also because of its reductionism, the concept of power can too often lead to foreclosing any further discussion. Because it is such a ubiquitous phenomenon, it ends up reducing the purview of a political thinker, subsuming everything else about social life under it. The concept of civic capabilities includes in it the meanings assigned to the concept of power, but it also situates power in agency (of citizens) instead of leaving it in the abstract, conveys the idea of its variability more clearly, lacks the same ‘predatory’ effect on the universe of social life that the concept of power enjoys, and plainly, does not bear the same stultifying intellectual baggage that the concept of power has built up in modern times. If power has come to stand for ‘what *is*’ for the realists of various branches, then capabilities stands not only for what is but also for what *can be* (but not for ‘what ought to be’, to avoid a likely

⁴⁶ The literature is indeed vast, although some of the most common references would include C. Wright Mills (e.g. 1956), Michel Foucault (1980), and further back, Nietzsche, Weber, and Marx. A good argument, complete with a helpful mapping of the literature, is still Steven Lukes’s *Power: A Radical View*, (2005).

confusion). Therefore, for thinking constitutionally, civic capabilities is a more preferable concept, by including the idea of power but avoiding the pitfalls of the concept of power.

In all four of the approaches, there is also a noticeable lack of appreciation of the empirical continuity of political life – that is, the fact that no arrangement of political life is ever ‘once and for all’ but is always subject to revision or reaffirmation because no agreement in political life, with its infinite and even inscrutable plurality of agents and factors, is ever quite fixed. Recognition of this kind of continuity would require viewing political life as analytically very uncertain, resistant to proposition of clear and logical causal (or correlational) statements about it. Continuity – understood not as permanence but as (flexible) uninterrupted-ness – is a key element obligatory for any analysis of political life, and hence, for any constitutional discussion.

Not least, these four approaches in their varying ways also tend to disregard constitutional context, or the situated-ness of any constitutional project. The truth is, of course, that these apparently universalist theories are themselves products of situated constitutional experience – be it that of the United States, Western Europe, or the ancient Rome. Where CC may be one approach seemingly most determined by contextual fidelity, that is not quite correct. If anything, the criticism of James Tully against certain multiculturalist theories is in large part a criticism of de-contextualized ‘imperial constitutional’ thinking. Contextual awareness in a constitutional manner is one that admits both the situated-ness *and* the openness to change within political continuity. Cultural essentialism, therefore, is no equivalent of contextual awareness but quite the opposite of it.

Thus, all of these four constitutional approaches, in their somewhat differing ways, have taken the political-ness of constitution out of the picture by disregarding some key empirical properties of constitution. This disregard could not be compensated by stronger normative and theoretical argumentations or large-n comparative studies. As has been remarked earlier in the introduction, *constitutionally speaking*, theoretical precision and elaborate philosophical argument may be quite the wrong kinds of emphases. The much greater and more urgent concern is with the dynamics of constituting, because that is where the political nature of the predicament lies, and that is also the only way constitution is realized. Almost any piece of writing on constitutional matters in the manner of any of our four perspectives tends to make for a very clear, very logical, precise and fine reading. The problem is that the nature of the subject matter – political constitution – does not lend itself to such elegance unless accuracy is compromised (see Salkever 1999).

This outcome – of avoiding the political-ness of constitution – could be explained rather simply (or complicatedly, maybe) by the very standards of contemporary social science, and political science in particular. As Elkin has argued, constitutional theory is a different kind of a subject requiring, essentially, its own disciplinary kind: it cannot be dealt with simply as one theme among others within existing disciplines (compartmentalized and specialized as they are) of social sciences or law, (see, e.g., Elkin 2010; see also Gibson 2011: 126-127). As has been noted earlier, political constitution as defended herein defies some of the central tenets of ‘good science’; it cannot be done in compliance with them (Elkin 2010: 224). Any question of political sort, constitutional or not, can only be addressed with the political placed in the center of discussion.

Over the years, a number of critical works have come out concerning the deficit of appreciation of the political and politics for what it is. In a classic essay in *APSR*, Sheldon Wolin spoke in criticism of political science for prioritizing method over substantive issues, which he argued led to eventual insulation of the discipline from actual political life, to stultification of imaginative thought among growing conscripts to the profession, (Wolin 1969), and later, to fashioning a democracy in its own image (Wolin 1996). At about the same time, from a rather different direction, a no less famous essay by Michael Oakeshott attacked what he called ‘rationalism’ in politics – a ‘technique’ of thinking about politics based on strict and sterile rational logic, (Oakeshott 1991).⁴⁷ Yet another call for restoring politics to its proper meaning came a bit later from Bernard Crick, who argued – anchored generally in the climate of British politics – that a number of themes, or rather, ideological ‘-isms’ rooted in various philosophic arguments, had eclipsed the real core of what politics was, which, in his view, had a right to independent recognition (effectively, Crick’s politics amounted to a form of republican political theory and practice), (Crick 1993). Benjamin Barber, in his turn, came out with a rather polemical – but eloquent as usual – outcry against ‘the conquest of politics’ by a series of major liberal political philosophers and theorists, where his objection was particularly against the liberal theorists’ prizing of theoretical [philosophical] certainty – about a world of politics that, if anything, was uncertain, (Barber 1988). To end this listing with (without exhausting such examples), one might mention the work of Chantal Mouffe, whose line of argument is somewhat similar to Barber’s, although she comes

⁴⁷ For an illuminating and brief discussion of agreement between Wolin and Oakeshott, see Aryeh Botwinnick, “Wolin and Oakeshott: Similarity in Difference”, (2001).

from (and goes to) a different political-theoretic agenda, that of inspiring a radical democratic left, (e.g., Mouffe 1993 and 1996).

All of the above critical takes on un-political political science and theory can be confronted for exaggerations, superficial treatment of their foils, reliance on the all-purpose and reductionist concepts of power as discussed above, and other faults, and such criticisms against them have come out in no short supply. But even taken with precautions, these numerous works by some of the notable but very diverse members of political science do suggest serious problems with the discipline's ability to grapple with the political. The variety of recent constitutional political scholarship discussed above is all fair targets for these critics.

Insofar as a political theory or theorist takes up a political problem of constitutional level, the claim is automatically made to say something of relevance about the political life *as it is*, the life that inexorably proceeds in its circumstances, with its public, within an unstoppable practical time. If no such claim is implied, then it would be a curious thing that such an issue was taken up at all. Thus, our theorist consciously positions herself in the midst of political life. What she faces there is a common life of human beings who have existed in the permanent mode of managing that commonality: managing their internal disagreements, sometimes resolving them and sometimes failing – and then, sometimes, undergoing grave consequences; sharing common language and understandings, ever updating their vocabulary and concepts but never all of them equally succeeding in keeping up; admitting varying degrees and forms of inequality among them, but debating on legitimate and non-legitimate inequality, explicitly or implicitly; claiming privileges and accepting responsibilities – but never in a single voice

on either; coping with challenges from without, be they economic, geopolitical, or ecological; and all the while, with widely varying success rates, aiming at improving their lives. That is, our theorist faces a highly uneven terrain of social relations, where the public manages their life to the extent of their ever-evolving and always uneven capabilities.

No simple formula is thinkable to seriously affect the nature or quality of this common life. A law, cleverly written and proposed by our theorist, has no guarantee of flying high. A nice institutional structure of government by our theorist has no guarantee of working as she thinks it will. A scheme for accommodating multiple identities within the society, no matter how elaborate, has no insurance of being adopted or even understood by the public. And the most comprehensive and likable value or procedure has no guarantee of ever touching ground in that society.⁴⁸ What our theorist, to be relevant to this common human life, needs to do first and foremost is comprehend this life as it is with all its perplexing messiness, resisting the urge to operationalize it into methodologically and logically neat categories. She will then recognize that all of the members of this society have agency – at widely varying levels, with widely varying activity, and able of widely varying kinds of organization and atomization. Her theoretical insight, to be able to communicate to this society, will have to gauge the ways in which that elusive but ever-present civic agency can be capitalized upon and organized for the various possible causes that the society takes up – and our theorist will keep her distance from closed-ended, definite, predetermined propositions on how that civic agency might work. In other words, her theory would then account for the political-ness

⁴⁸ For alternative - surely more interesting – fables, see Lon Fuller’s story of King Rex (1969), or Oakeshott’s examples of learning to cook from a cookbook (1991a and 1991b).

of the life and aspirations of the given society. The suspicion is that all of the above un-political theorists of constitution have tended to fall far short of these lines.

Now, it is of no little importance that with all their shortfall on account of politics, the copious un-political constitutional works have actually been produced and continue to thrive. As it were, if the market is still buying the stuff, then the good being supplied ought to be quite good. Without venturing deep into the logics of markets and academia, the point here is to return to an observation hinted at a few times above. It concerns the nuance of talking about constitution in regards to not-yet-constitutional polities, as opposed to discussing societies such as the United States, the United Kingdom and a few others. A great bulk of recent constitutional scholarship applies to the latter.

When constitutionalism is working, it might be safe to say, it is working regardless of what the many theorists argue about the reasons for its working – or the reasons for its minor hiccups. With the stable constitutional order in the United States for some two hundred years, it is of no practical import whether one explains it by the agency of the Supreme Court through its interpretation of the Constitution, or by the particular system of checks and balances contrived by Founding Fathers, or by the high ideals of life, liberty, and justice that the country believes stand as her core philosophy, or by the particular American culture – the ‘melting pot’ of generally tolerant multiplicity of hyphenated identity groups (as per Walzer 1999) began by the English Puritans (who, of course, had arrived into an empty house politely vacated for their arrival). American constitutionalism, by and large, is not affected by the various theories about it; it is certainly not going to collapse because a theorist describes it the wrong way. This is, obviously, not to say that any theory is just as good – it is only to say that the faultiness

of a theory is much harder to detect. This just could be why the rather un-political theories of constitutionalism continue to sell in this and similar markets.

The worth of a constitutional theory, therefore, is best tested upon cases of societies that are not yet constitutional but are aspiring to it. How does constitution begin? How does it persist on course against all odds of its early age? What are the ingredients – necessary and sufficient – to see a constitutional project take off? These are difficult questions to answer. In a recent book, Andreas Kalyvas addresses a comparable problem, that of democracy in extraordinary times (Kalyvas 2008) – he finds a dearth of literature on the working of democracy in times of crisis, following a revolution, and other extraordinary periods: the literature is too consumed with democracy’s normal times. The point about constitutional scholarship here is the same. But while suggesting a helpful analogy, Kalyvas’s argument should also be taken cautiously. Be it about democracy, or about constitution, such periodization can mislead. Distinguishing between extraordinary and ordinary times, or constitutional and normal politics, as Bruce Ackerman has done (1991), may suggest that political life is like driving a ‘stick shift’. Metaphor of an ‘automatic shift’ can be just as accurate about political life – the problem is not about the mechanics, it is about the skills of driving – which are tested the best when the engine is just started, on rough roads, at tight parking spaces, and on stopping. To get back to the question: it is not that a different sort of constitutional theory is needed for young constitutionalizing societies – it is only that a good theory needs to account for constitution’s young age (because, turning back to cars, every once in a while any constitution – if it is one – will need to go through rough roads, stop signs, and restarts).

Thus, to conclude, the challenge is to bring politics back into constitutional thought. LC, IC, CC, and PC, it has been argued, have generally avoided politics, and thus, have punted that challenge away. But the challenge is still greater than just that: not only how to bring politics back in, but in elaborating a political form of constitutional understanding, how not to punt away law, institutions, ideas, and identity/culture. This is constitutional predicament at its developed form.

Chapter 3

Restoring Politics in Constitution

The task that must be met by constitutional scholarship, then, is to bring politics back into constitution. It would of course have been noticed that political constitutionalism was omitted from among the four kinds of constitutional thought identified above. Or, rather more accurately, it will have been understood that this is a separate matter for discussion. And it really is. What this chapter aims to accomplish is an ambitious three-part task. First, it will discuss the problems attending the already mentioned growing literature about political constitutionalism; second, it will turn to two contemporary schools of constitutional thought – and briefly, to some of their roots in earlier thinkers – to derive, as it were, a language for a different, more appropriate conception of political constitution, and third, it will conclude by elaborating and restating more fully – informed by the first two actions – what a better, more acceptable conception of political constitution would be.

To begin with, a small but potentially important distinction needs to be made. There is a difference between constitution and constitutionalism, and when one or another is used with any consistency, it is used so for a reason. Dario Castiglione prefaces his essay with attention to this difference; he defines “the constitution as a political concept, constitutionalism as an ideological construction”, (Castiglione 1996: 417). Here, it is the former that is of greater interest, and where Castiglione takes it for granted that constitution is a political concept, it is clear from the above chapter that ‘*political constitution*’ may be needed to stress the import intended here over LC, IC, PC, and CC. By political constitution here is meant that broadly creative political activity which is

tantamount to ‘constituting a polity’. Hence, this is more of a generic concept than part of a specific theoretical argument on a par with the above four approaches. Ultimately, as remarked above, political constitution will need to be conceived as that broader and more accurate idea of constitution that combines the central categories of LC, IC, PC, and CC in a comprehensive, holistic account of the activity of constituting.

Some problems in recent political constitutionalism

The fact that political constitutionalism (Bellamy 2007), or ‘the political constitution’ (Griffith 1978; Thomas 2004), has been taken up and defended in a growing body of work is a good beginning. What they have argued, in a broad brush, is that constitutionalism depends for its maintenance and functioning not so much on formal law and its enforcing institutions of judiciary, but on the political battles that are fought continuously by the several branches of power, by the political parties behind them, and by the democratic citizens behind the parties and other political organizations. This reorientation takes constitutionalism into the midst of active, dynamic political life as it is conventionally known, and with good justification. However, this is only a partial correction, and in terms of the concerns of the present work – no more than a good beginning.

The first – less pronounced – problem already indicated above is the implication of political constitutionalists that, effectively, law is not where constitutionalism resides. As was suggested, this implication would be the logical outgrowth of the dichotomy that these authors have created between political and legal constitutionalism. Denying the Supreme Court, judicial review, or bill of rights, or even judicial interpretation as a form

of constitutional reasoning, their place and role within a constitutional artifice is equal to, essentially, cutting a part of actually existing and functioning constitutionalism out (cf. Walen 2009). That seems to be effectively the upshot of a somewhat earlier essay by J. A. G. Griffith, “The Political Constitution” (1978). The better stance to take concerning these matters, it seems, would be to consider the ways in which the political aspects of constitutionalism are able to inform them and not be superseded by them in a systematic way.

A second related problem – practically, the other side of the first – detectable within the present setup is that in opposing the legalism of LC, too often political constitutionalist thinking ends up in the swamps of IC, PC, and CC – all at once or some at a time. Insofar as political rivalries and balances are invoked – in most of political constitutionalist work – let alone elections and party systems more specifically, the tendency would be toward institutional constitutionalism (IC) as identified above: examples of that would be Bellamy, Thomas, Whittington, etc. Alternatively, some anti-legalist thrusts may lead our colleagues in philosophic constitutionalist territory – an example, again, is Bellamy’s central constitutional norm of ‘non-domination’ (off of Pettit), and procedure of ‘public reason’ (off of Rawls and others). Of course, invoking institutions or values or identities is not a problem by itself; rather, it is suggestive of a problem of identifying the problem: is it the legalism (its positive manifestations) of LC that is the problem, or is it the particular understanding of constitution that legalism engenders that is the problem? When the ‘solutions’ offered to LC’s problems seem too much like IC, PC, and CC, the likelihood is that the problem may have been wrongly identified.

The third problem in political constitutionalism – flowing from the first two but more important – is the narrowness of the space and sites allotted to politics. A particularly obvious example is seen in George Thomas’s interesting piece, entitled “Recovering the Political Constitution” (2004): as the definite article “the” readily suggests, the essay is indeed about a particular constitution, and moreover, it is about “the Constitution” of the United States. The author provides an enlightening argument on Madison’s original vision about contriving a Constitution where not the Court but politics would be ‘interpreting’ the balances of power within government. But, for all that the lofty reference to ‘the political constitution’ may suggest, Thomas never leaves “the Constitution”. He concludes the essay: “To see the Constitution in a more political light is to recover a more traditional understanding of constitution; it is to see how our Constitution constitutes our life...” and so on. A political constitution that is envisioned strictly within the scope of a capitalized Constitution – one that, moreover, is thought to “constitute our life”- is a problematically narrow conception.

Not being a subject of the American Constitution – but of one that is difficult to refer to as “the Constitution” – Richard Bellamy does not operate much with capital letters. However, his book *Political Constitutionalism* (2007) is built on a concept of politics that is also rather narrowly construed. The four senses in which he uses the political are:

- “First, a constitution offers a response to [...] ‘the circumstances of politics’. ... [T]he constitution cannot be treated as a basic law or norm. Rather, it offers a basic framework for resolving our disagreements...
- “Second, the constitution is identified with the political rather than the legal system, and in particular with the ways political power is organized and divided.
- “Third, it draws on work in the field of public law political science, [...], and sees law as functioning as politically as democratic politics,”(*sic*), and,

- “Finally, it offers a normative account of the democratic political system. In particular, it shows how real democratic processes work in normatively attractive ways so as to produce the constitutional goods of a respect for rights and the rule of law by ensuring legislation is framed in ways that treat all as equals,” (Bellamy, *ibid*: 5).

In this definition, the focus is incessantly drawn upon a limited space (normally found in the centers of capital cities of nation-states, geographically speaking): on the organized, institutionalized processes of political debate, on the overall design of political institutions themselves, on the political functioning of the law, and on political impact on legislation. This is an instance of what was taken up a few pages above – the reductionist and limiting effect of the concept power; to be sure, the concept has a central place in Bellamy’s work. For this conception of the political to be the exclusive content of constitutionalism, much of public life that *leads up to it* will have to be left outside the door. The daily life of the citizenry as adult persons – with their non-constitutional disputes, contracts, and commitments, the numerous ways of civic communion – upon professional, religious, and other interests, and the very varied – often not directly constitutional in Bellamy-an sense – ways of civic political education, or cultivation, will need to be accounted for outside his political constitutionalism. Bellamy’s two defining procedures of political constitutionalism – public reason and balance of power – further reinforce this sense of a rather elevated and exclusive conception of the political. Yet, in order for political constitutionalism thus defined to function, there needs to grow up a constitutionally capable public to inhabit and fulfill the above senses of the political – it needs to come from somewhere, and the political must include that ‘somewhere’, too.

On this point, a startlingly open-ended assertion about political constitution by Griffith is of interest. He writes: “The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens.

Everything that happens is constitutional. And if nothing happened that would be constitutional also,” (Griffith 1978: 19). The literal relevance of this statement presently is to suggest, to Bellamy, that apparently much more space asks to be included than his four-part delimitation of the political in constitutionalism.

But, for all its hilariousness and witty remarks, Griffith’s argument cannot be bought wholesale. He writes the above statement to drive home “a highly positivist view of the constitution” (ibid), by which he means that the way the society is governed – or constituted – with all its working laws, compelling values, and effective distribution of rights and duties, is no more and no less than a result of the obtaining balance of political power held by competing groups of political agents. No moral or other claim, but the simple and naked power of competing interests is what explains a constitutional conjuncture any day – and if the conjuncture changes the next day, that would be because the balance of power tilted.⁴⁹

Griffith’s radically positivist view comes close to cynicism, if not irresponsibility. Constitution might be “what happens”, but constitutionalism as such is all about managing the options of what can happen any day. To follow Griffith liberally, one would find rather unpleasant constitutions in ‘late century Africa’, as discussed in Bates (2008). So, while constitution may be whatever happens, such an observation cannot be where a constitutional thinker can afford to stop. Be it through promulgation and propaganda of some civic and human rights – which Griffith denounces as ‘nonsense on stilts’ – or by more politically-attuned civic education and cultivation, or any other manner, constitution needs to also elicit a formative process on which it can then rely: the

⁴⁹ For a more generous reading of Griffith’s article, suggesting the author makes a disguised normative argument in favor of political constitution, as opposed to being purely “descriptive”, see Gee and Webber (2010).

“whatever” cannot be anti-constitutional, destructive, or unsustainable – because then, there is no more constitutionalism to speak of. Again, such a thing might be safe to utter in the United Kingdom – which must have been the grounds for Griffith to say it; it would not be a safe proposition in numerous other places.

Griffith’s remarks lead to the fourth and last concern about political constitutionalist literature – and it is about the definitive mode attributed to politics: that of conflict, or antagonism, or struggles for power. Of course, the most radical of the theorists of this kind of the political was Carl Schmitt (2009): for him, unless one was talking about an enemy-friend relationship, one was not talking about a political relationship at all. Cooperation, co-creation, agreement, co-development – such notions were for him simply not political. Chantal Mouffe, in her rally for reinserting the political into democratic theory, gets some of her toolkit from Schmitt (e.g., Mouffe 1993: 2-3); despite underscoring that for her, not enmity but adversity is the defining moment of politics, the difference is only of degrees, and tenuous at that.

The political constitutionalist scholarship reveals a comparable tendency to define politics by antagonism, cycles of power struggle and conflict – albeit, without any thanks to Schmitt. That, obviously, is precisely how Griffith understands political constitution. The same understanding of politics – sometimes less starkly, as ‘competition’ rather than ‘conflict’ – attends the political constitutionalism of Bellamy (see esp. Bellamy 2010), Thomas, and others. If constitution is to be always staked out through conflict, antagonism, and at mildest through competition, and if cooperation, community, co-learning, and sharing are somehow not constitutive, then Griffith’s suggestion (op. cit.: 1)

that constitution had too often been understood as a form of equilibrium would be quite on target – and that equilibrium would be a highly tentative and un-enjoyable one.

To sum, the important point that these conceptions overlook – as heartening and encompassing as they are – is that any conception of political constitutionalism has to rely on some pre-existing, stable and generally workable ‘background culture’, to borrow from Rawls. But, pace Rawls, that background culture cannot be bracketed out of the most decisive spheres of political constitution – only by encompassing that wider range of public sphere can political constitution be complete. If the narrow meanings of the political as listed above continue to apply, then for safe operation of these conceptions one has to assume a society much like those of the United States, Britain, and a number of other old Western polities. Some may call these conceptions too narrow; some may call them parochial. What is needed is a conception of political constitution that can address itself to a much wider world, a much longer range of history, and – practically – apply to cases beyond those that are already stable constitutional orders. And for that, it has to be political in a fuller sense.

THUS, ‘the political’ found in most of political constitutionalism is unsatisfactory, and the concept needs to be revised. The previous chapter set the beginning of this work: it expanded the range of foils that a political conception of constitution must face. Without claiming to have exhausted all thinkable foils, it has discussed at least three more besides legal constitutionalism: ideal, institutional, and (essentialist) cultural. While interrelated at some levels and on some themes, all of these are different claims – from each other and from legalism. With them, a renewed political conception of constitution

has a much wider front to cover, and hence, needs itself to come out much wider in scope.

A good starting point is to adopt Sheldon Wolin's (unelaborated enough, alas) definition of the political as synonymous with "common", "public", "general", as referring to order, authority, and other subjects (2004: 10). He then defines politics as "a form of activity [centered] around the quest for competitive advantage", "[occurring] within a situation of change and relative scarcity", and producing consequences affecting the whole or almost the whole of a society, (ibid: 11). It is the first part – the political – that is particularly appealing, albeit very broad; and in the second part – on politics – Wolin opens the door to the attrition of the concept toward a crude meaning of 'power struggle' found in most of the literature mentioned above. The difference between the two may be attributed to Wolin's overall project of tracing political thought from Plato to the present, not least attending to departures from the above definition. But there is no logical or theoretical necessity to overdraw the distinction between the political and politics: it ought to be much simpler – one is the noun and the other adjective, or one is the substance, the other the practice – of the same referent. Thus, a slightly different formulation can be proposed: "*politics is the whole complex of a public's engagements in the pursuit of public interests*". This formulation does not deny the moment of antagonisms and political conflicts, but it goes well beyond them; it also does not deny the centrality of the conventional 'political actors' such as parties, politicians in offices or those competing for them, but importantly it includes all of them within a much broader variety of political agents that would include ordinary citizens and their associations and movements. Not least, this formulation does not restrict the forms of pursuing public

interests: they would include legal entrenchment, deliberative activities, political mobilization, as well as various ways of propaganda and, in the longer term, habituation to certain values and ways.

Two examples of envisioning politics somewhat differently may help locate the present conception (these two not being viewed as in any way singularly compelling). On the one hand, for Chantal Mouffe, who argues for recognition of the irreducible and permanent factor of political struggle of modern society, politics is essentially about “the constitutive role of antagonism in social life”, (Mouffe 1993: 2). So, antagonism, or adversity or agonism – as she has variously referred to the factor of politics – is then the key to her understanding of the political. On the other hand, Harry Boyte thinks of a “different kind of politics” (2003) that emphasizes citizen cooperation and co-creation of the polity as such, to which he refers as “public work politics” and defines as: “free action by distinctive agents who engage with each other to address common problems and shape a common world,” (Boyte 2011: 85).

These two views on what politics is – or can be, in Boyte’s case – may be seen as two extremes where Aristotle’s mean might be employed to settle the dilemma (with virtuous mean being often closer to one of the extremes (*Ethics* Bk 2, Ch. viii) – in this case, preferably, the Boyte-an extreme). Mouffe’s version of politics is all about antagonism, Boyte’s is all about cooperation and agreement. However, this is not such a choice situation. The resolution is that, in accordance with the above formulation, the entire range that these extremes span is rightly political. For in defining politics, one may not – because a public itself rarely can – only pick the kinds of engagements that are preferred and exclude those that are not liked. Thus, it is almost useless to try to define

politics by the manners of engagement in it. It seems, it is better to focus on what it produces, or aims at. “Collective pursuits of public interests” seems an approximately satisfactory formulation of that thought. There is also a slightly different way of formulating it, with some advantages. Hiding in the dusts of somewhat outmoded political science is an interesting definition that David Easton once proposed. He defined a political system by what it does – its function: “authoritative allocation of values” in society, (Easton 1965). Obviously, Easton was interested in a political system – by which he meant the complex of a state’s formal governing system – and was interested in a way of assessing, evaluating the system. That way was thought to be the functionalist way: evaluate a system by the performance of functions expected of it.

Presently, it is not a formal governing system but more broadly, politics that is the concept of interest. Correspondingly, the concern is not with any predetermined and concrete functions but with a continual political life process. But the formulation, “authoritative allocation of values” is still meaningful even when these two changes are applied. It is imaginable that, if it were offered for their consideration, both Mouffe and Boyte could have accepted this formulation as accurate of their vision of politics. The important element in this formulation is attention to the qualifier ‘*authoritative*’. In any political engagement insofar as it concerns an issue of public interest – or values, in Easton’s formulation – the objective of all participants is to arrive at some authoritative settlement of the issue. That is, in any such engagement, formal or informal, governmental or civic, what is vied for is to render a particular vision or program ‘authoritative’ in the eyes of the general constituency. Therefore, the earlier formulation

about politics may now be made more complete by introducing this element: “*politics is the whole complex of a public’s engagements in pursuing authoritative public interests*”.

The language of a different conception of political constitution

This present study does not need to come up with a new conception of political constitution, in better accord with the above formulation of politics, wholly from nil and on its own, thankfully. There is a good foundation for such an exploration already laid out in a range of existing works, less among contemporary and more among some earlier thinkers. The kind of constitutional thinking being pursued here has already been for the most part formulated by a circle of scholarship that, of right, can be called home for this study, the PEGS School. There is another school very akin in its approach to PEGS, the Bloomington School, which may also be called a slightly more distant (in space as well as time) home. Both these schools of constitutional thought, mostly overlappingly, go back in their roots to a line of older constitutional thinkers, the most obvious and influential of them being James Madison and Alexander Hamilton, but also very central among them being Alexis de Tocqueville, Charles-Louis de Montesquieu, and Niccolo Machiavelli. What follows below, then, is a predictably selective and brief overview of this range of scholarship with the intention of deriving a vocabulary, or even a whole language, for a different, more appropriate understanding of political constitution.

On republic, democracy, and liberalism

But before doing that, this might be a good point to settle a sort of a house-keeping question, so as to prevent confusion or wonderment down the road, the question of three

‘elephants in the room’: the ideas of republicanism, liberalism, and democracy. The discussion so far has had little to say about the relationship between them, simply adopting republicanism as the language – where “-ism” has been admitted only with reluctance. Each of the three concepts comprises enormous literature and claims distinct doctrines, core concepts and normative imports, supposedly. The proposition held here, however, is that the distinctions between the three can only be valid within the framework of political history, in studies of the rise of each in the course of evolution of constitutional order and political thought. In political and constitutional thinking appropriate for contemporary age, however, the three ideas are impossible to separate.

In a critical essay questioning the worth of recent engagements with republicanism, Robert Goodin argued that many ideas of republicanism are either covered by theories of liberalism, democracy, or nationalism, while most of the remaining, strictly republican ideas are at best suspect of being normatively unfit for today’s society (2003). Without engaging Goodin directly, Lovett and Pettit propose in pages of the same journal a neo-republican project that is implicitly in tension with both liberalism and democracy (2009). But famously, Pettit does confront liberalism and democracy, in their respective core ideas of liberty as non-interference and as development, respectively, with a republican idea of liberty as non-domination in an earlier work (1998). Shortly later, Maurizio Viroli, in his turn, offers a succinct view of republicanism, where he maintains that both democracy and liberalism belong under the larger theme of republicanism (2002). Still more recently, an objection has been raised by John McCormick (2003) to viewing Machiavelli as a republican – an objection to the so-called Cambridge School, including Pocock, Skinner, Pettit and Viroli. He argues that the republicanism of

Cambridge School has rather to thank Guiccardini, a contemporary and sometime interlocutor of Machiavelli, whose ‘elitist’ political views, trained on controlling the masses and retaining authority to aristocratically composed institutions of representation, are at stark contrast to Machiavelli’s ‘plebeian democratic’ views (McCormick 2011). While it is an important argument in setting the record straight about what Machiavelli really argued, it appears to be more of a ‘battle of concepts and brands’ when viewed in the larger picture of constitutional thought. Quite obviously, among today’s most developed democracies there is almost no ‘plebeian’ feature to be seen; they are all rather aristocratic or at best mixed, and hence Guiccardinian democracies. McCormick’s objection can only be accepted on narrowly defined grounds of what republicanism and democracy, respectively, mean.

All of these border-drawings are not helpful, nor do they offer any worthwhile insight for constitutional thought. Norberto Bobbio, an eminent theorist of democracy, expressed impatience with such distinctions in a conversation with Viroli, suggesting that “the republic of the republicans, of which you are one, is a form of ideal state, [...] It is an ideal state that exists nowhere, or exists only in the writings of the authors you quote...” (Bobbio and Viroli 2003: 11). Take any of the, say, 30 or even 50 best performing polities by *Freedom in the World* rankings for all the years that they have been conducted, or all the most stable democracies (not autocracies, some of which are also very stable) in the *Polity* rankings.⁵⁰ It is impossible to argue that any of them is not a “republican *and* liberal *and* democratic” regime at the same time. Trying to argue that in today’s world it is possible, let alone advisable, to have a pure regime of only one of

⁵⁰ For Freedom House “Freedom in the World 2012” report, go to: http://www.freedomhouse.org/sites/default/files/FIW%202012%20Booklet_0.pdf ; For Polity IV “Global Report 2011”, go to: <http://www.systemicpeace.org/GlobalReport2011.pdf>

these orientations – being an even less sustainable argument than the ‘governmental form’ purism discussed under Institutional Constitutionalism above – would be childish. Because none of these three big ideas has remained unchanged throughout its centuries of history, and has existed and evolved in conjunction with the other two, today any good polity is a case of all three (see Kalyvas and Katznelson 2008).

It seems Montesquieu – one of liberal republicans mentioned by Kalyvas and Katznelson (2008: 6) – proposed a good way of relating republic and democracy. The latter, along with aristocracy, were for him the two kinds of republic that are known. Democracy, just as aristocracy, is about the manner of conducting government, from the main players in it to its definitive procedures. The *kind* of polity that both democracy and aristocracy fall under is republic, which for Montesquieu, of course, is itself on a par with monarchy and despotism. Not holding on to this Montesquieu-an framework, *The Federalist Papers* juxtaposed republic and democracy as two competing choices in America’s constitutional quest, as did Kant – in somewhat more suspect way – in regard to chances of a perpetual peace. In so doing, *The Federalist* merged ideas of liberalism into their republican constitutionalism. That merger culminated, of course, in the appendage of the Bill of Rights to the US Constitution. Yet today, America is best known around the world – and is presented to the world by its leaders – as the ‘greatest democracy’, not ‘the greatest liberal regime’ or ‘the greatest republic’. On republicanism standing at the roots of political liberalism, a very able study has been offered by Kalyvas and Katznelson (2008), where they study the political thoughts of six preeminent liberal republicans (or republican liberals) who came and shaped what they claim to be the precise period of the merger of the two ideas, 1750-1830.

It ought to be beyond question that discussing these three ideas as distinct from and even antagonistic to each other is pointless in thinking about constitutionalism today: the desirable constitution today can only be imagined within the bounds of some sort of *liberal-democratic republic*. So, why then adopt the term republic here instead of the other two? That is because republic is the best term that stands for a polity, or constitution, as a whole. Both liberalism and democracy are descriptors of republic as we know it today; neither of the two, as words, as terms, stands for ‘a polity’. Thus, speaking of constituting a good polity, one is always talking of a republic, and depending on the parameters and properties that are meant, one speaks of ‘liberal’ or ‘democratic’. Moreover, *res publica*, insofar as modern non-monarchic, non-despotic governance is concerned, is the most encompassing rubric for speaking of a society’s common concerns. Those concerns can include individual as well as group rights, citizen freedoms and their responsibilities, public access to power, power’s accountability to the public. The specification and securing of objectives in any of these regards is what republican constitution is about. It is now time to turn to just such kind of republican constitutional thinking in the examples of two contemporary schools and three of their predecessors.

The PEGS and Bloomington schools of constitutional thinking

This project gets inspiration from many sources. The chief practical inspiration, albeit mostly of negative kind, was said to be the story of constituting Kyrgyzstan and many similarly struggling places around the world. It also derives immense intellectual inspiration from a broad range of constitutional scholarship, going back all the way to classics. But there are two contemporary circles of scholarship – we may call them

schools – that bring together very much of that older political thought to formulate an attractive, genuinely political conception of constitution, or ‘a new constitutionalism’ (Elkin and Soltan 1993). One is the scholarship centered around the Committee on the Political Economy of Good Society (the PEGS School), and the other is work done by the Indiana Workshop in Political Theory and Policy Analysis (the Bloomington School). The two schools elicit some differences, too, but their overlaps are clearly much greater. There is certainly a notable degree of exchange and collaboration between them (e.g, see the Symposium in *The Good Society*, 20/1, 2011). Without hoping to provide a fair discussion of either – which would require a separate dissertation – the following tries to describe some of the key contributions each school makes toward a view of the question of constitution.⁵¹

One distinctive focus of the PEGS School, possibly the key to rethinking the rest of what constitution is all about, is the meaning of citizenship. They try to go beyond the question of ‘who is the citizen?’ to asking ‘what does the citizen *do*?’, (Boyte 1999: 259). Harry Boyte’s suggestion applies to the whole of the PEGS philosophy: the real, constitutionally relevant questions, about citizens are about citizen capabilities, or competence – essentially, whether citizens are capable of securing a constitutional order, and what kind of an order they are capable to secure, (Elkin and Soltan, 1999; Elkin 2006). Running throughout PEGS literature, the discussion of citizen capabilities (or competence) takes on numerous issues, such as their role as co-creators of constitutions (Boyte, 1999; Soltan 1993b), good citizens (or, citizen virtues) (Elkin 2006: esp Ch. 7; Elkin 1999; Barber 1999), civic moderation (Soltan 2008; Soltan 2010), citizen

⁵¹ On PEGS, Karol Soltan’s ‘four themes’ identified for the first edited volume (1993: 13-16) seem to apply for PEGS constitutionalism as a whole, too. What follows is a slightly different but largely consonant set of themes.

capabilities within institutional and political environment (Elkin 2006), and more. What this emphasis does is take the question of constitution away from the dominant prisms of formal institutional design, of legal rationalism centered on constitutional interpretation by the Supreme Court, of positive scientific preference aggregations (all of these are chief foils in Elkin 2006). It points out that citizens are not mere voters, or consumers, or spectators. Citizens are the core of a constitutional order; such an order survives insofar as it corresponds to the citizen capabilities to uphold it; capabilities are varied and variable, situated within actual political contexts and not in the abstract.

The theme of capabilities leads to the theme of institutions – the sites where capabilities are applied, which capabilities create and maintain, and which themselves cultivate capabilities in turn. As Soltan begins his introduction to the first of PEGS trilogy, “[T]he new constitutionalism ... contributes to the current institutionalist turn in social science... It is a program for the study of political and economic phenomena from the perspective of an institutional designer”, (Soltan 1993a: 3). It is probably not so trivial to note that the terms ‘constitution’ and ‘institution’ not only sound similar but are very close in meaning, too. In a literal rendition, the one would mean ‘putting together’ and the other ‘putting in place’. Constitution is essentially the putting together of what is put in place (the ‘package’, in Elkin’s language) – albeit, lacking any simplicity of a mechanical motion that this suggests. This observed, however, ‘*what* is put in place?’ – that is, ‘what is instituted?’ – is not a very easy question. While the term ‘institutions’ probably appears at least once on every page of every PEGS publication, it still remains a somewhat elusive concept. Elkin writes, “[C]onstitutional theory is strongly institutional in focus”, then relates institutions to politics, complements them with mores and virtues,

and also says that “[I]nstitutions that are constitutional theory’s principal concern are ones directly involved in lawmaking.” (2010: 224). This is a lot, and how the various elements of what is said relate to each other and into a whole, is not easy to picture. Boyte’s story of “[reconceiving] institutions as living and dynamic communities, with norms, values, leadership, and cultural identities” is indicative of some important ideas, but is again a rather fuzzy way of putting it (2011: 94). What is clear is that for PEGS, ‘institutions’ means immensely more than just “offices and powers” (Elkin 2006: 95), and “structures, procedures, rules and regulations”, (Boyte op cit: 94), but it remains unclear just what that distinctive quality is that can tell an institution.

One way of going about this difficulty offers itself without leaving the language of PEGS. It seems crucial – nay, the only way – to understand institutions in tight relation to citizen capabilities. For constitutional thinking, the concern must be with *capabilities to secure institutions*, which in turn can support capabilities, stabilize the achievements of capabilities, and so on. Institutions are how citizen capabilities are arranged, or organized, to be stable and to show resilience in the face of constant challenges. This is very important. So understood, institutions introduce the issue, and become the medium, of *constitutional resilience* as such; in other words, they are what keep stable the achievements of citizen capabilities en route to a desired constitutional order.

Such a conception of institutions turns attention to the theme of politics in PEGS. As acknowledged from the start, PEGS’ perspective is very much political constitutionalist. *Reconstructing the Commercial Republic* is essentially an argument to deepen Madison’s understanding of the political-ness of constitution, to see that even Madison, as acute as his sense of constitutional politics was (his discussion of factions

being the strongest demonstration), failed to grasp – and account for, in his theory – the whole of politics. Politics is as much about cultivation of capable citizenry (including leaders, and especially legislators) as it is about managing overt clashes of factional interests. Thus, Elkin calls for the maintenance of a balance between conceiving “politics as instrumental activity” and “politics as creating and maintaining durable modes of association among people”, where he would probably agree to call the latter option ‘politics as institutional activity’ as distinct from ‘politics as instrumental activity’, (2006: 109). The former, then, is close to saying ‘politics is the activity of making constitutional order *resilient*’, to follow up on the note above. In an even greater departure from the conventional, Boyte speaks of a “different kind of politics” understood as “free action by distinctive agents who engage with each other to address common problems and shape a common world,” (Boyte 2011: 85). The emphasis on the creative, productive, cooperative sides of politics is a very important corrective upon more common reductionist views of politics as (mainly or only) the expression of the irreducible conflict in human societies (esp. Mouffe 1993, and, of course, Schmitt 2007 [1932]).

The three themes above, the way they are conceived by PEGS scholarship, lead to one more general feature of their constitutionalism: the awareness that constitution is a *practical* process, situated in time and society. This awareness gives rise to two related points about constitutional thinking: one, that constitution is an ever-ongoing, evolving process, defying permanence of any purposes or institutional shapes, and two, that because of its ongoing evolving-ness, constitutional theory is not an enterprise of *completely* spelling out the normative values of a constitution *a priori* (Elkin 2004). “The central concerns of constitutional theory, - Elkin writes, - ... are the realization of good

regimes, their maintenance once established, the prevention of bad regimes, and the effort to transform bad regimes into good ones,” (2006: 95). This means that constitution is never over, because in the practical political world no political regime works forever (and/or) exactly as it was designed. The awareness of empirical situated-ness and continuity of constitution suggests nuances to a ‘realist constitutional theory’ in the normative sense, too. Such a theory’s “normative claims [...] are more securely rooted in *an assessment of the capabilities and limitations of human action*” (ibid: 95-96, italics added).

Realism in constitutional thinking, thus, orients one toward normative values and ideals in a disciplined way: disciplined both by the continuity of constitutional enterprise and by what is *possible* given the available capabilities. Thus, Elkin consciously employs a seemingly under-specified idea of ‘liberal justice’ that ought to orient the aspirations of the American commercial republic. To potential objections on this point, he replies, “for the purposes of constitutional theory, and, in particular, for an account of the commercial republican public interest, [proper characterization of liberal justice] matters much less than is often supposed,” because no specific conception will be easily translatable into lawmaking in the first place, and different conceptions of liberal justice are unlikely to lead laws “down substantially different paths”, (ibid: 131-132). The more empirically based, ‘actionable’ as it were, specifics of liberal justice are then spelled out in elaborating the idea of public interest and of ‘a public interest politics’.

There are many other important PEGS themes, usually closely related to these. Within the limitations of the present work, these few themes, however, already give a good idea of what that ‘new constitutionalism’ would be. In borrowing this conception of

constitutionalism for wider application – as the present study does – one issue arises: that nearly all of PEGS scholarship is rooted in the American case and speaks, essentially, to American constitution.⁵² This need not be a major problem, but it does introduce some nuances. Thus, the slight unease with the language of institutionalism in this literature is in part to be explained by it being rooted in the American context. In Elkin’s book, for example, the somewhat unclear status of institutions gets much more specificity once applied to elaboration of ‘seven components of the public interest’, (ibid: Ch. 5). In the language of Elkin’s ‘shipbuilding at sea’ analogy, actual constitutional cases are likely to vary noticeably with regard to how close to shore they are, whether or not they discern a distant beam from a lighthouse, and how much experience and leadership the sailors on the ship can muster.

One PEGS piece of much relevance here and free from American-rootedness is Karol Soltan’s essay, “Generic Constitutionalism”, (Soltan 1993b). This is an attempt to express the idea of possible, not “ideal” constitutionalism that can apply, as it were, universally. The idea rests on an understanding that there exists a universally shared core of what constitutionalism implies, and so aims to explicate that core. The ability of PEGS constitutionalism to ‘travel’ outside the United States (and *The Federalist Papers*), then, is predicated on the possibility of expressing it in the language of ‘generic constitutionalism’. Soltan’s essay itself is the beginning of that universalist extension. Building on its start, the present work may be seen as another step in such an extension.

The core themes of PEGS constitutionalism outlined above make up some of the key departure points for the present work. Most of these themes are also shared by the

⁵² Soltan identifies “the importance of American politics as an example” as one of the four main themes in *A New Constitutionalism* (1993a: 15).

Bloomington School. A recent issue of the PEGS journal, *The Good Society* (20/1, 2011), in honoring the Bloomington School, offers many ways in which the perspectives of the two schools are closely shared. The output of this large cohort of scholarship from Indiana, too, is immense and impossible to do justice within a short text, so that is not the intention. Instead, it is pertinent to highlight a couple of important themes they add to the above.

One theme that is highly prominent in the Bloomington School literature is the view of citizens as artisans, and of institutions – culminating in constitution as a whole – as artifacts, (V. Ostrom 2008 and 1980), sometimes using craftsmanship interchangeably with artisanship. This term is particularly attractive – and crafting is adopted as *the* constitutional activity (see below) – because it is evocative, in an imaginative way, of the kinds of activities most associated with human creativity, thus being a more concrete concept than, say, creativity per se, or design. The vocabulary of artisanship/craftsmanship, then, is a poignant, un-cumbersome expression of the integral link between PEGS themes of citizen competence and institutionalism, as proposed above – not surprisingly, the same vocabulary is often to be met in PEGS literature as well (e.g. Soltan 1993b: 72).

But here, a warning is warranted. Vincent Ostrom’s own use of ‘artisanship’ is closely tied to the idea of ‘choice’, as in constitutional or institutional choice. ‘Choice’ is not a random term for Ostrom; it is one of the central issues in his reading of *The Federalist Papers*, inspired as it is by Hamilton’s famous question about “reflection and choice”⁵³, (esp. V. Ostrom 2008: Ch. 3), and also rooted in his pioneering interest in the

⁵³ Hamilton wrote: “It has been frequently remarked, that it seems to have been reserved to the people of this country to decide, by their conduct and example, the important question, whether societies of men are

public choice approach in political and administrative sciences (e.g. V. Ostrom 1975). Strictly speaking, the meanings of the words ‘artisanship’ and ‘choice’ are almost at odds: artisans/craftsmen *create*, don’t choose. More generally, the latter term is problematic in view of its close association with the vocabulary of (formal) institutionalism discussed above. ‘Choosing’ certainly is an element in the overall process of constituting, but it is not preferable as a rubric to describe all of what constitution posits.

Another theme, probably even coined by the Bloomington School, is the idea of *polycentricity* (see McGinnis 1999; also Soltan 2011: 114). It is the empirically based claim about the pluralism within any larger system of governance: that a workable system elicits many centers, or institutions, of governance. This idea stresses an inherent pluralism in governance, and draws constitutional thought toward local, sub-national levels of governance, to associational life, and to small-scale rule-making communities.

The theme of polycentricity leads to the broader theme of institutional design, which is another, possibly a core, area of interest for the Bloomington School. Based on data from numerous studies of small-scale common pool resources governance in the United States and around the world, the Bloomington School (principally, Elinor Ostrom) has extracted a general ‘diagnostic’ framework for analyzing institutional design and development – the Institutional Analysis and Development (IAD) framework, (E. Ostrom 1999: esp 509). The framework introduces more concreteness to questions of institutional design and agent (citizen) choices in the process – an issue of relative obscurity in PEGS

really capable or not, of establishing *good government from reflection and choice*, or whether they are forever destined to depend, for their political constitutions, on accident and force,” (Fed # 1). Mark Tushnet (2008: 1473) helpfully notes the important reference to “*the people of this country*” in this quote to suggest that Hamilton may not have said this in any universalistic sense.

literature, as noted above – but that comes at the price of adopting a rather heavy dose of rational choice language, further deepening the ‘choice’ unease, and substantively, requiring rather demanding assumptions of rationality among agents. While the empirical studies of small-scale common pool resource governance may be interpretable in such rationalist languages, it seems much more difficult to adopt the same language in larger-scale, longer term constitutional projects.

Even so, the very findings that Ostrom and her colleagues have revealed about the capabilities for self-governance among small-scale communities in as diverse places as the United States, Switzerland, Japan, the Philippines, India, Nepal, and so on, are very valuable. What they tell is that workable institutional craftsmanship is not limited to Western societies, does not take place over elaborate designing boards, and, most importantly, citizens are capable of self-governance, with or without a sword (of their own making). Harry Boyte describes this import of the Bloomington School as demonstration of a ‘public works politics’ actually working in diverse settings and societies (Boyte 2011). The international application of IAD framework by the Bloomington School has been limited to studies of CPR regimes. What would be highly interesting now is to take the broader constitutional perspective in the manner of PEGS and Bloomington schools (including Boyte’s own idea of ‘public works politics’) similarly to the international, global scale.

To sum, between the PEGS and Bloomington schools, there emerges a very different conception of political constitutionalism than the ones taken up at the top of this chapter. This conception is very empirical, located at the juncture between the normative and the practical, emphatically anchored in citizen capabilities, and oriented toward a

continuous, essentially never-ending constitutional process wherein the key ingredient is not so much attainment of some ideals as maintenance of a resilient institutional ensemble that secures realistic political objectives and values. If there is one word to describe this conception of constitution – if only to avoid having to repeat such long and convoluted sentences again – the word might be ‘pragmatic’. This term seems to be well advised also on the grounds that PEGS literature often uses it, and for Charles Anderson, it is a focal term (1993; 1990).

From Machiavelli, Montesquieu, and Tocqueville

It is now worth to pause for a moment on some of the sources that inform and inspire these two schools themselves. Their pragmatic conception of constitutionalism owes much to a line of earlier constitutional thinkers. The most central place of *The Federalist Papers* (mostly of Madison, and for Vincent Ostrom (2008), also of Hamilton) is already very obvious, and it may be redundant and also difficult to dwell on them here. There is also the large shadow of Aristotle in the background, which also may be relieved here in view of its ubiquity. There are three other, modern thinkers that are very central and very interesting, Alexis de Tocqueville, Charles de Montesquieu, and Niccolo Machiavelli.

These three authors, all of them described variously as republican, liberal republican, republican democratic and so on, are key figures in a canon of constitutional thought that presently has been described as pragmatic. A notable biographic detail about all three is that they were both observers (students) of politics and its non-trivial participants, or practitioners. It is more than likely that their perceptive understanding of

how politics and constitution *actually* work has much to do with their practical experience of it.⁵⁴

Machiavelli, the oldest of them, is possibly the most controversial political thinker that ever existed (see Berlin 1971), but his credentials as a champion of republican constitution (as opposed to principality/monarchy) and of civic liberty may now be assumed as very much settled, (e.g. Viroli 2002). If so, then his manner of thinking about politics is of interest. Arguably the most prominent characteristic of his political thought is its pragmatism, more often referred to as realism. Sheldon Wolin described his political theory as concerned with manipulating or managing political reality, as opposed to Platonic ‘architectonic’ theory; for Machiavelli “[P]olitical action, therefore, was essentially manipulative, not architectonic,” (2004: 194). It is manipulative in the sense that Machiavelli took political reality as it is and thought about how a workable republican regime, able to guard civic liberty, might be possible. Throughout his *Discourses*, in observations seemingly so obvious and even mundane, what Machiavelli stressed so persistently is an acceptance of political life without filters, of human society as it is, of interests as they tend to be, of contingency as it tends to happen – and all of that not to preach some doom scenario but to show how governance is possible, and possible at less costs than often unnecessarily incurred.⁵⁵ So, Machiavelli’s theory is

⁵⁴ Machiavelli served the republic of Florence for some fifteen years as a high-ranking diplomat, before seeing harsh reversals of fortune of a politician’s career and life. All of his most important works were written after his political career. Montesquieu presided over the criminal division of the Parlement of Bourdeaux for over ten years, carrying out judicial and administrative duties. The longest and a more significant career in politics was Tocqueville’s who in total served in public capacities for nearly fifteen years, including a brief appointment as Foreign Minister and, more relevantly, active role in the drafting of the Constitution of the Second Republic.

⁵⁵ Wolin’s more famous claim about Machiavelli is that he was a theorist of ‘economy of violence’, advising only sparing resort to violence when necessary, and of course perfectly happy if non-violence was capable of providing the intended objectives. The claim about it being a ‘manipulative’ kind of theory is to

realistic, but not hopeless – in fact, it is not hopeless precisely because it is realistic. The hopes that Machiavelli sets for political life are themselves realistic, achievable ‘hopes’, ones that he knew to have been realized in the past, and not abstract ideals. Those hopes are, quite simply, the preservation of seemingly countervailing two goods, order and liberty, in a republic – both for citizens and for constitution as a whole (see Bk 1, Ch IV).

Neither liberty, nor order (or discipline, or tranquility, as Machiavelli interchanges) is ever safe. They not only tend to oppose each other – as shown in the “short” life of Solon’s constitution (Bk 1, Ch II) – but are preyed upon by so many internal as well as external threats, that their ability to last is always precarious, and only a prudent combination of order and liberty in a strong regime (or better, nation) may hope to have them last. Machiavelli proposes numerous ways of ‘manipulating’ this precariousness of a liberal political order in order to avert failure: adopting a mixed regime where the people and the nobles checked each other’s power, using the disciplining and moderating promises of law and religion, maintaining moderate institutions of accusation, honoring, and punishment, resorting to the educating and mobilizing potentials of rhetoric and exhortation, using demonstrative examples from history when relevant, and cultivating citizen virtue, to name a few. The last one is of interest, earning Machiavelli the title of a father of modern nationalism, albeit he rather preferred to speak of patriotism (see Viroli 1998). He thought maintenance of political order and liberty needed some serious devotion of citizens to the republic – only if it is valuable for them are they able to maintain that prudent balance of order (which is neither oppressive, nor weak) and liberty (which is neither license nor servitude).

argue that Machiavelli’s theory is about manipulating political life in order to economize on resort to violent means. See (2004: 197-200).

More generally, however, it seems most worthwhile to heed to Machiavelli not so much for the literal things he said and advised (as Viroli likes to do), but for his keen sense for the nature of political life. What is valuable and desirable in political life is always in need of vigilant watch. There is no God, except when it is believed; nor are there laws, except those that human beings are able to institute amongst them and enforce. All that political life can rely on is what's within the capacity of people to affect: some things are less capable of being affected – such as *fortuna*, some things more – such as law and patriotism, but that floating margin of affectability is all the handle that human society has to achieve and keep the life they want. And this is to say, contrary to how it sounds, that there is an almost limitless scope for shaping political life. Peoples' treading through that wide scope, always under circumstances of the context, to ever shape their common lives is what politics is all about.

A little over two centuries later, there appeared Montesquieu's treatise on the republican constitutional theory, *The Spirit of Laws*, a work quite different from Machiavelli's *Discourses* in style and even much of content, but one that also carries on some of the important themes of the latter. Judith Shklar, in an essay comparing the two thinkers, described Machiavelli's as classic, militant, or warrior republicanism, and Montesquieu's as modern, moderate, commercial republicanism (Shklar 1998, Ch XIII). She also suggests that Montesquieu did not particularly admire Machiavelli, thought his ideas (and him?) to be too immoderate, and preferred rather to turn to Thucydides and Cicero, (Shklar 1987, 15-16). While that may be up for debate, there seem to be at least very important common themes between the two, differently treated as they may be –

quite understandably – given some dramatic changes between their times. A rather rich civilizational change had taken place from early XVI century to early-mid XVIII century – from the end of Renaissance, to the Reformation, to breakthrough in natural sciences, to the Enlightenment in full bloom. Montesquieu offered his considered thoughts (result of twenty years of research, as he reported) on how to think about constitution, and how to maintain a workable, free constitutional order, and in this, he continued Machiavelli's adherence to the practical context, rejection of abstract metaphysics, and a sharp sense for the art of political life.

The title is important: *The Spirit of Laws* is about the 'spirit' of societies governed by law, not about the design, application, or reason behind law *per se*.⁵⁶ Law's spirit is, essentially, the character of the society concerned, the political culture and aspirations of that society, its experiences and capabilities for good governance, which Montesquieu suggests are formed by numerous factors including even climatic conditions. What does this rich, difficult, very long work about the *spirit* of laws tell generally about politics and constitution? It tells many things, but only a few points are possible to be highlighted here.

Possibly the most important constitutional teaching derived from this work is the idea of moderation. Moderation is the definitive virtue, or principle, that is needed in a republic. The doctrine of the separation of powers – the still more famous idea attributed to Montesquieu – can only be appreciated fully as one of the mechanisms of

⁵⁶ Montesquieu writes: "I have not separated the political from the civil institutions, as I do not pretend to treat of laws, but of their spirit; and as this spirit consists in the various relations which the laws may bear to different objects, it is not so much my business to follow the natural order of laws as that of these relations and objects", (p. 7). The very first sentence of Book I indicates how broadly Montesquieu views law: "Laws, in their most general signification, are the necessary relations arising from the nature of things," (p. 1).

constitutional moderation. In an interesting discussion of Montesquieu's application of separation of powers to the case of Britain, Vile explains some seeming inconsistencies therein – Britain's constitution normally viewed as a rather weak form of separation of powers – by stressing how Montesquieu depicted the British system differently, (Vile 1998: Ch. 4). But the answer to the puzzle of Montesquieu's fascination for the British constitution with its debatable separation of powers, it seems, is that political moderation, and not separation of powers *per se*, is what concerns the thinker the most. Moderation for him relies on much more than institutional design, contrary to Vile's rather more 'institutional design' perspective. It relies on a political history that has inculcated the right kind of a political outlook, or culture, that values and can abide by moderation. Correspondingly, his highly practically-attuned comparative discussions of various places around the world, including China, Spain, and Russia – even when not necessarily precisely correct on historical facts – unmistakably underscore his prime emphasis on the situated-ness, empirical-ness of constitution. Introduction of changes in law for him was very little about drafting, designing various codes, and very much about understanding the social and cultural setting of law, and therefore, about cultivation of the appropriate 'spirit' of law.

Thus, at the minimum, Montesquieu's constitutionalism is a teaching in constitutional moderation, in attaining and maintaining such moderation, in the pertinence of social-cultural environment in pursuing moderation, and in showing law to be the medium of moderation. It stands to be noted here, Soltan's argument about law as essentially a strategy of moderation, is a thoroughly Montesquieu-an argument, albeit aimed at a level somewhat alien to Montesquieu – global constitutionalism, (Soltan

2010). He might have gone along with such an extension, provided that the requisite discipline of moderation is applied: that it is a soberly empirical, historically set, culturally realistic application. There was no global constitutional civilization for Montesquieu – indeed, that was precisely what he stressed – but there was a lot of despotism, the third alternative, an immoderate and lawless kind of constitution which he regarded as no constitution at all. On account of his discussion of despotism held together by terror, some have suggested that Montesquieu – among other things – was a theorist, or even the philosopher, of fear and terror (see Robin 2000). The much more agreeable way to think, it seems, is that for him, despotism was that illustrative stark alternative, the bad form, a heuristic device, as it were, in order to show the distinctions of monarchic and republican constitutions, the centrality of moderation and law in them, and also, possibly, to suggest a live and constant danger that moderate constitutions face of devolution into despotism.

Another century or so later, a third notable constitutional thinker became known, Alexis de Tocqueville. In Sheldon Wolin’s work on Tocqueville, it is richly shown that both Machiavelli and Montesquieu (especially) had enormous bearing on his political theory (Wolin 2001). Much like them (and certainly more than Montesquieu), Tocqueville also combined in him the perspectives of a political theorist and of a politician – the interplay between these “two worlds” being the organizing theme of Wolin’s book. Unlike them, Tocqueville also had the practical wisdom gained by witnessing two of the greatest modern revolutions. Informed both by his predecessors and two revolutions, Tocqueville further extended their teaching about republican

constitution. The immense volumes of *Democracy in America* are a difficult text, not because of style – Tocqueville’s is one of the most lucid styles – but because of the overwhelming wealth of subjects taken up, numerous returns to the same themes, occasional contradictions on such repeated discussions.

In the first lines of his work, Tocqueville’s reports that he was struck by ‘the general equality of conditions’ he saw in America. That equality was the foundation, the springboard, of democratic and free governance. Yet soon enough, equality and freedom were realized as being at odds with each other. Americans’ jealous love of equality, under the condition of citizen sovereignty, stood to sacrifice the freedoms of the better off, of the higher achievers, in the name of equality, producing what he called the tyranny of the majority. If this tension is to be taken as the key theme organizing Tocqueville’s thought, then his constitutional theory can be read as investigations into how political life, or the political, can mitigate, smooth, or control this tension. Again, much like Machiavelli and Montesquieu, although yet again in a rather different setting and facing rather different kinds of problems (at least in the case of *Democracy in America*), one finds a very rich, broadly construed, but also very empirical, practical, conception of politics.

In Tocqueville’s conception, politics contains the rich arena – and arsenal – for dealing with the vicissitudes of democratic governance. Seated in the bed of customs, religion, history, providence, and geography, politics encompasses the wide spectrum from formal constitutional issues, to numerous democratic institutional devices, to less formal institutions of associational life, to public spirit, to cultivated ‘habits of the heart’

and ‘habits of the mind’, to political culture and education.⁵⁷ Because of the tension between equality and freedom, and the threat of the tyranny of majority, democracy is always captive to the danger of self-destruction. But this tenuous balance is not necessarily so tenuous after all, and it need not be. Security of democratic constitution is based, of course, on the summary effect of all the above levels of political life, but in particular, it is deposited in the requisite political culture which he found possible during his travel in America – and which he could not yet observe in Europe (in France, mostly) – a culture of public-spiritedness, of egalitarian independence, of general inventiveness, and of moderation through law and legally procured rights. This political culture is the bedrock of democratic constitution, the measure of its resilience in the face of challenges certain to arise continually.

For all three constitutional thinkers, political-ness is at the very heart of the predicament of constitution – it simply cannot be any other way. This political-ness is a broad idea, not confined to any set of formal institutions, not limited to only some kinds of social interaction such as antagonism, and not animated by any singular motivation such as want of power. Rather, political-ness is the whole essence of social life insofar as its constitution and governance is concerned. If so, then constitution of a political order – both its creation and maintenance – is a question of creative management of its numerous discontents, in a pragmatic manner, by cultivating the requisite capabilities among the constituent public that best respond to the evolving context of any constitutional endeavor. None of these thinkers would suggest either that there is a singular

⁵⁷ See Kraynak (1987) for a perceptive discussion of ‘Tocqueville’s Constitutionalism’ as a theory combining ancient and modern perspectives with a stress on a broad conception of politics to include culture.

constitutional order permanently best fitted for a given society, or that any society can be easily molded into any desirable constitutional form. From all three, the larger message is that constitution is a situated, continuous, pragmatic political engagement within the scope of the possible.

Machiavelli, Montesquieu and Tocqueville, as noted, are not the only thinkers of this mode of constitutionalism. With differences here and there, this line can be continued with John Stuart Mill, Burke, Rousseau, and many more as one goes back in time, ending at least with Aristotle and Thucydides. These three thinkers are the ones particularly visible in the background of the constitutional thought of the PEGS and Bloomington schools. Of course, again, it is Madison and Hamilton who sit most centrally in the presidium on this scholarship. The PEGS and Bloomington school constitutionalism as described above carries on all of the main highlighted themes – and some more – in Machiavelli's, Montesquieu's, and Tocqueville's thought. That is to say, it is a perspective with some serious ancestry, and one that had the advantage of having been gestated by some of the greatest political thinkers who had first-hand acquaintance with political life itself.

Idea of Political Constitution Restated

Based on all of the preceding discussion, some general conclusions can be drawn about the idea of constitution politically understood. It is not, in contrast to some of the literature noted above, one species among a variety of other conceptions of constitution. It is an empirical idea of constitution, based on the understanding that constitution of

good polities is itself necessarily a very empirical, that is, practical, idea. Political constitution as restated here, therefore, is tantamount to the idea of constitution as such.

For such an understanding, the very first, highest-level normative question, which is effectively a rhetorical one here, is whether constitution as an enterprise aims at a political order oriented to provision of justice, freedom, and respectful life for its citizens-constituents, or whether it is in pursuit of objectives at variance with justice, freedom, and equal respect. Simply put, is a constitutional project aiming at a good polity, or is it aiming at a bad one? This question, for all intents, can be taken as resolved for contemporary constitutional thought. It is not anymore of any urgency to begin with this question, and so, it is not important for constitutional theory to engage in defense of justice, freedom or equal respect and dignity of citizens. Such questions, insofar as they need to be taken up, are best left to moral theory, not constitutional theory rightly conceived. For particular odd cases, where even these questions are substantially in dispute, constitutional theory – empirically understood – has little to offer. Empirical constitutional theory has to be able to assume that any particular society to which it is directed, has resolved these questions, and that constitution of a good polity – one that is aimed at securing this set of general normative values – is known to be the objective.

When that much can be assumed, there are some general characteristics that apply to the idea of constitution. The first of those is about this very normative content.

An empirical idea of constitution rests on *a thin and generic normative core*. That core can be expressed in the form of an idea of ‘liberal justice’, as Elkin does, or as the idea of popular self-government, as Rousseau can be read to be arguing, or as the pursuit of highest level human good or happiness, as Aristotle prefaces his discussion. Detailed

and rigorous specification of the core normative orientations of constitution are apt to remain on paper, and as a constitutional project proceeds, those core ideas are apt to evolve and take shape in ways that could not be entirely predicted beyond general outlines. Political theory often speaks of dangers involved in certain ideas, especially ones that are not well specified or are teleological. Thus, one commentator has suggested an affinity between Plato's theory of forms to the National Socialist racist project (Forti 2006); the danger that 'popular self-government' can easily produce despotism of a majority is another familiar theme. To these concerns of danger, the answer that the idea of political constitution gives is that the averting of these dangers is the job far more of the practical constitutional development than of *a priori* specification.⁵⁸ Political life is dangerous; the seemingly un-dangerous parliamentary democratic constitution of Germany, operating through democratic elections, under certain circumstances was able to produce the greatest political evil humankind ever saw. Averting of that danger depended not on fine polishing of the normative core.

Relying on a thin and generic normative core, the constitutional process elicits an ever *ongoing negotiation between the desirable and the possible*, between aspirations and realities, between the normative and the practical, as Elkin indicated. It is in that process of ongoing negotiation that the actual specifics of the normative constitutional content are filled out. The negotiation, to be noted, is not a singular event, not a mass convention of all concerned, but rather an amalgam of interactions at many levels, among many different actors, on numerous issues and objectives. While they negotiate and renegotiate

⁵⁸ A political attitude of awake-ness to such dangers is Judith Shklar's "liberalism of fear" (1998a), (also taken up in Katznelson, "At the Court of Chaos", (2001)). It is a sobering attitude, but as Walzer rejoined on it, constitutional politics must go beyond constant guarding against danger (Walzer 2001).

continuously in this way, the thin and generic normative core stands as their overall orientation, their lighthouse.

Such an idea of constitution, then, suggests the necessity of *a broad conception of politics*. This broad conception suggests that, insofar as human beings are ‘political animals’, everything that relates to the building, securing, maintenance, and development of a common life among them is inherently political. Bernard Yack has offered a compelling discussion of the richness of Aristotle’s conception of ‘political animals’ and their life, located as it is in an interplay of every-day politics of conflict and debate, and the ideals of a good political order that are striven for, (Yack 1993). The political, therefore, encompasses a much wider range of interactions than just antagonism or adversity; it extends well beyond struggles for power in any apparent sense. Nor is politics confined to the opposite corner, understood as common engagements in cooperation and harmonious life. Rather, political relations comprise the entire range of public engagements from the most conflict-prone to the most harmonious, and since these relations are never to end and are never pre-scribed, conflict-prone relations can become relations of agreement, and agreements can change into sites of contestation. Those engagements are political because they are not ‘just so’ engagements, but ones pursuant to issues, interests, values, or simply questions of pertinence to the public, and hence, to their polity. Because the sphere of the political is so wide and so plural, it is not meaningful to view politics as purposive in any strong sense. The people rarely engage in politics en masse in the name of some distinct and high common purposes; much more often, they engage in political interactions because that is the way they live as a collective body, as collective political animals.

This broad conception of politics in constitution points to two themes that animate and sustain such political interactions. First, there is *the centrality of citizen capabilities* for engaging in politics in productive, effective, constitutionally-conducive ways. Second, insofar as such capabilities require to be set and sustained in a medium or shape, that medium or shape comes in the form of *institutions*. Said together, constitution is a process of political engagements defined – or carried out – by citizen capabilities and expressed in and centered on institutional creation and maintenance. Institutions are understood broadly, well beyond the formal offices and powers of a government, although including them, too. They are meant not as sites (of agreement, of allocated powers and values, etc.) but as products and processes. There is a close, direct linkage between capabilities and institutions. Civic capabilities are what produce and sustain, ultimately, a constitutional order, but since capabilities are an ephemeral and intangible category, the manner in which they are registered and maintained is through institutions. Institutions are multi-purpose; they not only help extant capabilities to produce some result, but they produce, maintain, and channel capabilities themselves.

This broad conception of politics at work in a constitutional process leads to another pair of important elements of political constitution, which are already presupposed in the above points but deserve explicit note. One is that, under this view of constitution, the relevant social setting is characterized by serious *pluralism*. Soltan's discussion of pluralism, along three levels, is well fit as a depiction of it: "pluralism of ideals, institutions, and creative projects", (Soltan 2010: 238). In view of these, constitution is not and cannot be confined to issues of central formal institutions of a regime; nor is constitution thinkable as somehow applying to society as one monolithic whole. Thus,

constitutional relevance is shared among all ‘units’ comprising the given society – units capable of changing, uniting, disintegrating and overlapping. From the individual to the society as a whole, the infinite variety of societal groups, networks and projects contribute their share to constitution – and demand their share from it. This multidimensional pluralism is why constitution requires a broad conception of politics.

The other point deserving explicit note about constitution, having been already mentioned at the very beginning, is its *empirical-ness*. Political constitution is strictly empirical, not utopian, formal, logical, or rational in an abstract sense. It is empirical in the sense of being always and necessarily situated in actual life, *in media res*, always in a real context. This is why constitution is not an engagement in detached speculations about a desirable life. Constitution of a good polity must happen here, in this context, with these people, in this neighborhood, given these resources, against these odds and problems, and so on. It is tempered by numerous constraints and limitations. It cannot be, even if tried hard, made into a clean and convenient canvass, into a mostly logical puzzle.

Here, an objection is relevant to V. Ostrom’s stress on clarity of language (1997; 2008: ch. 10). It would be quite nice, if every word meant exactly the same thing to every person, so that every utterance in a constitutional process was understood exactly how it was meant by the speaker, and so on. That would facilitate agenda-setting, agreement on actions, etc. But this notion of logical clarity of language, tracing its roots most notably to Thomas Hobbes, and culminating in the nearly incomprehensible propositions of logical empiricism in the early 20th century, is, constitutionally speaking, meaningless.

Its empirical grounded-ness makes constitution also aware of *empirical continuity*. Social life is continuous, an endless and flexible trajectory of common experiences,

developments, achievements, and failures. At any point in a society's life, it will have pre-existed up to that point and will go on indefinitely into the future. A constitutional project takes place within that continuity. It is not a discrete one-time operation, nor is it possible to plan it as a project of some duration with limits. It is only thinkable as an ongoing process without a clear terminal point to it. This makes constitution always a matter of achieving a certain political *modus vivendi*, not just any – insofar as animated by orientation toward a thin normative core shared by the public, and insofar as it is an ongoing negotiation of the desirable and the possible, the *modus vivendi* cannot be an empty, motive-less condition: it would be very much a lived and ever so contested condition, a continuum of checkered equilibria, as it were. Insofar as the *modus vivendi* is at any point a result of confluence of public interests forged by extant civic capabilities, it is also a robust and stable one – and the best constitutional order is able to achieve the most stable *modus vivendi*.

Thus, political constitution is oriented toward a *thin and generic normative core*; it is sustained by *politics broadly conceived*, which can be understood as a process of *ongoing negotiation of the desirable and the possible*, centered on and actuated by *citizen capabilities*; it takes place within the condition of social *pluralism*, and is also an *empirical* process, wherein especially to be noted is the *continuity* of that process. Described in this way, political constitution is a very *pragmatic* project.

Earlier, it was warned that 'pragmatism' here is not used in the specific philosophic senses, and stays away from the swamp of relevant philosophic debates. Still holding onto that distance, the pragmatism of political constitution can be said to be very much Dewey-an as informed by his *The Public and Its Problems* (1954). That is: it is a quest

carried on within the bounds of the actual common life itself, a quest for a better, acceptable public life *in view of the life and problems people experience*, where along the process the public itself gets formed and developed. It is a quest carried on by a plural public, where not individuals only, not a single community only, but a broad range of actors – defined not by metaphysical laws but by their real aspirations and actual experiences – forever contribute their varied demands and input. It is a quest that is not amenable to *a priori* determination of its ends, because those ends are very much shaped and determined in the process of the quest. And it is a continuous quest because the object of the quest itself is never defined finally, and because – as it is about common human life – the process is not one of inexorable upward development but more likely one of recurring slopes. It is pragmatic in the sense of eliciting all of these characteristics.

Consider the more appropriate, or even simply *the right*, conception of political constitution to have been restated now. The conception is about *how* to think about political constitution, but is not too much about *what* to think about. Getting clear on ‘how’ is an important but only partially accomplished job. To complement it with some more substantive content is what would take the job nearer to completion (but it will never be completed, to be sure). A full, ripe job of this order is normally called a theory. Providing such a theory is beyond the realistic ambition of this work. What follows in the remaining chapters is an elaboration of the idea of *pragmatic republicanism* – an inroad toward, or a preface to, a theory, while stopping short of fully expounding one. What it does is give some idea of *what* might go into a political constitutional project when the *how* of such a conception has been heeded to.

Chapter 4

Parameters of Pragmatic Republicanism

The foregoing discussion in two preceding chapters has noted a range of problems in recent imagination of constitutional regimes and some ways of how that needs to be done properly. Some of the key features of a properly political conception of constitution were highlighted in the few preceding pages: a conception which this study holds as a more accurate orientation for constitutional thinking in general. What follows next – in two chapters – is an attempt to elaborate, as it were, this conception of constitution, to spell it out more substantively – albeit, consciously maintaining a level of generality and incompleteness, as a generic constitutionalist perspective requires. The proposal is called ‘pragmatic republicanism’ because these two terms describe the approach well and set up the discussion toward more specificity; however, this conceptual term should not be taken as strictly definitive – it could just as well be called ‘political constitutionalism’ if not for its breadth.

Before entering the outlining of the idea of pragmatic republic per se, there is need to pause on one issue that has been implied throughout the preceding pages and now requires to be faced explicitly. That is the idea of incompleteness, or relative open-endedness, which is argued to be a necessary characteristic of the conception of political constitution defended here. With this discussion at hand, it will be possible to commence the outline of the idea of pragmatic republicanism – to formulate the several components of it. That begins by proposing a brief and moderately permissive sketch of good polity toward which political constitution – and pragmatic republicanism in particular – is oriented. The sketch is a realistic vision of a desirable good polity that is derived based

on actually existing or previously observed examples of good polity whose main constitutional features have by now acquired a more or less universal approval. After outlining this realistic sketch, the chapter moves on to considering three thin-normative orientations of pragmatic republicanism – the key procedural norms or principles that must be followed in a constitutional project. Importantly, these are not mere means to an envisioned end, but rather *formative* thin-normative procedural principles which realize the end while the project proceeds. The last third of the chapter elaborates what has been called the basic empirical conditions of constitution. These conditions are where the constituting takes place; they are not fixed empirical data only relevant for some putative beginning point, but are dynamic, evolving conditions – their evolution is how the attainment of a constitutional order happens. In the next chapter, the fourth and last main component of pragmatic republicanism is discussed. *Constitutional crafting* is tantamount to ‘constitution’ in its verb meaning; by calling it ‘crafting’, the idea is to refer to a special, particular kind of political activity that takes place amongst the three other components of pragmatic republicanism – its parameters, as it were – to ever so gradually approximate the envisioned good polity. To avoid any misleading, it should be reminded that the sketch of a good polity that follows is not by itself a complete argument – it is not a theory or a fully-formed conception of constitutionalism. That is what many works in constitutional theory tend to do: outline highly detailed sketches of constitutional order. The complete argument of this work (for an incomplete constitutional conception of pragmatic republicanism) is represented only in the combination of the sketch, the normative and empirical aspects, and the idea of constitutional crafting.

The incompleteness of pragmatic republicanism

One way to address the issue of incompleteness is situating the idea of pragmatic republicanism in this regard vis-à-vis an exchange between Michael Walzer and Agnes Heller in a pair of very succinct and rich essays. Since that exchange is very well-fit for the present purpose, it may be allowed to dwell on them somewhat lengthily.

In a reaction to Heller's book, *Beyond Justice* (1987), Walzer picks up on a theme in it that he thought of great importance and not fully abided by the author who explicitly avowed it – the theme of theoretical incompleteness. He defines: “[C]ompleteness means a closed system, an account of the single best regime, a ‘whole’ that can be rationally discovered or invented but not rationally contested or revised.” Viewed against such a ‘closed system’, “[I]ncompleteness is a virtue... for it leaves room for local self-determination and cultural diversity; but it is a hard virtue, more problematic than Heller admits,” he writes, (Walzer 1990: 225). He contends that Heller's argument, claiming to expound an incomplete theory of justice focused on procedure (‘real discourse’) and not outcomes, comes “dangerously close to the completion she means to avoid,” (ibid). That is because “the decision procedure, the constitutional mode, is given, and it already is *a way of life*. How could it not be? Free and equal speakers, committed to life and liberty, practicing the virtues of tolerance and mutual respect don't leap from the philosophers mind... They are historical creatures; [...]; and they inhabit a society that ‘fits’ their qualities and so supports, reinforces, and reproduces people like themselves,” (227-228). Since “incompletion doubles here for pluralism” (226), Heller's nearly closed just discursive procedure “suggests a (limited) set of variations on a theme but not anything like a genuine multiplicity of themes,” (228). After thus taking issue with Heller's near-

completion, Walzer admits that the variety in a more genuine multiplicity can include, historically, many options that cannot patently be palatable: various tyrannies, despotism, autocracies, and so on; but if incompleteness is to be truly abided, the philosopher must forego judgment of bad alternatives – something Heller is not ready to do, he concludes.

Heller's brief answer is very 'simple'. "We live in the modern world. [...] We need to extrapolate the situation called 'modernity' into our close future, and if this is so, we can also extrapolate the main values of modernity into this future," and the values of freedom and life are "actually universalized" in modern world, she writes (Heller 1990: 231). She objects to Walzer's suggestion "that no real, authentic pluralism of forms of life is possible" within the values of modernity, (232). With a brief elaboration, she concludes that the diversity within modern ways of life is as much as "the way of life of a Fiji fisherman [in nineteenth century] is different from the way of life of the Homeric heroes". The only difference between those older times and (our) modern times is that their forms excluded "generalized pattern of symmetric reciprocity" whereas our forms exclude "asymmetric reciprocity", the reason for this difference being that pre-modern societies did not know what values and forms of life would follow in their posterity, whereas modern society does know what preceded it in pre-modern times and thus is better informed, (233).

The project of pragmatic republicanism is much closer in spirit to the "simple" and *situated* vantage point of Agnes Heller, (see also Heller 1996). Given Walzer's own admission of what dangers the real diversity of ways of lives may elicit, it is hard to understand his demand that a philosopher pay the price of not judging the bad-ness of bad forms of life – except if normative thought is completely extraneous to that philosopher's

enterprise. Pragmatic republicanism, for all its criticism of manifestly “closed systems” in other literature, is very much grounded on normative judgment: its points of departure are some of the same ‘actually universalized’ modern values that Heller takes as hers, without, however, being dependent on such agreed values being universally held. Not being a philosophical inquiry, but political, pragmatic republicanism in fact rests on a wider scope of such broadly accepted and valued features of modern political society, including some institutional ones. It is an idea that is consciously situated within the contemporary civilization the way it is; it is cognizant that some of the important values are principles are not universally shared. Each of the features of modern political life held up in this work is only elaborated to an extent, and is capable of admitting a diversity of forms that is equal to, or wider than, Heller’s, because it is aware of non-universal status of many of those features while hoping they can become so.

Pragmatic republicanism is decidedly an incomplete idea. It is more incomplete than Heller’s, because whereas her ‘incompletion’ is forfeited by her just procedure of ‘real discourse’, as Walzer sees it, pragmatic republicanism does not outline any such strict procedural rule. It does include what is the closest to a procedural principle – the orientation to the principle of moderation – but that element itself is very much, and consciously, incomplete. Walzer’s charge against Heller’s ‘incompletion’ in this regard is very well placed; and what is compromised by such a strict procedural rule is not only real diversity of outcomes, but – more importantly for the present discussion – also its empirical feasibility. The issue of this strict procedural rule is exacerbated by its methodological individualism – something Walzer does not explicitly point out. If a society should consist of *individual* men and women deliberating about the shared values

of liberty and life under Heller's formula of 'what I should do unto you and I can expect you doing unto me, should be decided by you and me', (Heller 1990: 232-233), the outcome seems to be indeed a rather predictable form of life; and for far too many societies in (our) modern world, adherence to such procedure of discourse is very unrealistic, which is perhaps the much more urgent problem.

So it may be argued that pragmatic republicanism is more responsibly incomplete than Walzer imagines it ought to be, and it is more genuinely and realistically incomplete than Heller allows it to be. The way to this 'middle ground' lies in being even more accurately situated within the contemporary world than Heller's work is; even with the ending of the Cold War and most of communism since Heller wrote her book and her response to Walzer, the content of her *situated-ness* seems to be too optimistic. Pragmatic republicanism is situated within a world where there is still not a universal agreement on *individual* being the main political agent, on human rights being the moral code for all humanity, on deliberative consent of all individuals being the only admissible decision principle, and so on. It is, however, situated in a world where the best actual political orders do uphold these principles, and where such good orders also uphold a range of other principles: agreement about the people being the ultimate source of political authority under which they live, agreement in opposing abuse of political power, agreement on preferability of institutional stability, agreement on preferability of moderation over extremism, agreement on goodness of a mixed regime with separation of powers, and so on. Because contemporary political life does not know what *our* posterity holds in stock, and because the currently best political orders are characterized by these sets of key political and moral principles that are not yet universally shared, pragmatic

republicanism comes from the perspective that it is prudent and responsible for the rest of the world, not yet sharing in these principles, ought to be oriented toward them. Its constitutional thrust is therefore beholden to a concern for the ways in which such an orientation might be actualized.

This kind of incompleteness, as it should be clear by now, boils down to a recognition of political *uncertainty* much like it is defended, say, in Dewey (1954), and more recently, in Oakeshott (1969), Wolin (1969), and Barber (1988). It is an uncertainty situated within its historical context, and not in an a-historical cosmos. Because of this situated-ness, despite the richness of the discouraging variety of political circumstances, pragmatic republicanism can be a carefully hopeful idea: the societies hitherto unsuccessful in constituting themselves into good political orders have nonetheless pre-existed within some sort of a *status quo*, even if barely bearable, and have sustained some degree of stability of social relation, on which they are able to build. The hope, then, is tied to incremental social malleability – be it through narratives, discourse, education, laws, institutions, as well as pressure, protests, and necessity – whereby the existing unsatisfying *status quo* can be made ever more satisfying. Because of all this, it is rightfully identified as an idea of *political* constitution.

A sketch of a good polity

We start the outline of the idea of pragmatic republicanism by sketching some general and central substantive elements of a good polity – something in the order of a slightly blurred black-and-white portrait by an artist. The sketch is a logical step in a work purporting to tackle the question of constitution of a good polity. This sketch of a

desirable polity is decidedly slim and its exposition short, which may quickly overwhelm an audience used to being treated to very rich descriptions and specifications of such political orders, the tallest contemporary example being Rawls' *Political Liberalism* (1993). Rather, this sketch is more akin to Stephen Elkin's use – and limited elaboration – of the idea of 'liberal justice' needed for a commercial republic (2006: pp), only perhaps both more general and more specific, in line with the kind of incompleteness involved here as specified above. This is so because here the idea of a good polity is not a matter of speculation or abstract analysis; it is a practical concept meant to give direction to practical constitutional activity. That such a sketch is both necessary and sufficient is addressed once its substance has been laid out.

At the top of Chapter One above, a brief description of a contemporary good polity was proposed. To repeat that passage, it was said that “such a polity would be a stable political order animated by some [set of] values and aspirations shared and pursued by (most of) its members, providing security – to its constituent public in their capacities as individuals and groups, and to their property – based on legal and legitimate authority that also guarantees broad but not unlimited freedoms and dignity of citizens and precludes arbitrary use of political power upon citizenry; the polity is of the citizen body as a whole, a ‘body politic’, and as such, in maintenance of such an order, the participation of all citizens would be expected, although not absolutely, directly or in any dogmatic sense.”. That description was a generalization based on broadly accepted features of a good polity and on the examples of more or less well-functioning polities nowadays.

The following sketch elaborates that brief description, expressing it in terms of a slightly more formal set of good polity attributes. It has been noted in the preceding chapter that this work is not a contribution to the kind of conceptual political theory that focuses on distinctions between ideas such as republic, democracy, and liberalism; it has been suggested that any actually existing good regime today would be some instantiation of a *liberal democratic republic*. That practical eclecticism of existing constitutional regimes is the main source for the idea of pragmatic republicanism, not the several clean theoretical conceptions. The thin sketch of good polity here can therefore be viewed as a generic image of such a liberal democratic republic, and each of the five criteria that make up the sketch as an element more or less identifiable with liberalism, democracy, or republicanism.

Pragmatic republic, thus, is not the name of a particular political system; it is not identifiable and distinguishable from others by a peculiar arrangement of its institutions. Rather, it is a fairly generic reference that may encompass almost any modern good regime, including most variety of what are now called liberal and democratic and some variations of socialist systems, but excluding bad regimes, such as dictatorships of various kinds - or *tyrannies*, as Walter Murphy chose to refer (2007: 16). In this generic usage, the term republic is applicable to nearly any good regime found in modern world: as long as the regime is not hegemonic but mixed, its authority and legitimacy emanate from its citizenry which is itself politically diverse, it serves the good of all its constituents in their diversity, including their freedoms and well-being, and it is a stable political order. The term *pragmatic* captures both the conceptual flexibility that attends

‘liberal and/or social and/or democratic republic’ and the practical dynamic quality attending the compliance with these several qualities of a good polity.

To state these criteria very clearly: the generic ‘liberal democratic republic’ envisioned here is defined by five key criteria – commitment to public good, maintenance of a mixed regime, preservation of social pluralism, adherence to popular sovereignty, and securing of constitutional resilience. Commitment to public good is normally considered to be a classical republican idea of Machiavelli and earlier; mixed regime is among key concepts of both (more modern) republicanism of Montesquieu and (classic) liberalism of Lockean mold; social pluralism is probably best at home under modern liberalism of, for example, John Stuart Mill; popular sovereignty is the main criterion of democracy, for which the most eloquent if in parts extreme articulation came from Rousseau; and constitutional stability is a logically necessary concern for all of them, albeit rarely stressed in any body of thought on its own terms. Each of these identifications will be readily contested from all sides; the simple point here is that the idea of a good polity in early twenty-first century has come to include all of these elements – liberal, democratic, and republican.⁵⁹

This is not a dreamy eclecticism that simply imagines an impossible amalgam of everything good; it is not even decisive that each of these elements are actually universally agreed to be ‘everything good’, albeit it is plausible to assert that they are more or less universally accepted to be good. It is more relevant here that they are met in this amalgamation – either attained to a good degree or explicitly aspired – in actually

⁵⁹ To stress this: the ‘casting’ of each of liberalism, democracy and republicanism in a composite idea of good polity is not a conscious theoretical principle heeded here – rather, these rough linkages are only to suggest the obvious amalgamation across these three ideas, in an extension of the discussion earlier (Chapter 3).

existing regimes that are generally recognized as good, or better, regimes. Thus, either attained or veritably aspired, these five criteria can undoubtedly be said to describe, say, Britain, Canada, the United States, Germany, and Norway. The scopes and degrees of realization of these criteria in every actual constitution are of course always open to revision and to being settled through debates – especially considering that each of these criteria is a continuum rather than a singular condition. Whether a particular regime would therefore deserve to be called a good polity vis-à-vis these qualities, obviously, may not be decided *a priori*. For all these reasons – theoretically muddled eclecticism, incomplete articulation, and principled reliance on practical contextual realization – the conception of the good polity is called *pragmatic*. Let us elaborate each of the five criteria a bit more.

The first criterion concerns the objective of a republic. A republic must hold as its *raison d'être* the objective of *servicing the public good* – the good that all of its constituents share and desire. It would be corrupt if it served the good of only part of its constituents or the good of some group or people outside the given public – that is, after all, Aristotle's benchmark definition of a corrupt constitution. What that good means can be imagined by reference to certain common values: it would include general human welfare – health, education, security, as well as bodily and economic safety (against predation and crime); it would encompass more non-material goods, such as respect for the dignity of a person and groups of people, recognition of their identities and ways of life – and maybe summarily understand it under the name of happiness. The risk of engaging in any serious specification is that it would soon need to be embedded within a particular society – or, of a number of such societies, leading to a very long list of

specific goods that is both not very useful and potentially rather parochial (see Elkin's quite specific elaboration of *public interest* politics for the American republic: 2006). At the same time, it is difficult to discuss public good in a thoroughly defensible way *in abstracto* for reasons of its situated-ness within practical contexts as noted already. Therefore, this central condition of a republic will have to be only introduced in this limited, general form.

The second criterion concerns the republican institutional regime: it would need to be a *mixed regime*. Without the heavy emphasis on the mixing of social classes, as found in Aristotle, the 'mixed regime' here refers more to the divisions and balances in the institutional structure. No single locus of state power may be allowed to so dominate over all others – and over the society at large – as to be able single-handedly to decide on matters of general public importance. The main concern here then is with separation of powers, although it includes more than that. The idea, as already noted, was particularly well formulated by Montesquieu (Bk 11, Ch 6) and in *the Federalist Papers* (esp. No. 10 & No. 51), but it is a common notion running all the way from Aristotle to Locke, to J. S. Mill, to the present (for a careful discussion, see Vile 1998; for a recent rethinking of separation of powers, consider Carolan 2009). The specific content of a mixed regime is a matter of practice, not of theory. Achieving a workable mixed system is not a trivial matter, and error is possible in both directions – not having enough of a mixed regime, opening it to abuse, or having too much of it, leading to institutional impotence, a complaint raised by McIlwain (1947: Ch 6). Hence, again, the real arrangement here will need to be left to the practical constitutional process.

The third criterion is about the republican society. Concomitant to the preceding point, and importantly balancing the first point, it holds that the envisioned republic will house a viable degree of *social pluralism*. A highly homogeneous society that elicits very little to no diversity of opinions, outlooks, cultures – that is, no basis for meaningful social debate – would inevitably be en route to self-destruction. Pluralism within society is essential for many reasons, including security of citizen liberties⁶⁰, maintenance of social criticism, enabling a moderate political culture (Soltan 2010), and hence, a hedge against pursuing any extremist political projects. It is essential for social balance, broadly construed. Practically, pluralism would be represented in the plurality of public opinion on policy and values, plurality of cultural or identity groups, and on the political arena per se – access to the public sphere through multiple channels of organization and articulation, be it multiple parties, plural independent media, and a wide variety of forms of civic association. Some prominent theorists have made the case for pluralism, including Isaiah Berlin, Michael Walzer (1983) and William Galston (e.g. 2002; 2011).

The fourth criterion concerns sovereignty: the republic would be based on *popular sovereignty* – that is, the highest constituent authority would belong to the whole of the citizenry. What sovereignty practically means – for every citizen regarding various issues – is hardly possible, and not helpful, to spell out *in general*, except, maybe, to say that it is the basis on which office-holders can be asked to vacate their seats, by expiration of terms or by impeachment, and on which more generally the demand for political accountability is made. Further concretization of the notion normally evolves in constitutional process and policy-making in a given polity. The security or stolen-ness of

⁶⁰⁶⁰ So pluralism is a constitutional need for safeguarding individual liberty the way John Stuart Mill spoke of it – although individual liberty is not the only concern of a pragmatic republic in this regard.

sovereignty at any given point is a difficult thing to detect – especially in the modern societies of generally multi-million populations and complex bureaucracies. Often, an eruption of mass political action – revolution – would suggest usurpation of popular sovereignty *post factum*. One major safeguard of people’s sovereignty, without it being wholly reliable, is a robust system of political participation and especially representation.

Popular sovereignty, especially if likened to Rousseau’s concept of ‘the general will’, is possibly the most contentious idea, and is very difficult to define in a strict, thoroughly unambiguous way. It does not need to be necessarily associated with ‘general will’; it may be conceived ‘as procedure’, as Habermas has argued (1998), or viewed as the equivalent of ‘consultation’ (Tilly 2007). Difficulties of the concept are real, but still it is an essential normative foundation of any republic that must be explicit and recognized. In asserting this principle, the idea is not to see literal or concrete manifestations of popular sovereignty in a good polity at any time. It may be more symbolic most of the time, and may not require to be ascertained constantly. In everyday life of a polity, this concept resolves itself in more mundane and less ceremonial workings of institutions. But there are times and moments, when political authority and order itself may be tested, and in such times, popular sovereignty must come out to be the ultimate point of reference. So, Soltan’s rejection of the idea of popular sovereignty – especially by citing Riker (1982), whose critique of ‘the general will’ is arguably based on strictures that Rousseau did not intend (see, rather, Neidleman 2000) – seems too hurried; he claims the idea is “built on an illusion” (1993b: 92-93). But so are the ideas of liberty, equality, justice – none of these can be imagined to exist in any society in a literal sense. His alternative of ‘limited sovereignty’ must still be vested in the people, the

populus, if it is to be vested anywhere: that ‘anywhere’ in a constitutional polity cannot be law by itself, or courts behind it, or a Constitution, and certainly not a Leviathan. The recognition of this ultimate source, even if it is symbolic, has important normative weight wanted in a constitutional polity.

The fifth criterion is about the republic’s viability. The good polity will require a certain measure of *constitutional resilience*, or robustness.⁶¹ This is an obvious thing to say. However, beyond simply saying that a good regime is only good if it is able to last, the issue here is that such a regime needs to include certain ways, mechanisms, institutions that make it resilient – without thereby becoming static. Any political regime is to some degree a *modus vivendi* or equilibrium – it holds while it holds, and there is no necessary assurance that it will remain the same way as designed and desired (on *modus vivendi* political theory, see Horton 2010). There are always sources of potential tilting of the equilibrium – disagreements, discoveries, shifts of numeric balances, and if nothing else, some calamity beyond human control. A good regime, then, will need to have provisions that make it less volatile, less vulnerable to both internal and external shocks, without making it impervious to any impulse. All of the above criteria, of course, can be mechanisms of resilience – and they can be exactly the opposite, too. Some other resilience mechanisms might be the idea of ‘constitutional precommitments’ (Holmes 1988; Sunstein 1991), the realization of the dual role of citizenry as both subjects and authors of constitution (Habermas 2001), more generally the authority of a written Constitution (and a respected Court behind it), but most importantly, resilience would

⁶¹ As noted earlier, ‘resilience’ is used in Polity IV vocabulary as the opposite of ‘state fragility’, quite consonant with the present use. ‘Resilience’ has also been taken up in some of republican political theory, although not necessarily as applying to political regime (and more often as ‘resilient liberty’); see Haakonssen (2012), Pettit (2007).

depend on a vigilant citizenry – the institutional resilience mechanisms depend on presence of a requisite political culture (pace, e.g., Weingast 1997: see in Ch 6).

These five elements are both sufficient and necessary to depict a republic's essentials. First, let us take up why these five are “necessary”. Then we will take up why they are “sufficient” – that leading us toward elaborating on the ‘reluctance and caution’ accompanying this exercise to begin with.

The five criteria are all necessary in a polity to recognize it as constitutional and a republic. When any of these five is missing – or more realistically, found to be in severe deficit – the republic will be in risk of becoming something else, something categorically different. The non-satisfaction of any of the first four criteria precipitates the emergence of some sort of a tyrannical regime (again, in a general sense employed by Murphy, 2007). The sense of republic not serving the public good indicates severe corruption of the polity; absence of a meaningfully mixed regime suggests reliance on the goodwill of a hegemonic power; lack of social pluralism opens the way to intolerance, coercive conformism, and immoderate political life; and loss of popular sovereignty suggests the turning of citizens into subjects – an usurpation by which the collective constituent body loses any claim over what they have constituted themselves into. The fifth criterion concerns the very viability of the constitution – a republic that lacks resilience in the face of daily challenges is one that soon does not exist: it either devolves into tyranny or first plunges into chaos, then producing a tyranny.

All of these five criteria are of course closely interconnected – in the absence or weakness of one element, the presence or strength of the rest is endangered. Such interdependence may suggest that – by the logic of correlative or spurious relationships –

perhaps the really important criteria are some subset of the five and not all of them. Such a claim seems impossible to substantiate on logical grounds, let alone practical. While each criterion is closely tied to the rest, no single criterion is able to supplant the other. That said, it may be plausible to distinguish between a theory (or a sketch, as here) and political reality. Within a theory, it may be acceptable to suggest that some of the five criteria – say, popular sovereignty – would be satisfied, even if not mentioned, if the rest of the criteria are observed. That is different from saying that an actual good polity, lacking on any of the five criteria – say, a meaningful degree of popular sovereignty – is able to remain intact. Only all of them together produce what this project is concerned with: a good polity.

But why are these five criteria – especially at this low level of specification – sufficient? Why not more criteria, and why not greater specification? To both questions, the answer lies in the conception of constitution as crafting. The five criteria set out, in very general terms, the core dimensions of a good polity. There can and probably will be more dimensions to any actual constitutional polity that will be considered important – although, probably any such dimension would be closely related to, or a sub-dimension of, one of the five. Most definitely all of the components of a republic will acquire much more detailed expression and practice – albeit much less amenable to singling out any of it – in an actual process of constitution. All of the content of a republic beyond the ‘sufficient’ is left to be fulfilled in the crafting process.

This is an important part of the overall argument in this work. Given the extremely encompassing range of issues that constitution implicates, straddling between normative and empirical arenas, too often political theory ends up reducing the complexity of the

subject matter in pursuit of intelligibility, or rather more accurately, amenability to political science. Some of the results of such reduction have been observed in the chapters above. Constitution is a holistic and practical enterprise, and intellectual comprehension of it must take it as such if the hope is to understand and speak to it accurately. This practical holism of constitution, then, is also the reason why a theory ought not to engage in excessive elaboration of the contents of constitution. Engaging in such an exercise would be *a priori* theorizing.

John Dewey may have addressed this concern as well as anyone. In his *The Public and Its Problems* (1954), Dewey points out the flaws of *a priori* political theory – the inevitable foundation of such theory on some formulations of human nature and human needs, which are themselves necessarily speculative, and the proceeding from such speculative foundations down (or up) to speculating about the observable (i.e. expected) political outcomes. The more reasonable way to proceed, for Dewey, is *a posteriori*, or depending on the consequences of actual political arrangements. (This point is not to be confused with utilitarian *consequentialism*.) This is a key point of pragmatism.

A contemporary pragmatic thinker, Roberto Unger has argued for a comparable perspective contra ‘a priori’ philosophic thinking in a more radical language. He writes: “[T]he dominant styles of normative political philosophy today, particularly in the English-speaking countries, treat the formulation of normative principles and ideals as an activity separate from, and prior to, the design of institutional arrangements,” and “suppose that the separation of institutional design from prescriptive principles, on one side, and from raw wants and intuitions, on the other, is necessary to ensure the transcendence of normative theory over historical context,” (1998: 17). He argues instead

that the transcending of context can only happen from being grounded in that context, by practical and institutional experimentation that takes place within the context just as it aims to transcend it. “We must *win* our independence from the context, not assume it by a conceptual sleight-of-hand,” and we need to realize that “institutional debates and experiments are not a separate and subsidiary exercise; they represent our most important way of defining and redefining the content of our ideals and interests,” (ibid: 18; italic added). Here, then, again is a strong statement for limits to theoretical elaboration in abstraction from context and practice.

Not the least, this slim sketch of a good polity can be placed within Aristotle’s distinctions between political theory’s interests that can be expressed as being about a) the absolutely best constitution, b) the best generally *possible* constitution, and c) the best constitution possible for a given polity (*Politics* Bk 4, Ch 1). The present work is an exercise of the second kind (b). It is concerned with the best polity that is actually possible and is generally accepted as such in the contemporary world. Providing more specific elaboration of the constitution would lead this work in either direction on Aristotle’s ‘taxonomy’.

Qualified and defined in these ways, then, is the empirically-based, realistic vision of a good polity that constitutional projects of today need to be oriented to. This vision being only a sketch, any particular constitutional case will very likely modify, ‘customize’ the specific fit of all five elements of a good polity, and fill them with substance depending on its particular conditions. That takes the discussion to the next step. Consistent with the view of constitution as crafting, it is time now to consider some

practical elements, or *aspects*, of constituting that attend such crafting. Awareness of such elements is crucial in order to have the right idea of what constitutional crafting is, and why, for example, it is to be distinguished from constitutional choice, engineering, or design. To consideration of those elements we turn next.

Three thin normative orientations

Three of the elements concern the normative-procedural dimension of a pragmatic republic, and are referred to as the ‘thin normative orientations’, or thin normative procedural principles. They are: pursuit of overlapping common goods; minimization of arbitrary use of political power; and adherence to a culture and principle of political moderation. They are ‘normative orientations’ in the sense of precipitating the political objectives, the wished-for goods that a republic might aim at. They are not by themselves concrete objectives or finite normative goods: they are imprecise for such a status, and only represent orientations toward more concrete – and always re-negotiable – goods that a public can pursue as a constitutional polity.

Said otherwise, these orientations are thin-normative in the sense that they are relatively open-ended, not predefined philosophically before the act of constitution. In being thin normative orientations, what these three constitutional aspects introduce are the normative parameters within which, in the practice of constitution, the publics are able – intersubjectively, through negotiations, compromises, and debates – to specify more concrete – thicker, that is – normative content of their constitutionalism. In this crucial role, then, these normative orientations represent a bridge – or cover a gap – between, on the one hand, leaving the project fully open-ended, as exemplified in

Griffith's phrase, "constitution is what happens", where obviously the idea of constitutionalism itself would remain up in the air, and on the other hand, theoretically predefining the normative content of envisioned constitutionalism to a degree that forecloses the possibility of the relevant public debating on their values – 'possibility' which is generally more of a 'factuality' in the real world. In trying to define these orientations more clearly, it may be helpful to call them procedural principles – they refer to the procedural norms of constitutional crafting, without themselves being the objectives of crafting per se. But they are *substantive* procedural principles (much like the notion of 'substantive due process' in the United States constitutional jurisprudence) in that by following them, the constituent public already starts approaching the envisioned good polity. Let us consider each of these three principles.

1. Pursuit of common goods

A well-ordered political union of a people is first and foremost an undertaking in common interest. Be it in the fable of a social contract, in the practices of constitutional conventions, or in the actually existing and functioning polities, it is a valid and necessary assumption that the project is expected to serve interests and pursue goods that all of its participants consider applicable to them. It is quite obvious that such a union cannot be conceived as being opposed to the interests of its constituents – a public cannot be assumed to unite in order to hurt itself. But, less obviously but equally importantly, such an endeavor is intentional and purposive – people do not come together in a constitutional project 'for no reason', or 'simply because'; nor can constitution be defended on purely deontological grounds – good political order is not an independent good, but a good

because it promises good life to its members. This point is ultimately Aristotelian in the sense that ‘all human beings aim at their good’ and that good is happiness. Political constitution is the highest level of human organization, and so it promises the attainment of the human good to the highest level.

Having said so, there are two important caveats that qualify this point. First, it would be misleading to suggest that constitution is always and evenly animated – let alone *ought to be* so animated – by some unitary and highest-level visions of common good. While things like happiness, freedom, justice, and equality are all very attractive and always have gained public approval, they are so general that beyond being rallying cries, their utility in the constitutional process is rather limited. They can, of course, be asserted as more than just battle cries, but that road would lead down radical ideologies of Marxist or fascist mold, producing regimes like those of the Soviet Union, Hitler’s Germany, or Mussolini’s Italy. Therefore, the normative constitutional orientation toward common goods is, on the one hand, just that, an orientation, and on the other hand, an opening to further and more concrete public goods and interests that can be culled out of this general orientation.

The second related caveat concerns the plurality of common goods. Because the singular common good is mostly only an idea in a constitutional project, and because the practice of constitution – as long as non-totalitarian – tends to produce less teleological and singular conceptions of it, the plurality of it is inevitable. Just as the goods of liberty, equality, and justice are already plural, the more practical constitutional conceptualizations of these goods would be even more so. Because of that inevitable plurality of common goods and interests, this normative orientation is a source of

permanent public debating, negotiation, compromises, and settlements. Moreover, this plurality always features multiple levels and occasions of overlaps: it is nearly unthinkable that discrete groups within a public will stably pursue their own distinct and discrete sets of goods. Distinct ethnic communities, interested in the good of their identity recognition, would overlap with others in their economic interests, and with still others in party alignments, and so on. This fact was argued very ably by Michael Walzer in his *Spheres of Justice* (1983), (see also Sen's idea of plurality of legitimate claims to justice, 2009: Introduction).

Between these two caveats, an observation becomes relevant: in speaking of pursuit of common goods, two constitutive elements are involved: the subject (the public behind the pursuit) and the object (the common goods). Or, the *publica* and the *res*. Both these components are plural, complex, and evolving. For all these reasons, goal-setting or definition of constitutional common goods is not a one-time exercise dealt with by drafting caucuses (pace Murphy 2007) but necessarily a continuous and moving target, thus making the United States, post-2011 Egypt, and the post-Taliban Afghanistan all engaged in this pursuit, with or without understanding.

What results from these observations – that orientation to common goods is not absolute, and is not the hegemonic motivation for people, and that the actual realization process of those goods reveals unlimited plurality of more or less widely shared goods – is that common goods is always a subject of public deliberation, debating, and reaching agreements. That much was already proposed in the first element of the sketch of a good polity. What is of particular importance for this normative orientation is that it actually does remain a stable *orientation* toward common goods, that the public and its members

can – and do – regularly ascertain that debate is indeed geared toward common goods, that persuasive reasons are given why that is or is not the case by protagonists, and that implementation of particular settlements can – and does – get appraised on its merits of serving common interests. It is that kind of a debate that, for example, the United States has been having over healthcare reform and tax break extension in recent years. These examples readily alert one to dangers of subverting the debate, to the possibility of disingenuous factional interests coming to dominate or significantly skew the outcomes. The answer to such suspicions is, first, to sigh “alas, such dangers are ever the possibility”, and second, to point to the interdependence of all aspects of constitution, where checks upon the quality of deliberation on common goods are – as far as possible – to be provided by the remaining aspects below: limits on arbitrary use of power, political moderation, civic capabilities, and so on. In recognizing the inevitability of impairments in public deliberation, Cass Sunstein offers a good argument that one of the most important rationales for a system of separation of powers is precisely to mitigate such impairments (2001). Here, the remedies are suggested to reside both in institutions and in culture.

2. Minimization of arbitrary use of political power

Often, a constitutional order – and especially, a republican regime – are defined essentially by limitations on the power of government, another common term for which – not being synonymous with it – is rule of law⁶². When ‘limited government’ is

⁶² But see Shannon Stimson (2008) for a broad overview of the concept of rule of law, its legalism and political-ness, its variety, and on it being essentially equivalent to modern constitutionalism.

understood more politically, the doctrines of separation of powers, and of checks and balances are used. Constitutional theorists, as has been suggested in the earlier pages, tend to imply that they are clear, known with good certainty, and elicit some uniformity in terms of institutional apparatus. In truth, each and all of these several concepts are contested, have acquired wide-ranging meanings, and have been put under criticism in theoretical debates. They are ambiguous, widely varying, and caught in gaps between theories and practices of constitution, just like the terms citizen, nation, people, identity, and so on (cf. Tully 1995).

Still, despite such contested and ambiguous status of this terminology, these ideas have firmly become the accepted vocabulary of the modern constitutionalism and *sine qua non* of constitutionalism in practice – albeit too often at the level of declarations. The realization long since made has been that when entrusted to single hands, power tends to be abused, absolute power being abused absolutely, to use Lord Acton’s quip. Regarding abuse of political power, perhaps Montesquieu reasoned very clearly: “[Political liberty] is there only when there is no abuse of power. But constant experience shows as that every man invested with power as apt to abuse it, and carry his authority as far as it will go. [...] To prevent this abuse, it is necessary from the very nature of things that power should be a check to power,” (Bk 11, Ch 4:150). Thus, the importance of this set of concepts is beyond question, and they are what comprise the intentionally broadly put normative orientation toward *minimization of arbitrary use of power*. Several points need to be noted here.

First, by referring to minimization as opposed to prevention of such abuse, it is maintained that in a realistic constitutional project, what is important is a stable

orientation rather than a terminal achievement. Political power granted to, and wielded by, formal (as well as less formal, such as political parties and factions) institutions of governance is a dynamic and continuous phenomenon that precludes any resolution ‘once and forever’. The best hope for avoiding institutional power abuse that a constitutional project can be oriented to is ‘institutional design writ small’ (Vermeule 2007). More generally said, this constitutional desiderata encompasses too many relevant actors and processes, too many potential sources of abuse and of guarding against abuse, that it is not entirely meaningful to try to secure it solely or even mainly by ‘institutional design write large’.

One problem especially illustrative of the potential futility of preventing abuse through institutional design is the phenomenon of emergency powers, usually granted to the executive in times of war and other special circumstances, (see Schlesinger 1973; also, Mansfield 1993; for a less usual, ‘non-panicky’ argument, see Vermeule 2006, and Posner and Vermeule 2007). Many examples of usurping such power are found in Machiavelli’s *Discourses* (1950: esp. 218-224, the case of Appius Claudius), usually corrected only with difficulty and losses. John Locke, a father of liberal constitutionalism, had little else to say on the danger of abuse of executive prerogatives except to moralize that such a thing would be wrong, and that the usurper would be referred to their own conscience and to higher authorities above earth (*The Second Treatise*: Ch XIV, §168). Thus, the limits of limiting power through institutional design lead to the next point.

This second point is that the orientation to minimization of power abuse involves much more than resorts to institutional design at any level. Particularly, it raises the

relevance of civic society and, more generally, a political culture that both populates the constitution with all its power distributions and guards its working in the day-to-day political life. Absent a relevant and capable culture of vigilance within the society against such abuse, no formal institutional contrivance of balances and checks is able to last. The upshot of this is to join the arguments for viewing state (and politics) as integrally parts of society, as opposed to viewing them as two separate realms, (e.g. Migdal 2001, 1988; Eckstein et al 1998). Therefore, it is plausible to speak, at a general level, not so much (or at least, as much) of ‘limited government’ – the outcome that is aimed – as of political *culture of vigilance* – the mode of civic life that secures and guards that outcome.

A third point raised here, related to the first and especially second point above, is the broadening of focus in pursuing proper use of power. By speaking of ‘limited government’, and by invoking the common concepts like separation of powers, the automatic tendency is to think of the higher level, central institutions of government in a polity. However, the loci of authority, and hence, of chances of abusing entrusted power, are multiple, (see, e.g., Eckstein 1998: 5). Within subunits of a state and its government, various social and political organizations, political parties, trade unions, down to universities and schools, there are ‘patterns of authority’ (Eckstein and Gurr 1975), and therein, venues for potential abuse of authoritative power which are generally just as unwelcome as abuse at high levels of government. A political culture of vigilance can be the general bulwark against all levels of abuse, whereas preoccupation with ‘limited government’ leaves out too much relevant space.

A last point concerning minimization of power abuse is the fluidity of the very problem itself. It is never quite measurable and knowable with certainty. Rather, any

occasion or pattern of abuse is determined ultimately by a ‘thermometer’ of public perceptions, understood much more broadly than the ‘thermometers’ of attitudinal survey methodologists. Democratic politics are almost guaranteed to always have some parts of a public crying out “SOS”. For some people, President Obama’s forging of the healthcare law is an instance of abuse, whereas for some European polities it is only a weak act proposed by an embattled president; and in a ‘democracy’ like Kyrgyzstan, an abuse of power is noted by the general public at a much later stage when it starts to involve physical victims.⁶³ Because of this fluid and floating nature of power abuse, it is all the more important that a respective culture of vigilance is stressed, and that institutional design measures – particularly at the level of constitutional theory – be regarded within a broader context.

3. Adherence to a culture of political moderation

Having spoken of a culture of vigilance as essential to minimizing the arbitrary uses of power, the next topic, a culture of political moderation, may sound rather contradictory at first: the two cultural outlooks seem to point in opposing directions. But that is not so, as will become clear. In fact, as will be shown, the two require each other in order to be sustainable.

Moderation is one of the key moral virtues taken up from the very beginning of political thought – depicted by its lack in the ancient Greek tragedies and comedies, stressed for the mishaps that its absence creates in Thucydides’ *History*, and discussed as a virtue (more often as temperance) in Plato and Aristotle. In a more clearly political

⁶³ Both of Kyrgyzstan’s recent revolutions, 2005 and 2006, had as their precursors increasingly violent tactics of securing power by the respectively incumbent presidents.

application, moderation runs through the constitutional teaching of *The Spirit of Laws* and defined, therein, as the political principle of republican government.⁶⁴ Presently, too, moderation is invoked more in its political relevance, less as a purely moral virtue, while recognizing the ultimate fogginess of the division between morality and politics, (for an illustration, see Murphy 2007: Ch. 1; see also Craiutu 2012 on moderation's movement from morality into politics).

A modern republic, being a composite public – even if not a ‘compound republic’ (see Ostrom 2008), is only able to survive when there is an overarching adherence to the principle of moderation. Allowing immoderation opens doors to various kinds of generally unacceptable propositions, to introduction of intolerant and radical demands amongst public, to political behavior that disregards its political environment, and generally, to instability of the constitutional order. It is, however, easier in this manner to come up with what moderation is not; it is much more difficult define what moderation *is*. Political moderation cannot be defined *a priori* in a specific way. It is something like temperature and air conditioning. While there is a common acceptance that somewhere between 65 and 75 degrees of Fahrenheit is a ‘good temperature’, there is no specific single level which can be defined as ‘The good temperature’. That temperature shifts within a certain range depending on the time of the day, season of year, climatic range around the world, and the goodness of a given temperature is determined by perception. Similarly, moderation is a matter of perception and good sense. It is possibly because of this “mushiness” that moderation has not been a popular theme in recent times, with

⁶⁴ Montesquieu (1949) writes of *aristocratic* republic: “Moderation is therefore the very soul of this government; a moderation, I mean, founded on virtue, not that which proceeds from indolence and pusillanimity” (Bk 3, Ch 4: 23). Later he writes: “Democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments. ... It is only there when there is no abuse of power,” (Bk 11, Ch 4: 150), thereby leading into the discussion of separation of powers.

recent exceptions being introduced by Craiutu (2001; 2012) and Soltan (2010; 2008a; 2008b) among few others.

There have been, however, some other ways of talking about moderation without using the word itself. One is John Rawls's criterion of 'reasonability' which is, ultimately, called upon to carry out the same task that moderation is asked to do presently, only 'the reasonable' is more specific and thus narrower. Something close to a definition is offered by Rawls. "Rather than define the reasonable directly, I specify two of its basic aspects as virtues of persons," (1993: 48; see also fn. 1 in the same page). "Persons are reasonable in one basic aspect when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so," (ibid: 49). "The second basic aspect ... is the willingness to recognize the burdens of judgment and to accept their consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime," (ibid: 54). This is very close to a principle of moderation but it fails seriously as a substitute for it: moderation is far more of a practical virtue than intellectual, whereas reasonability has a strong affinity to intellectual virtues.

Another alternative, much closer to moderation, is civility (see, e.g. Boyd 2004), a term for an appropriate, civil behavior for members of a good society. Toleration is yet another concept close in meaning to moderation but coming from (and often still staying in) religious discourse (for its broader political application, see Walzer, *On Toleration* 1990; for religious toleration, see Locke's *A Letter Concerning Toleration*). One more interesting concept of relevance, needing more elaboration, is the idea of 'political sobriety' that Margaret Canovan finds in Hannah Arendt's works (cited in Boyte 2011:

91-92). The list could go on. Political moderation may have been an inconvenient topic to discuss for contemporary political theory – as opposed to, say, Montesquieu – but its import has nonetheless been tackled from various angles rather richly. It is necessary, however, for constitutional theory to put political moderation – not its substitutes – in the center.

The difficulty of having a clear measurement or definition of moderation was already noted in Aristotle's work. The concept of the 'mean' is quite precisely the term for moderation in general. The mean was Aristotle's criterion of virtue: being placed between too much and too little (or any other range of extremes), virtue was none other than the mean level of any such range. Aristotle went on to highlight that mean was not the same as 'middle', and that it often tended to be closer to one extreme than to another – all due to the absence of any acceptable metric and the infinite complexity of situations and themes where the mean would apply. The real solution to defining moderation, then, is left to political life where it applies. It is an orientative concept that acquires its meaning within the particular context, in accordance with the social norms that inform the context and form the basis of judgment. Most of Book I of *Ethics* elaborates on this theme. *Political* moderation is something that can be concretized only within the political setting where it is raised – and Aristotle had enough to say about imprecision of politics itself as a subject of inquiry (see, e.g., *Ethics*: Bk. 1, Ch3; Bk. 2, Ch. 2).⁶⁵

This leads to the solution of that seeming contradiction between moderation and the culture of vigilance mentioned earlier. If moderation is the mean, then any departure to

⁶⁵ For a broad-ranging discussion of Aristotle's political philosophy – including its elements referred to presently – and its import for modern social theory and for liberal democracy, see Stephen Salkever, *Finding the Mean* (1990). By Salkever's understanding of Aristotle, the present work can be generally described as Aristotelian.

extremes is by definition a violation of the principle of moderation. Political life, obviously, is a dynamic and continuous flow that does not automatically stay on a set course, and is constantly pushed and pulled to extremes. At every moment that politics moves to extremes, moderation has been compromised. If that happens often, moderation does not exist. Therefore, moderation needs to be robust, resilient, *vigilant*. Vigilant moderation, perhaps, is semantically somewhat less contradictory than ‘militant moderation’ of which Soltan writes (2008), but the idea is the same: moderation must be able to meet immoderation, and to prevail in such an encounter. The dependence applies in the other direction as well. Insofar as vigilance is needed to guard against abuses of power, immoderate vigilance would clearly fail that task. Hence, there is no contradiction but, conversely, interdependence between the two requirements.

These three encompassing aspects of constitution – commitment to common goods, political vigilance, and a culture of moderation – make up the core normative orientations of a republic. They are thin normative, again, in being orientations or procedural principles rather than substantive values or dicta; they direct toward the kinds of norms that are necessary for a republic’s emergence and sustainability – in other words, for meeting the criteria of a republic sketched at the top of the chapter. The more specific, thick normative content of a republic is the product of political life: it is both futile and potentially misleading for political and constitutional theory to elaborate beyond the orientations.

Three basic empirical conditions

There are, now, three more aspects in a constitutional endeavor to which pragmatic republicanism requires heeding. They may be called the three *basic empirical conditions* of constitution: civic capabilities, constitutional context, and continuity. A short foreword on what these basic conditions do for constitution is pertinent: they are a crucial element that brings the political-ness of constitution home.

The above thin normative orientations channel constitutional crafting toward what is aimed at, a good republic. It has been stressed how important it is to keep these orientations *thin* normative – giving a more complete, stronger definition to the aimed polity would be equal to assuming the role of Rousseau’s mythical Lawgiver, or even better, usurpation of the General Will, or – more generally and familiarly – repeating the mistakes of much of ‘ideal’ political theory. That may be argued to produce good political theory, but it certainly would be bad constitutional thinking. Stressing the importance of this incompleteness is a way of stressing the role left to the concerned public.⁶⁶ The substantive normative details of the polity being constituted must be filled out by the public: not at once, not forever, but in a continual constitutional process of testing, negotiating, and settling. This automatically turns attention to the public itself, the *public in res publica*. The possible constitution is the one attainable for the given public with its incumbent make-up, context, history, and more – and hence, the basic empirical conditions. This tight-knit interconnection between the normative orientations and the basic conditions constitutes a serious corrective on ideal theory (as criticized in Elkin 2004), and on modern constitutionalism (as criticized in Tully 1995). The corrective’s

⁶⁶ Again, consider the illuminating if ultimately not wholly agreeable exchange about “the virtue of incompleteness” between Walzer (1990) and Heller (1990).

bottom line is, indeed, to retain the political-ness of constitution – the thrust of the argument being proposed in this work.

Having thus stressed the centrality and consequentiality of these basic empirical conditions, it is now time to consider each of these three aspects in turns. As these outlines proceed, it should also become clear in what status, or relation, each stands vis-à-vis the other two. They are closely intertwined. The chief aspect of interest is civic capabilities: the success or failure of any constitutional project, to the extent that ‘constitution’ entails human activity or performance, is squarely determined by the availability of corresponding capabilities. However, a pragmatic understanding of capabilities requires awareness of two circumstances of capabilities: their situation within a political context, and their existence within a condition of continuity. Neither context nor continuity is to be taken as a static given. Context is a given at any concrete moment but it is changeable, and not in the least – by application of capabilities. Continuity, too, is not an assertion of some unbent line in the historicist (as opposed to historical) manner. Rather, it is an ontological concept denoting un-interruptibility of social life, within which both context and capabilities evolve in interaction with each other. For constitutional thought, continuity might be said to be a ‘disciplining’ condition; it rejects as unsustainable any discontinuous projects, be they messianic visions (e.g., see Aron 2001), engineering of a Huxley-an mold, or, closer to home, constitutional designing in abstraction from capabilities and contexts. While history has witnessed not a few of such discontinuous projects, pragmatic republicanism advises that such projects were never occasions of constitution of good polity.

In an ideal world of expressive (linguistic) capability, these three concepts would have been discussed in a seamlessly flowing single text. Lacking that capability, the next good trick of analytic writing is to divide the discussion into a section on each; that is because the third thinkable strategy – speaking of only one concept instead of three (if they are effectively one thing), say, of only capabilities – is too often used, and too often it leads eventually to neglect of components that happened to be ‘incorporated’ into one.

1. Civic capabilities – the basic condition of constitutional possibility

‘Civic capabilities’ is, thus, the first of the three aspects to be taken up. When we think about constitution of a good polity – that is, when we imagine a desirable end product of constitution – we are hostage first and foremost to the capabilities of the human society under question. There is no way out of this reliance on extant and potential capabilities of people. The moment a constitutional thinker drops that factor out of her view, the work is dead; the moment a constitutional thinker adopts some operationalized, simplified, uniform assumption about such capabilities, the theory is flawed. So, the foremost concern of any constitutional thinker needs to be with the political, or civic, capabilities actually found and realistically attainable among the people.

Civic capabilities are the general capabilities of the people in question for coming together for sustained periods of time in productive (not destructive) relationships to achieve for themselves a condition of governance that precludes anarchy and provides reasonable levels of general predictability and security. This suggests, just as was suggested earlier, there is an unbroken link between capabilities and institutions: civic capabilities are capabilities for instituting stable public relations. Civic capabilities are by

definition capabilities for collective undertakings or collective engagements; moreover, they are capabilities pertaining to the question of collective order and governance, and not just any human capabilities.

To the question of ‘whose capabilities?’, it is obviously not fully satisfactory to say ‘people’, or even ‘citizens’: in a practical constitutional project, every person’s capabilities as a citizen cannot be the same as every other person’s. There will always be those who exhibit and employ greater and more sophisticated capabilities. In constitutional development, such citizens and groups – who are normally known as the political elites, leaders, and civic activists – will be the vanguards, and will lead other citizens in enhancing *their* capabilities as constitutional partakers. However, in recognizing this practical and inevitable inequality in capability attainment, it is important not to fall in the trap of incidentally reifying narrow elitism and crude classism. While these latter phenomena are empirically possible, they are not so common, and in reality, any ‘elite’ is itself a pluralistic category, containing the seeds of its internal self-control and of the need to appeal to the broader public anyway. Strictly equal civic capabilities across a whole citizenry would inevitably mean rather mediocre if not worse capabilities of all; however, overly insulated capability inequalities are neither very realistic, nor a good thing constitutionally. It with this recognition that, here, civic capabilities are said to be those of citizens, without distinctions and categorizations.

Today it is almost impossible to speak of capabilities without invoking the names of Amartya Sen and Martha Nussbaum. Their works have richly defined and set up a broad agenda for the concept of capabilities; an agenda that, now called ‘the capabilities

approach', has been picked up by numerous followers and some critics.⁶⁷ The present reference to capabilities does not go counter to the thrust of the arguments of these theorists; it is particularly congenial to the critical – or rather, corrective – contributions of both regarding John Rawls's project (Sen 2009; Nussbaum 2006). What they offer in these respective works is a reworking of the idea of social justice that is more properly fit for the actually existing world of widely varying human capabilities. They bring, in other words, the Rawlsian ideal theory down to the realities of contemporary societies: a perspective shared in this work. Needless to say, Nussbaum and Sen are unequalled in providing the philosophic foundations of their concept of capabilities – something this work humbly leaves alone.

But there is a difference of application of the idea of capabilities. The difference here is dictated, obviously, by the fact that this is an engagement in constitutional thought: civic capabilities are what determine the possibilities of a constitutional project. In the Sen-Nussbaum capabilities approach, the application is more often of a diagnostic kind: it is interested in evaluating development projects, national policies, theories of justice, or constitutions by asking to what extent any of these increases and/or upholds human capabilities (or functionings, as it is also referred). For pragmatic republicanism, civic capabilities are rather the main agency factor determining the nature and the outlines of a constitutional endeavor. That is, instead of capabilities being dependent on good policies, theories and constitutions, here the capabilities are seen as defining the constitution and corresponding policies and so on. To be especially stressed: here, the public of whose capabilities we are speaking is the author (or maker, designer) of

⁶⁷ See Martha Nussbaum's *Creating Capabilities* (2011), for a long but admittedly still incomplete bibliography of works both by Nussbaum and Sen, and by other 'capabilities approach' writers.

constitution as well as the user or consumer of it. In much of the capabilities approach works, the emphasis is on the latter.

Regardless of which angle it is viewed from, the idea of capabilities as they relate to social and political life certainly owes much to Aristotle – the key inspiration for Nussbaum in particular. In *Politics*, Aristotle makes numerous references to the importance or relevance of capabilities – in constitutional change and preservation, in issues of citizenship and especially good citizenship, and on fit between peoples and constitutions, to name a few. There are, however, some other later thinkers equally eloquent on the decisive factor of citizens' capabilities, and possibly more direct than Aristotle. Among such works, one must include Montesquieu – his discussion of the customs and norms of a people, of the various historical evidence from various parts of the world (he spends especially much ink on China), and how all of these inform 'the spirit of laws' appropriate for each people: these parts of *L'Esprit de Lois* are about the capabilities that we are interested in.

Thus, civic capabilities is a fundamental concern that constitutional thinking cannot avoid or take easy – these capabilities are what make constitution, just as constitution nurtures them. Capabilities, lacking any corporal dimension, are evidenced by the presence and shape of civic institutions, such that lack of institutions – which would suggest disorder, anarchy, absence of governance – indicates weakness of civic capabilities. Capabilities are not abstract or universally homogeneous goods; they exist and are cultivated or suppressed in the particular environment and history of a given case. To that environment we turn next.

2. *Constitutional context - situating civic capabilities*

The civic capabilities, as already noted, are not about some universal capabilities, such as human rationality, human gregariousness, human selfishness, and so on – that is, not about any of these in the abstract. Rather, the concept is here employed within the broader engagement of the question of real, possible political constitution. If so, then the concern is with empirically observed, uneven, multi-level, and variable capabilities; in a word, situated capabilities. Hence, the attention needs to also turn to the constitutional context: the ‘situation’ where capabilities are found. One could easily apply here the old language of agency and structure – our two concepts are almost precisely a variation of that, it seems. However, that conceptual dualism is very problematic, tending – as it does – to over-define two very distinct universes that always compete as much as they interact, making it nearly impossible to bridge the problem back together, (see Mahoney and Snyder 1999). Instead, capabilities and context, at least in thinking about constitution, must be viewed as inseparably inhering in each other. They are in a co-creative relationship to each other, and as such, they create constitutional order.

Context may be understood as *the given but changeable environment* of capabilities at any given time. In a constitutional process, civic capabilities always deal with the given constitutional context with a view to transgressing its limitations – to making it ever more congenial to the desired constitutional order. With every ‘unit’ of successful transgression, the context will become different from before, and correspondingly, capabilities become different, because capabilities are shaped by context all the while aiming to transgress it. In this manner, the context acts as both a constraining and an

enabling environment: capabilities are *gained and tested* generally in that process of facing up to context, in the process of transgressing it.

Saying ‘constitutional context’ does not imply, in general, any limits on where that context ends: such limits will need to be ‘felt’ and faced in the practice of constitution, and even at that, never be settled conclusively. Potentially, the limit is the whole world. To the extent that a global consensus on relevant constitutional issues has any effect on a particular case – be it consensus on goodness of democracy over autocracy, on necessity of separation of powers, or on the validity of the claim for human dignity – these considerations certainly fall within the limits of pertinent constitutional context. This is how the arguments about universal civilization being the ultimate criterion of ‘global constitutionalism’ can make sense, (Soltan 2008a and 2010; Kumm 2009; see also Ferrajoli 1996). More often and more effectively, however, the context of a constitutional project is still centered on the limits of a nation-state: occasionally its outer neighborhood, occasionally its subunits, but mostly the whole of a state.

Not to leave this discussion too unspecific, three spheres of relevant context may be marked out. The division into three is only nominal, and is for the facility of understanding the possible scope of relevant contextual conditions. Thus, one may speak of a *geopolitical- geoeconomic* (or, simply geopolitical) sphere as the general macro-context surrounding the state under constitution. It is about what influential, consequential relations with the outside world the polity has – with the understanding that some of those relations would have encouraging effect for constitutional development, some will have deleterious effect, and some may even be neutral. In contemporary world, where the term ‘interdependency’ is the *sine qua non* of international relations, this is

crucial for the chances of any constitutional project. In this regard, one might argue that the neighborhood of the post-communist East-Central European states was a crucial positive factor for democratization (e.g. Tudoroiu 2010), whereas a country like Kyrgyzstan needs to transgress its geopolitical context en route to democratization. The *historic-cultural sphere* would refer to the cultural, value, identity characteristics of the given community, or its make-up, as developed over time. It may include such factors as mono- or inter- or multi-cultural population, the ways in which such cultural make-up has appeared and conditioned the society. A brilliant discussion of constitutionally central historic-cultural context is the already cited work by James Tully, *Strange Multiplicity* (1995). Among other things, the emphasis on this contextual aspect is as a cautionary sign for those who have championed unrealistic, imaginary tales of multiculturalism – a deep problem now faced by even such supposedly established societies as Germany, the United Kingdom, Canada, and the United States, let alone less established ones (see, generally, Choudhry 2008). Lastly, the *socio-economic sphere* draws focus upon issues of class divisions and differences, economic welfare disparities, educational hardships and inequality, gender inequality, and so on. This set of contextual problems is the most common concern of Nussbaum's and Sen's works about problems skewing human capabilities; a very relevant argument about capabilities from this angle is that by James Bohman (1998) in a critique of mostly Rawlsian deliberative theory.

Thus, constitutional context is the environment within which capabilities are found and which these capabilities shape, change, transgress, or rely on, in turn. Civic capabilities in present usage are not about natural and universal capacities of speech,

reproduction, or even reasoning. The concern here is with the highly varied and changeable capabilities for participation in the constitutional process, capabilities to build and sustain institutions of public governance. For an appropriate understanding of capabilities, then, it is indispensable to be aware of the relevant context. Context can itself include institutions – each of the suggested three spheres of context have institutional elements in them – but it comprises more than just institutions. In fact, in certain severely problematic constitutional sites, the very absence or persistent failures of sustaining any institutions – the condition of anarchy, chaos, day-to-day instability – *is* the relevant context in its constraining function.

3. Continuity – the basic empirical accountability condition

Both capabilities and context occur within an ontological condition of continuity; constitution as a whole takes places within continuity. At the most general level, becoming tautological, time as such is continuous, and hence, anything that happens across time happens under continuity. But the point here is not to press such tautologies. In political thought as well as practice, the condition of continuity is disregarded rather often: when done in thought, it produces *utopia*, when disregarded in practice – it is often human disaster. For a political endeavor that aims at producing a sustainable and good political order, given the rather manifest limits of human achievement over recent centuries, continuity must be abided by. It may therefore be called a ‘disciplining’ condition, and hence, possible to speak of ‘demands’ of continuity in a constitutional process.

At one level, there is little novelty in invoking continuity – political scientists constantly talk of continuity (and change), (e.g. many IR and CP textbooks; more relevantly, Luong 2002), by which they usually mean a persistence of certain political phenomena, their refusal to easily change. But while that general idea in such usage is not contrary to the one here, it tends to be either too narrowly construed or left too oblique. The more elaborate discussion of political continuities under the theme of path dependence also fails to deliver the whole of its import by downplaying the role of civic capabilities and tending instead toward a form of structural determinism (see Pierson 2000). To do its ‘disciplining’ job in crafting, continuity therefore needs to be explicitly specified in its constitutionally relevant meaning.

Continuity means that a constitutional project, insofar as it is a transformation of one state of political life into another, must be aware that both the initial and the subsequent state are but instantiations of an actually *continuous lived* experience. Civic capabilities do not suddenly materialize from nowhere into the present, and cannot suddenly become different tomorrow from what they are now; the relevant context does not come into being out of previous non-being, only to suddenly fall into yet another different state of being. By stressing these, continuity does not require tracing the origins of the current state into an indefinite past, or tracing the possibilities of the present into an indefinite future – that is just impossible. What it requires is adherence to a level of political sobriety concerning what is possible how and when. Constitution takes place not only *in media res*, but *in continuous media res*.

In more concrete terms, continuity advises against revolutionary approach to constituting better orders; it advises instead gradual, steadier paced proceeding.

Revolutions are the closest to ‘suddenly falling into a different state’ in politics: they are by definition disruptive, spontaneous, unpredictable. Because of these all, revolutions tend to be weak on keeping their achievements, tend to end up where nobody wanted or expected, and tend to cause unwelcome and un-consented suffering to the public – none of these conform to the idea of constituting a good order. It also advises against taking the best known models as blueprint for constitutional crafting at early stages of the project. Taking Switzerland, or Austria, or even Singapore as models for emulating by Kyrgyzstan, for example – models that were entertained indeed – would predictably not work. Edmund Burke makes the point well in extolling the greatness of the long tradition of inheritance of both the Crown and the public liberties in Britain. He writes: “This policy appears to me to be the result of profound reflection, or rather the happy effect of following nature, which is wisdom without reflection, and above it.” And he goes on: “A spirit of innovation is generally the result of a selfish temper and confined views,” (Burke 1987: 29).

Not to mislead, the idea of continuity here is not an argument for shunning change and embracing an unchanging preservation, as sometimes erroneously Burkean conservatism gets construed based on his notions of constitutional *inheritance* and *prescription* (ibid; see Jacobsohn 2006 for intelligent discussion of Burke on these). Change is possible and welcome under the condition of continuity. Burke himself clearly says: “the idea of inheritance furnishes a sure principle of conservation and a sure principle of transmission, *without at all excluding a principle of improvement,*” (Burke, ibid; italics added).

Famously, Burke intimated these ideas in reflecting on the Revolution in France. He was exceedingly eloquent in pointing out the calamities that the revolution had given rise to. But was the French Revolution, even at the price of such calamities, able to disregard continuity and build a *Novus Ordo*? Some half a century after the revolution, Tocqueville would conduct some serious research to conclude that there were principal continuities running from before the revolution through its posterity, rendering the French Revolution essentially a short-run disruption at best and a costly enterprise more generally, (Tocqueville 2008). A more positive continuity before and after revolution is observed in the case of America in an essay by Jacob Levy; he argues that the American Republic was “not so novus an order” but rather a continuation of constitutionalism found in the preexisting state constitutional orders, in the pre-Union America, and further back, in the European political heritage (Levy 2009).

Thus, an accounting for the ontological inevitability of continuity in constitution introduces discipline, a political sobriety. In doing so, it not only renders constitutional endeavors more realistic and more capable of succeeding, but also makes them more aware of costs involved in deviating from it. More specifically, “the convention” of continuity secures the health of cultural ways and lives of involved peoples, as opposed to disruption, violence, and domination that discontinuity gives rise to, as Tully points out (1995: esp. 124ff). Machiavelli advised a new prince, upon conquering a city – if he did “not wish to establish there either a monarchy or a *republic*” – that “the best means for holding that principality” would be “to organize the government entirely anew”, that is, to entirely discontinue its preceding order, (1950: 183-184, italic added). Establishing a

republic being precisely the objective, a pragmatic republican constitutional project requires exactly the opposite: working within continuity.

Conclusion

This sketch of a desirable polity – republic – and these six aspects of a pragmatic constitutional endeavor make up the guiding parameters of constitution. The sketch is the general vision of what would define a possible republic – a vision based on already known and generally agreed features that modern constitutional orders carry. The three thin normative orientations describe the necessary normative directions that a particular constitutional project requires to abide by. The three basic empirical conditions guide such a project to the general constitutional ‘givens’ that will keep the effort always grounded in its reality. How are these several elements to be put together to produce a constitutional whole? Theory by itself cannot propose that final operation, just as it cannot concretize even these elements beyond the general outlines just presented. Putting them all together into a moving, lived whole, filling them with more specific content, is the task that must be left to constitutional action itself. What is possible to propose at this stage, short of plunging into such constitutional action, is to consider the likely nature of that action. In pragmatic republican view, constitutional action is best conceived as *crafting*.

Crafting can be thought of as the action of constitution. It is the whole process where all the above elements become engaged. What is observable with any clarity in the actual constitutional process is crafting, but not the several elements that go into it. The normative orientations and the empirical conditions do not appear, one after another, in

clear, distinguishable shapes. They come all mixed together in an organic process. Therefore, it is of serious interest to consider what crafting is and how it would mix these elements together.

Chapter 5

Crafting Republics

This chapter is an attempt to explain and give more specificity to the idea of constitution as crafting. In the unfolding discussion to this point, the recurring idea has been that constitution (the activity) requires a perspective that is practical, capable of imagining the *possible* political development from the actual historical context of a given society. In such an approach, constitutional thought must not be tied to purity of logic, must not depend on the feasibility of distilling away all the inconveniences of political life that defy theoretical control or parsimony, and should be able to accompany the practice of a constitutional project beyond providing detached intellectual blueprints. Constitutional crafting is proposed as such a perspective.

Below is an attempt to articulate this perspective. As said in the chapter conclusion above, the several elements of constitution in pragmatic republican view are not generally to be observed in an actual political process. While they could be described for the present purposes as if they were discrete, that would only apply for a conceptual discussion. Constitutional crafting, as the political process as it actually unfolds, features all of those several elements in an organic mix – in their ‘natural habitat’, as it were. How does one *explain* this fluid ‘bricolage’ of many elements? It is a challenging order. In the following, besides more strictly conceptual propositions about crafting, resort will be made to the example of the craft of saddle-making, to selective critical remarks on some non-crafting approaches to constitution, and to an example of well-crafted constitution – the case of Norway.

On the Craft of Saddle-Making

For a start, depiction of a more mundane instance of crafting may be helpful. There is an old and very interesting craft of saddle-making.⁶⁸ The best and most expensive saddles are products of craftsmanship, not of assembly-line factory production. So what is involved in crafting a saddle? Let us imagine a possible history of this craft. A saddle is a necessary practical convenience; without it, it is almost impossible to ride a horse which for some people and at some periods is an indispensable activity for livelihood. It is probably unknown now when exactly saddles started to appear – mass use of them was not known to the armies of Alexander the Great, some sources say. At the very beginning, the first saddle-makers must have been rather amateurish, inexperienced (how could they be?) dilettantes who just thought that having a comfortable seat on the horse would be good. So, they must have produced what their imagination was capable of.

Soon – probably as soon as the first saddle was mounted on a horse – they must have realized that their saddle did not fit the horse very well and was inconvenient for the rider to sit on; and when they decided to take it for a test ride anyway, within the first few seconds of galloping the saddle must have either come loose, taking the rider down with it, or more likely, it must have broken. The saddle-makers may not have rushed immediately back to their workshop, but soon enough the continued inconvenience of riding without a seat, coupled with the clarity of what was missing in the first saddle, must have led the craftsmen back to work. Most likely, they did not succeed in resolving all of the probable mistakes in one try; but also likely, with every new trial, the saddle was lasting slightly longer, was slightly more convenient for the rider and less painful for

⁶⁸ This imagined history of saddle-making is just imagined, not based on a research into the subject.

the horse (we, of course, omitted the concurrent challenge of taming the horse to agree to be saddled).

As the improvement continued, more and more novices must have gotten interested in the craft and wished to learn it. The original saddle-makers, gaining ever more experience and seeing fast growing demand, and thus needing helpers, should have then admitted some of those people to apprenticeship – of course not just anybody, but their friends, sons, relatives, or neighbors' sons who showed promise. A few of those apprentices were probably especially gifted, suggesting new ideas that the masters had not thought of. With each new and improved saddle, the craftsmen probably received more and more positive feedback, praise, and reputation. As they did so, incidentally, they probably started to live better lives than before, too.

With ever growing demand for this invention, there of course must have been an ever growing number of saddle-makers, or now – saddle-making workshops. Some of those were probably completely new starts by novices who were good at making things ('handymen') but who had never made a saddle – had only seen and used them. Some others, very likely, were those apprentices of original saddlers who were especially gifted and eventually branched off to be on their own. As the business grew, of course, competition must have started, with the best saddle-makers getting the best orders from the richest and most thankful horse riders. And as a particular workshop excelled more than others, those others probably took close looks on their excellent saddles, and tried to do their own in the same ways. Alas, some of the best workshops may have even been

looted and destroyed some nights, destroying some craftsmen's lives and raising much public consternation against the dishonest play. But crafting saddles continued on.

At some point in its history, saddle-making probably reached a slowing level of improvement – most of the essential elements of the saddle were now known. However, every saddle-maker must have continued seeking improvement with every saddle – made it smoother, padded it better, chose better lining material, decorated it with fine engraving, and so on. Especially, the good saddle-maker must have sought consistency from one piece to another, because given the kind of work it is, most likely every saddle ended up just a bit different from every other. Now and then, perhaps, even some breakthroughs happened, such as finding a dramatically stronger kind of wood for the frame, or a dramatically faster way of carving the wood. But for the most part, it must have been a steady work, with saddle-makers ever in search of perfection, with riders generally quite satisfied, and new saddle-makers joining the ranks, as older ones retired to horse-riding.

Then, of course, the Industrial Revolution must have hit saddle-making as well, and mass production of precision-cut, perfectly look-alike saddles must have started by some entrepreneurial money-maker. What probably ensued for most of the involved was some level of alienation from the pleasure of this work.⁶⁹ But true lovers of horse-riding probably never switched to factory saddles, and remained loyal patrons of the few remaining hard-working craftsmen who loved their craft. Alas, because they so loved their work, and because they needed to maintain a livelihood, some of the saddle-makers continued to make ever more *beautiful* though not necessarily better saddles for some

⁶⁹ Karl Marx has not been much of a presence in this work, but here it is – a highly relevant pitch for him, too.

conspicuous consumers who simply collected expensive hand-made saddles or gave them as presents to no less conspicuous gift-takers – none of them much of horse-riders.

There are a number of properties of the craft of saddle-making that can be highlighted here. First of all, it has a long history, the beginning of which is impossible to pinpoint. It is a history of continual improvement – sometimes fast, sometimes slow, and especially steady once it reached a level of perfection. Second, it is a useful craft, one that could not have emerged except as remedy for a practical need – so, it could not have emerged before human beings learned to ride horses. All of the essential steps of its improvement – thus excluding, say, the fine engraving - were the result of perceived need, realization of something missing and needed. Third, saddle-making was a collective undertaking, even though it could have been started by an individual, and even though individual masters must have guided the groups of apprentices and whole workshops. It was also collective on account of the input from horses and their riders, and especially the competing saddle-makers. Fourth, the craft of saddle-making in this probabilistic account was not a *scientific* work in a serious sense – no saddle-maker could have put the craft in the language of generalized equations, measurements, numbers, and so on, although it is quite possible that some sketching was done, some writing down of best practice took place. But most essentially, the craft must have developed by doing it, by trying and erring and improving, and then by passing it on to physically attending new craftsmen.

All of these and some more properties of the saddle-making craft apply to the crafting of good polities, the political, constitutional craft. One good reason to start with saddle-making – the kind of a craft that comes to mind much more naturally – is really to stress some characteristics of the political craft that are common with saddle craft, and so,

to get started on the right foot, as it were. It is all too easy to give a word meanings that seem to fit its environment. For example, when ‘constitutional crafting’ is mentioned to a political scientist, the meaning of crafting is immediately made dependent on the word constitutional. See that happening in Di Palma’s otherwise highly interesting book, *To Craft Democracies* (1990).⁷⁰

Constitutional Crafting: A Preliminary Outline

So, then, what does crafting add to our understanding of political constitution? A number of attributes can be suggested. First, constitution is a *dynamic process*, an active concept as opposed to a thing, or a constant state. Note here the avoidance of the word ‘craftsmanship’, a noun that suggests a state or vocation, and not a process. Second, constitution is *collective*, requiring the participation of numerous – but never dogmatically prescribed numbers of – participant craftspeople in its evolution; it is collective in the broad sense of including cooperative, critical, competitive, and even conflictual manners of input by its indeterminate numbers. Complementing this property is the third, that constitution is a *pluralistic* process. The participants in constitution vary widely in their roles: leaders and their opponents, supporters and followers, core and marginal contributors, passive and mobilized masses, providers and recipients, makers and users, and the list can go on. Constitution is never unanimous, never a single body or a monolithic process moving in one step and breath. This plurality itself is not a constant, but it is never gone.

⁷⁰ Di Palma argues for a much more contextually-informed, dynamic view of democratization; the only slight issue is that for him, crafting is after all about democratic institutional design most importantly.

Fourth and fifth, constitution is *practical* and *concrete*; it does not and cannot take place at a detached theoretical level, and it is meaningless in the abstract. It is to be reminded that ‘constitution’ here is predominantly used in its meaning of an activity, as in ‘constituting’. Sixth and seventh, constitution is a *continuous* and *iterative* process, not a one-off, single-event happening; to speak of constitution properly, one need to speak of an ongoing, continuous process. It is also iterative in the sense that constitution’s continuity is rarely an unbroken linear progression; rather, it is checkered with trying, erring, correcting, and renewals. Eighth, constitution is a *useful* endeavor, complementing its practicality – it happens because of a felt need or even urgency, and is not an optional pastime engagement. Ninth, constitution is an *evolving* process, becoming ever more complex and better through continual iteration, through trials, failures, reflection, and correction. It is not revolutionary, except in a limited and figurative sense in some particular instances in its continual process. Tenth, constitution is a *purposive* process in a qualified sense. It proceeds toward solution of actual problems, toward achieving real objectives, but rarely beholden to some distant, ultimate and singular purpose, except in a very general sense like desire of a just and happy life.⁷¹ Accompanying this ‘qualified purposive’ property of crafting is the eleventh important property of being an *imaginative* process: while not purposive in that ultimate and terminal way, it nonetheless needs an element of imagination, an envisioning of something desired. That imagination coupled with the felt need is probably what gives constitution its reason for taking place at all.

⁷¹ Purposive politics in a more ultimate sense would risk leading in the paths of messianic ideologies seen in the long mid-twentieth century, depicted most forcefully by Arendt (*The Origins of Totalitarianism*) and Raymond Aron (*Opium of Intellectuals*), among others. Republican constitutional process, instead, proceeds in the day-to-day political life of the society, and is normally animated by more ‘mid-range’ objectives: attainment of equal treatment of all under the law, guarantees of decent health, education and life conditions for the least well off, security of private property and sustainability of common property, fair distribution of tax burden and transparent and justified use of public monies, and so on.

Twelfth and most importantly, constitution is *political*. In this property, all of the above listed properties are brought together; and it stresses the agency that does the constituting throughout – the ‘political animals’. ‘Constitution’ as such is devoid of agency or ‘self’, and it is only due to linguistic constraints that one might speak of it *being* or *doing* things.⁷² Properly if somewhat awkwardly said, constitution is the sum of political agents’ engagement in the activity that defines them – politics. Understood as comprising all of the above properties, constitutional politics is an encompassing concept that includes much beyond the common meaning attached to politics, that is, essentially, power struggle. So, it could have been enough to point out this last property of crafting and omit all the rest, but the preceding qualities – and the list is certainly not exhaustive – underscore this otherwise too often short-cut scope of the constitutional *political*.

Having listed these numerous attributes of constitutional crafting, and having suggested that the list could easily be longer, one is bound to get the ‘so what?’ question. Anyone with any bit of interest is capable of coming up with a comparable – or an alternative – list of qualities of constitution: on what does any such definition of crafting rest? Why does it have to include this set of qualities and not a wholly different other set?⁷³

The qualities of crafting as proposed here acquire their grounding in the several elements of the idea of constitution related in the preceding chapter, the loose sketch of an envisioned republic and the six aspects of constituting such a republic. As argued there, constitution never happens in the open space or a *tabula rasa*; it is a process that

⁷² So when some speak of constitution as being ‘self-enforcing’, such statements need to be taken with care (e.g. Weingast 1997; Ordeshook 1992).

⁷³ This is, to be sure, a rhetorical posing: it is unlikely, given the idea of constitution being defended here, that ‘just any other list’ of attributes of crafting is composable.

happens in *media res*. The sketch and the six broad aspects of constitution are the outlines of the *media res*; they direct attention to where the constitutional process comes from, where it may be headed, in what manner, and why. Said otherwise, the combination of all these elements makes up the particular ‘constitutional environment’ where crafting, made up of the given attributes, takes place.

Thus, crafting should be the way it has been described above because it is guided by the imagination of a better republic, represented in the sketch – just like saddle-making must have envisioned a likeness of a comfortable chair on the horseback. Crafting is an oriented, purposive process because it proceeds toward certain mid-range objectives as related in the three thin-normative orientations – just as saddle-making should have been guided by concerns for the ever greater comfort of the horse riders and the horses. Crafting has the many empirical properties because it happens within the given basic empirical conditions – just like the evolving mastery of saddle-making happens thanks to evolving feedback from all relevant people and under the evolving supply of materials, tools, and demand.

‘Drawing some perforated lines in the sand’

Saying the constitutional crafting is characterized by such and such a list of properties, and takes place within such and such a ‘constitutional environment’ is not to claim in a categorical way that the missing of any of these particular properties or elements would preclude the possibility of success in constitution. The description of crafting above clearly excludes any suggestion of pre-scriptedness, but rather stresses its openness to further properties, to un-charted turns and twists. The suggestion is that these

proposed sets of qualities and elements are what normally obtain in a constitutional process. They need not be heeded consciously and may often figure in the process only in an unconscious way. However, when a constitutional process does go against the grain of any of the aspects of constitution, or in departure from some essential qualities of crafting that reflect those aspects, the quality of constitutional process is likely to be very different, and chances for its succeeding may also differ starkly. And then such a proceeding may not be constitutional crafting, but some or another of alternatives that are current: constitutional choice, engineering, design, creation, and so on.

It is relevant now, having invoked some of those alternatives, to briefly ponder on what constitutional crafting is *not*. A good example to entertain is an impressive work by one of the patriarchs of constitutional theory, the late Walter Murphy, *Constitutional Democracy* (2007). The following picks on the book may be a bit unfair to its author, given his occasional caveats (such as that the order of the book is not meant to suggest that constitutional process should follow the same order: *ibid*: 18). With due apologies, however, these critical remarks are justified by many attributes of the book, as well as on the grounds of heuristic use: the point is not, ultimately, to sit in judgment of Murphy's theory, but to highlight on his example some ways of not abiding by constitutional *crafting*. Plus, it is just a too well-told story to pass by.

In the imaginary country of Nusquam, after seven decades (!)⁷⁴ of a junta rule, a military coup takes place led by a good Colonel Martin, who immediately after the takeover calls together a constitutional caucus, inviting to it an excellent and diverse

⁷⁴ See Barbara Geddes (2006) on how long authoritarian regimes have tended to last in modern history: up to 30 years, roughly. For a society that did go through 70 years of authoritarianism – such as some of the peoples of former USSR – the Nusquam template of constituting is very unreal.

group of twenty-five Nusquam citizens that any real country could envy. In a process of deliberation that reveals erudition of each participant that could put many constitutional theorists to shame, the caucus goes through questions such as where to start, what values to adopt or not to adopt, what alternative constitutional order to opt for, and, of course, what to include in the Constitution that they decide to write. In this beginning lies the first problem. Murphy has the caucus – as hilarious as it is to read – to really think up a constitutional order from nearly a *tabula rasa*. Even with the wide diversity of opinions he provides for, that diversity operates at such a level of sophistication that no real country could hope for. With such intellectual sophistication, the caucus indeed seems to successfully proceed with ‘creating’ a people out of a junta-dominated mob. Thus, the first departure of Murphy’s tale from constitutional *crafting* is that – mostly due to its genre and the difficulty of proceeding otherwise – it is very organized, all problems and nuances of the society are raised and discussed (and for their purposes, resolved) by the twenty-five intelligent people, and the best answers to all relevant conundrums are reached within minutes or at most days of discussion. A more accurate term for this process is ‘designing’, not crafting or even ‘creating’ – because, after all, the caucus does not really create any order or society: it only designs a neat program for creating one.

The caucus, having began as it did after the coup and by active cooperation of the ideally well-disposed military, is engaged in coming up with a new society. The novelty is already suggested at a semantic level by the activity of designing, because such an activity is normally applied to new things, not to preexisting or continuing matters (albeit less obviously than ‘inventing’ would be). What is happening through the work of the

caucus is the birthing of a new nation as such. Sage Professor Deukalion's invited speech is especially indicative of this creationism. He says:

I concede that some eminent scholars believe that passive popular acquiescence is sufficient. For long-established and successful constitutional orders that may well be so. You, however, are *creating a new constitutional order*. [...]. You need 'positive consent', because you will ask your people to *stop being mere subjects and become citizens*, [...]. That is a *transformation* that neither force nor mere acquiescence can accomplish. [...] ... [T]he goal of a constitutional text must be not simply to outline governmental structures and processes but also to help construct a new 'way of life'," (ibid: 197; italics added).

Such an engagement in *creation of a new people* is an important departure from crafting; it is an 'intellecting', as it were, of a new people. Crafting directs us to long-term, gradual appearance – or rather, cultivation – of a constitutional people; imagining a 'transformation' of a whole people, a 'new way of life', a 'becoming of citizens out of yesterdays subjects' – past all the complications raised by all the caucus members – is not a proceeding in the manner of 'crafting'. The stark juxtaposition of 'long-established successful constitutional orders' to 'a new constitutional order', is therefore misleading – a good intellectual maneuver, not a prudent constitutional advice; its upshot, to be sure, is very different from the distinction between the established and the only aspiring cases proposed in the present discussion.

Having 'created' a constitutional order, Murphy exits the dialogic genre and discusses issues of constitutional maintenance and change in normal academic prose – and again, impressively well. But here is a pick. Once the constitution is created, he takes up the question of "creating citizens". He begins the chapter: "Even a small group of men and women can, if they control enough physical and fiscal power, create a constitutional democracy. But to preserve such a system, they must convince the mass of the population

to become constitutional democrats,” (ibid: 342). The first wonderment is the very meaning of ‘create a constitutional democracy’: how much meaning is in it, if it can be done by a small group of people for one day? Can, then, a constitutional theorist sitting in her study, and without any notable physical or fiscal power, create a constitution, if ‘creation’ can have a meaning apart from its chances of preservation and acceptance by the relevant people? The second wonderment is about ‘convincing the mass to become constitutional democrats’. Murphy offers a careful and lengthy discussion of the complications involved in such ‘convincing’, but the proposition at its face is a wondrous one. If it is about convincing, why not instead try and convince the masses to become, say, angels (what Madison had wishfully fretted about). Third, Murphy suggests there are three ways of fitting citizens and constitutions: one – make the constitution fit the existing culture, another – make the culture change and fit to the demands of a constitution, and third – some mix of the first two. He is quick to doubt the third option, suspecting “the philosopher’s middle” of being “mushy”, (ibid: 345). But realistically speaking, it is hard to imagine any constitutional case *not* being of the third kind: the former two are but intellectualized formulations and cannot much more. So, that opening sentence, ordered as it looks according to Murphy’s second model of fitting, is where the third wonderment lies.

One last point from this rich book, possibly the most symptomatic of constitutional scholarship, concerns the issue of constitutional *choice*. “Constitutional democracy” is a particular form of constitutional regime that Nusquam chooses from a “long menu” of options that initially included “all fascist systems”, “Marxism”, and “plebiscitary democracy”, but was shortened down to “constitutional democracy, representative

democracy, consociational democracy, coercive capitalism, and a perfectionist state”, (ibid: 67). Of this strange menu for choice, the seemingly common-sense “constitutional democracy” was elaborated by Murphy in an earlier, much-cited essay (1993), where he found a nearly forbidding antagonism between democracy and constitutionalism, making it sound like a very strange creature.⁷⁵ In truth, it seems, constitutional democracy is a rather generic concept allowing serious configurative variation within, and just as ‘antagonistic’ internally as human beings’ antagonistic desire of both freedom and equality. This curious menu of constitutional forms thus proposed is a good illustration of ‘constitutional choice’ rhetoric more generally – something very common and possibly traceable to Aristotle himself, if only in an insufficiently careful reading of him.

One such instance of ‘constitutional choice’ by inspiration from Aristotle occurs in an essay by James Ceaser, a champion of what he calls ‘traditional’ or ‘constitutional’ political science. He identifies the ‘choice of the form of government as the most important question’ for that tradition (Ceaser 1993: 57). An alternative route to stressing constitutional *choice*, even as the overall argument emphasizes constitution as artisanship, is found – as discussed at greater length in Chapter 3 – in the Bloomington School, and in particular in Vincent Ostrom’s book (2008). One of the central chapters – very short, though – in this book is devoted simply to posing the question of ‘constitutional choice’, (see also, more succinctly, Ostrom 1980).

⁷⁵ For an earlier excellent discussion of constitutionalism vs. democracy problem by a select group of constitutional scholars, with some constructive insights on the problem, see the edited volume by Elster and Slagstad, *Constitutionalism and Democracy* (1988). For another, non-antagonistic discussion of constitutional democracy, see Sunstein, *Designing Democracy* (2001).

‘Choice’, such as found in Ceaser and Murphy, and to a lesser extent in Ostrom – suggesting a rather crude idea of ‘picking and choosing’ – is a misleading term. To the extent that there is today any choice to be made at the level of general constitutional form, insofar as constitutional government is really wanted, the global consensus has more or less converged on some form of a republic – be it liberal democratic, social democratic, or maybe constitutional democratic, if it is any different from others. The real question is in the details of any republic – and in that question, the issue is not so much about choosing as it is about crafting.

A position very akin to this has been argued by Karol Soltan, who proposes the concept of ‘generic constitutionalism’ – constitutionalism whose general and essential outlines have now gained a global consensus. His language is very much one of constitutional crafting. “Institutions, personalities, characters, actions must all be seen as human *artifacts* (see Giddens 1984; Unger 1987) created by men and women, not products of some impersonal forces. From this perspective the human species would appear above all as a community of makers and designers. Instead of predicting human behavior on the basis of external clues, we would try to give an account of human capacities to create or constitute. We are led along this path toward a form of *constitutionalism*,” (Soltan 1993b: 72). Aristotle himself, in criticizing some of his fellow theorists, found fault with those who searched for the absolutely best constitution, which is hardly attainable, and those who searched for “some common constitution” while dismissing the constitutions that actually existed. “But what is needed is the introduction of a system which the people involved will be easily persuaded to accept, and will easily be able to bring in, *starting from the system they actually have*” (*Politics*: IV-1-1289a11;

italics added). This injunction takes the matter some way away from choosing in a direct sense and closer to crafting. A constitution that its constituents “[can easily accept, easily bring in, starting from the system they actually have],” begs that the involved people craft it themselves.

It follows then that constitutional crafting is different from constitutional choice, as well as the associated operations of designing, creating, engineering, and so on. It is a broader concept that captures the whole of the process of constitutional development, as opposed to limited periods or phases of it that such terms suggest. In fact, the crafting process may certainly feature instances of choice, elements of design and engineering, thereby making up constitution whole, whereas the alternatives do not. Because of the limited spans of time and action that the alternative concepts indicate, they are relatively easier to illustrate by examples. That is harder to do with crafting. Nevertheless, an illustration is necessary and needs to be attempted. There is one constitutional polity that for many reasons promises to allow a rich and very relevant illustration of crafting, and that is Norway.

The Crafting of Norway

The Kingdom of Norway is a remarkable constitutional story. Despite the fact that it remains – still, after the classic inaugural study of it by Harry Eckstein (1966) – a rather understudied story, there are a number of reasons to take it up presently as an illustrative case. One good reason is probably the author’s impressions of it in the course of an election observation mission in 2005, a short but highly edifying experience with

exposure to electoral campaign, to the voting day procedures, to the diverse roster of political parties, to a good sampling of citizen participation, and more broadly, to Norway's culture and history. Just as Gustav Vegeland's sculpture park, and the open air folk museums on Bygdøy Island, the constitutional landscape of the country seemed to be just as lovingly tended, being a product of much more difficult craftsmanship.

Methodologically, the choice of Norway is advised, in part, by a good degree of comparability with the country of Kyrgyzstan – the subject of the next chapter, and a case of more urgent interest.⁷⁶ They are both small countries with about the same population living in very mountainous terrain of which some parts are very sparsely populated. Norway's history, from the times Old Norse kingdoms to the Viking age, is reminiscent of the nomadic kinship organizations of the Kyrgyz. Norway's long history of being a colony-like periphery of the Danish realm, and then a more liberal but still not-fully sovereign status under the union with the Swedish Crown, is comparable – but not similar – to the peripheral status of the Kyrgyz in the Kokand Khanate for about 150 years, a period of wars and suffering under the Czarist colonization for about 50 years, and then membership in the Soviet Union as union republic for another 70 years. Just as Norwegians' sense of nationhood and claim for self-determination matured under the Danish and Swedish influences, the Kyrgyz sense of nationhood and especially statehood can be said to have emerged by the influence of these subjections, the most important being that under the Soviet rule. Other similarities – such as egalitarianism and fragmentation – will become clear in their proper place. Norway today is dramatically

⁷⁶ But lest it be misunderstood, it bears stressing that this is not a comparative study of Norway and Kyrgyzstan. Norway is here an example to illustrate several prominent ways of constitutional crafting; it is an undisputed example of constitutionalism, and it is a simpler example than, say, the United States or Britain. Pointing out some of the similar experiences of the two countries helps put Norway's example in a more relatable perspective.

different from Kyrgyzstan, being among the leading models of constitutional democracy, as opposed to Kyrgyzstan's persistent struggle at getting one started. Given this vast difference, it is certainly not the intention to conduct a close comparative study of the pair. Rather, Norway's case is presented more as an illustration of constitutional crafting as conceived presently, so as both to explain this concept better and to set the tone for a subsequent discussion of Kyrgyzstan.

Besides comparability to the case of Kyrgyzstan, Norway is also a more convenient case, if one may put so. Its history of political development is not as convoluted as those of, say, the United States or France or Britain; it never had major reversals of constitutionalism like Germany, Italy, or Austria had; and Norway's democracy in its overall institutional makeup is not as *sui generis* as Switzerland's is. With all that, however, Norway does present numerous interesting puzzles and counter-conventional features – so eloquently described by Eckstein (1966) – that constitutional crafting seems to be the most appropriate rubric to apply to it. So, for all these reasons, this case seems exceptionally well-positioned as a resource for illustrating the likely workings of constitutional crafting. Because of the particular purpose for using this case, it is deemed not necessary to delve rigorously deep into historical studies. The discussion below is a fairly non-specialist one, and relies on a limited (but respectable) literature base.⁷⁷

⁷⁷ In this section, I have especially relied on: Harry Eckstein, *Division and Cohesion in Democracy: A Study of Norway* (1966); Knut Heidar, *Norway: Elites on Trial* (2001); T. K. Derry, *A History of Modern Norway: 1814-1972* (1973); and Rolf Danielsen et al, *Norway: A History from the Vikings to Our Times* (1995), as well as credible web sources, such as Norwegian governmental sites, for more factual and contemporary information. That some of this literature is rather old is not of serious concern since the present work is more interested in the patterns of political developments that they do discuss than in the exact accuracy of data that they may lack.

Knut Heidar, a Norwegian political scientist and historian, organizes a succinct but broad-ranged book on modern Norwegian development along ‘three themes and one proposition’ that he argues have characterized Norway’s political development all along, (Heidar 2001: 5-7). The themes are: Norway’s status of “a small state in the European periphery”, “the egalitarian culture”, and “the struggle between the center and the periphery”. These three themes, as they unfold and explain the main trajectories of Norwegian development, lead to the proposition about “the primacy of politics” in the country’s life, (ibid). These contours seem very well tapped, extending not only throughout Norway’s modern history starting in 1814, but also going back to the earliest recorded history of Old Norse communities (on the earlier history, see Helle 1995 and Dyrvik 1995; for very relevant thoughts on that history, see Eckstein 1966: Ch. 6).

Heidar’s three themes and one proposition provide useful thematic guidelines for a consideration of the crafting of Norway’s constitutional order. Such a consideration, certainly, cannot in any way be a representative outline of the country’s political history as a whole. More relevantly, however, it can be an exercise in highlighting some select and instructive moments in its crafting process. The exercise would be one of looking a bit more closely at various historical periods in the country’s history. In that connection, to alert attention toward some appropriate directions, it is worth noting the need for ‘zooming in’ on three particular historic periods that seem to be too often viewed from more of a ‘bird’s eye view’ perspective. The first concerns the status accorded to ‘Europe’s longest surviving written constitution’: a closer look at the written constitution’s rather limited practical role and place in the political process, and closer attention to its symbolism and the circumstances of its emergence and functioning, stand

to open up a wealth of crafting experience that surrounds it. The second point is about extending the historical span of modern Norway's political origin: contrary to the more usual dating of Norwegian democratic and constitutional experience by 1814, when Norway achieved 'home rule' and adopted its Constitution, there are serious reasons to look further back to see the seeds and even shape of the modern polity. And third: the prevailing 'birds-eye' view, especially by outside world, sees a very steady, stable constitutional order in Norway ever since 1814, with a landmark in 1905; it is highly rewarding for a student of constitutional crafting, however, to note a continual series of important transformations that the polity underwent throughout this period, some of the changes coming through very fierce political battles. Alerted to these points, a student of Norwegian constitutional path will notice the persistent playing out of the 'primacy of politics', and will see how these politics – contrary to the narrow conceptions discussed earlier – are almost vividly equivalent to the idea of constitutional crafting as presented here.

Today Norway is a republic in everything but the name. Throughout its history of political development – especially starting from the late period of its union with Denmark – the country's constitutional order has been crafted in instructive ways. As suggested above, it is now easy to compress Norway's political history into a happy story of stable democracy, egalitarian economic wealth, and excellence of its long-running Constitution. But it must go without saying that the country's current blessings were neither hard-wired into the genes of the people from its primeval existence, nor granted it by some higher or external powers. The 'blessings' are the result of able self-crafting of the polity, a process

not free from mistakes, crises, or conflicts. It is therefore of some interest to consider some particular examples and periods of Norwegian constitutional crafting that, in sum, have led to the country it is today. It should become clear from such a consideration that the overall shape and health of this polity cannot be described *principally* as an outcome of rational ‘choice’, of institutional ‘engineering’, of assertions of essentially given culture, of the excellence of legal codes or of their interpreters, or of terse political battles. Elements of any of these mechanisms may be present but only as partial elements in a complex fabric of constitutional politics, so that the more appropriate rubric for the whole process would be crafting.

Four themes of constitutional crafting

Under the four themes specified by Knut Heidar, with some revision and reordering, it is possible to speak of four themes of constitutional crafting that have taken place in Norway. Each of the themes reveals multiple topics and strategies of crafting that, put together, have produced – and continue to maintain – this remarkable constitutional story. In elaborating on each of the themes, it will be interesting to note how they feed into the various elements of a good polity that have been specified in the sketch thereof in Chapter 4. Fulfilling all of those elements of the sketch for Norway, it will be noted, has been anything but a clean process of intellectual design or happy-ends by default, but one of crafting over a dynamic practical process set within empirical conditions. The four themes by themselves need not be thought to be unique for Norway; especially in the slightly revised form from Knut Heidar’s original four themes, they are very generic themes of crafting that could apply to many other cases, including the case

of Kyrgyzstan. The differences among cases are in the actual contents of the ‘dynamic practical processes set within their empirical conditions’. Lastly to note, the various concrete examples drawn to illustrate each of four themes of crafting should not be thought as exclusively relevant for a particular theme; the relevance of most of them clearly overlap across our four themes.

Crafting vigilant patriotism. Heidar’s proposition that modern Norway elicits a persistent ‘primacy of politics’ is a very important observation, but also a fairly broad one. More pointedly, this observation may be instead viewed as the crafting of a civic vigilance and care for the country, or of vigilant patriotism. That is, the substantive thrust of the primacy of politics for Norwegian citizens can be argued to have been their never-dormant concern for the country. To see how the cultivation of vigilant patriotism has occurred, let us consider some episodes and examples under each of the ‘alerting points’ proposed above, about the Constitution, about the dating of modern Norway’s origin, and about the ‘bird’s eye view’ of Norwegian stable order.

In a remark related to the Constitution, Harry Eckstein wrote: “it is not apparently the formal institutional arrangements of [Norway’s] government that make the system successful”, contrary to the “attractive view” that “governments are mechanisms which properly work if properly constructed”, (Eckstein 1966: 20). Relatedly, Narud and Strom, documenting a recent shift in Norway away from Westminster-style parliamentary sovereignty toward more Madisonian-style separation of powers, advise: “The place to look for these important changes is rarely in the formal constitution itself. The Norwegian constitution has become an increasingly archaic and often ambiguous document,” (2011:

209). Making such observations, however, does not mean that the Constitution is irrelevant. “The primary importance of the Norwegian constitution lies in its *symbolic value*”, writes Heidar (2001: 34; italics added). Relevance of symbols for patriotic sentiments, of course, need not be stressed here, (see, for example, see Bobbio and Viroli 2003: 20; Anderson 2006 more generally and critically).

The closer, more discerning look into the role and place of the written constitution, as advised above, reveals several symbols of importance for crafting vigilant patriotism. One is, of course, the very fact of adoption of the document under the highly charged political circumstances of 1814. Following the conclusion of the ‘personal union’ with the Swedish Crown that year, the Constitution was possibly the most central instrument for Norway’s leadership in persistently staving off the advances of the King for more ‘amalgamation’ of Norway with Sweden. Historian T. K. Derry describes that sustained period of resistance as one of ‘vigilant nationalism’ (Derry 1973: 64ff); that is, of jealousy with which the Norwegians defended their claim to self-determination and thereby ever strengthened that vigilant affection for the country.

The Constitution has some more specific provisions of great symbolic value which also contribute to vigilant patriotism, two of which are the seemingly contradictory (re-)institution of a monarchy and the provision for popular sovereignty through parliamentary representation. While it is a “limited, hereditary monarchy” with very little significance in governing the country, the symbolism of it derives, on the one hand, from it being a continuation of old Norwegian monarchy interrupted during the Danish rule. Tellingly, the first independent monarch of modern Norway in 1905 was named King Haakon VII, in view of six other kings named Haakon that lived before the Danish

period. The provision for popular sovereignty is contained in the part of Constitution of which Derry writes, “ ‘The rights of citizenship and the legislative power’ are significantly grouped together” (ibid: 10). Providing for a rather broad suffrage by those times, and later being one of the earliest constitutions to introduce universal suffrage, this unmistakable granting of sovereignty to the people – again, a result of various factors obtaining at the time of drafting – is a mighty symbol that kindled strong and especially *vigilant* patriotic sentiments then and continue to stand as the bedrock of popular sovereignty.

In looking beyond the ‘start date’ of 1814, one learns of further processes of crafting, not so much by symbolism but by the practical conditions that excited participation. While the prehistory beyond that date is very long, the particularly relevant shorter period is between 1807 and 1814, when the Danish Crown got involved in the Napoleonic war on the losing side, culminating in the breakup of the union. The period was a very costly and wholly unwanted adventure for the Norwegians and as such gave the spark of move for independence. Before the dismantling of Denmark-Norway union was concluded, the Norwegians had to go through intense hardships, experience the singular economic downturn that included hunger, and wake up to political thinking outside the frames of a union, in terms of Norway by itself. Sentiments for independence captured ever greater swaths of the people, and in the culminating year of 1814, engaged virtually the whole community in a highly charged advocacy for sovereignty through taking oaths of allegiance to Norway’s independence and electing a representative constituent assembly that drafted the Constitution. That period stands as a particularly illustrative case of crafting vigilant patriotism by participation.

Looking underneath the reputed Norwegian stability since 1814, one finds still more lessons of constitutional crafting. The period is again so rich, there is no possibility of being exhaustive. The most famous constitutional event in this period is possibly the long process that culminated in 1884, when the shift into the Westminster-style parliamentary sovereignty, of which Narud and Strom write (2011), took its definitive shape. While this was the culmination of an intra-Norwegian political struggle between the *embettsmen* aristocracy and the peasant-centered populist movements, the outcome is probably more remarkable not for the victory of one part of society over another, but for the dramatic concretization of popular sovereignty foreshadowed in the Constitution. The effect of this shift for its posterity, one may argue, was bringing politics and government so much closer to the citizenry thereby heightening both their sense of political vigilance and that of belonging in a political community.

A less famous but no less interesting episode of crafting a vigilant patriotism may be said to be the case of the Quisling regime. Norway was, like a number of other European countries, occupied by German army in World War II, and remained under Nazi control until the end of war in 1945. While Norwegian government took refuge in Britain, most of the population of course stayed in Norway. The governing of Norway was effectively the business of the German occupants, but they employed the service of the Norwegian collaborator, “Minister-President” Vidkun Quisling, whose fascist party Nasjonal Samling had seized power on the eve of German arrival. This was a puppet collaborating regime under the occupying power much like Petain’s Vichy regime in France. Quisling was put on trial after the war, found guilty of high treason and other crimes, and sentenced to execution by firing squad. This was a rare occasion of capital

punishment, which had been out of use in Norway already in XIX century. Quisling became an item of national memory of betrayal; his name became a word for national treachery, just like ‘xerox’ is a word for copy machine. Norwegian history does not provide any other known examples of high-level national betrayal, but in the aftermath of horrors of the war, the case of Quisling may be seen as crafting, by aversion, of vigilant patriotism through ‘judging of the political past’, in this case, of a person, his party, and his regime, (for a recent critical discussion, see Dahl 1999).

These few examples suggest some of the variety of how a culture of vigilant patriotism – a more specific rubric for highlighting the primacy of politics – was crafted in Norway’s constitutional history. In that variety – featuring symbolic rhetoric, practical participation, realization of popular sovereignty, and political memory, to name a few – these aspects of constitutional process can be said to have been especially productive on such key elements of a good polity as assertion of popular sovereignty, orientation to common good, institution of a mixed regime, and strengthening constitutional resilience, (see Ch. 4).

Crafting a pluralist political culture. The theme of vigilant patriotism may suggest the idea that Norwegians should have developed a very homogenizing, potentially intolerant political outlook. The second theme of crafting suggests how such an outcome need not have arisen. This theme is a broadening of one of Heidar’s themes, that of “the struggle between the center and the periphery”. While the particular ‘struggle’ he underscores may be factually the most prominent, it is certainly not the only line of political differences and struggles. There are many more of them, as Eckstein stresses

(1966: Ch. 3). But more important is not the presence and scope of such lines of struggle, but their constitutional upshot: the conditions of social diversity and the varieties of accommodating that diversity within a workable single polity.

Possibly the most enlightening topic regarding the crafting of a pluralist outlook is that of Norway's political parties. These institutions did not arise either suddenly or by some concrete instance of general design. While early party-like formations started to operate on a Left-Right principle soon after the 'home rule' began in early XIX century, the real development of parties occurred in the context of the constitutional upheaval that culminated in 1884. From then onwards, in the institutional setting of parliamentarism, political parties became almost naturally the main channels of political organization, mobilization, and competition. Today, an average of ten political parties can be said to have regular parliamentary representation in Norway. Unlike the dominant two-party systems of the United States and (to lesser degree) the United Kingdom, the multi-party system of Norway does not feature any resemblance of a 'catch-all' party that tries to cater to virtually every cluster of electorate. The party that may be the closest to such a description is Labor (*Arbeiderpartiet*), and by any contemporary standard it is a left-leaning social-democratic party with its base mostly among the working middle-class and left-liberals. Eckstein, speaking of an earlier period, recites the diversity of party platforms very lucidly (*ibid*: 53, 56). Thus, being rather specific and usually organized (by splitting from a larger party) in pursuit of specific political agenda, Norwegian parties, on the one hand, indicate the rich political diversity, and on the other hand, allow all that variety of interests to be represented.

The last point leads to an important observation about the accommodation of social pluralism in Norway, and that is a strong taste for institutionalism. The channeling of all the diversity of political interests through the institution of parties is just one ubiquitous example of that. Besides parties, the highly effective system of local governance, adopted and increasingly strengthened from mid-1830's on, is another strong institution of political articulation and representation. Before transportation and communication became unproblematic, the sparsely populated and distant communities in the north would have difficulty engaging in decisions being made in Oslo. The introduction of local governance system, where both administrators and representative councils are elected offices competed along party lines, do not simply facilitate engagement of distant peasant and fishing communities but itself cultivated an informed and engaged citizenry from local level up.

Add to these the oft-cited large presence of the state as such – the anathema in current-day American conservative politics, – the highly developed and trusted institution of elections, and a high degree of 'legalist culture' (see Eckstein op cit: 26-27), and some of the key components of the institutionalist outlook would be accounted for. In particular, the size of the state, it seems, is not defended simply for the generous welfare and other means of social security it provides (that could have led to a rather passive consumerist citizenry), but rather for the kind of political playing field it represents. The state is an effective unifying system within which it is safe and healthy to have disagreements and differences by multiple party lines, and it is also the site where all have legitimate voice and pretensions and thus can affect most issues of common relevance – a possibility that is highly limited in a more libertarian system where most

socio-economic domains are left for private control. Elections and litigation are two other institutions by which Norwegians have habitually managed their political differences, peacefully and non-disruptively.

Thus, a highly robust pluralist culture seems to have arisen as a result of the historical development of Norway's constitutional order. It is robust in particular by virtue of being expressed through effective institutional forms, where the rise of those institutions themselves is notably a product of practical political development and in no way a thing of *a priori* designing. What this cluster of crafting mechanisms highlights vis-à-vis the elements of a good polity is, again, a reinforcement of a mixed regime, strengthening of constitutional resilience, but especially, securing a robust social pluralism.

Crafting an egalitarian culture. The third theme of constitutional crafting is represented in Heidar's 'egalitarian culture', in this case needing neither broadening nor narrowing of his theme. The implication here, not denied by either Heidar or any other source consulted here, is that this culture is not an a-historical given but something in part rooted in the people's earlier traditions of governance and in part cultivated in the political development of modern times. Constitutionally, the relevance of egalitarianism is very rich, from relating to moderation, tolerance, identification with a common political project, to sustenance of a 'cohesive pluralism', if one may say so.

The possible earlier roots of Norwegian egalitarianism, going back to the Viking times, are considered very positively by Harry Eckstein, with due warnings about the inevitable speculative quality of such suggestions, (1966: Ch 6). He suggests that some of

the usual social requisites of such old societies, represented under his rubric of ‘primordialism’, would have been a strong focus on actual kin-based solidarity within limited groups, and consequently, a robust egalitarianism – not a strict equality, he notes (116-117) – in treatment of each other among members within such group. While he has little persuasive evidence of that old egalitarian culture having survived through ages into the modern society, there is also no reasonably conclusive argument for rejecting such a suggestion altogether.⁷⁸ Under the circumstances when Norwegians were dominated by Denmark for over 300 years, during which the preexisting social structure would not have changed very seriously, and continued strength of a ‘parochialism’ of some sort until very late in Norway’s development, Eckstein’s suggestion is deserving of some probabilistic regard.

There are, however, some more recent developments that should also explain this egalitarianism at least part. At the moment of achieving ‘home rule’ in 1814, there was almost no aristocracy in Norway in the usual sense; that role was filled by the state apparatus, the *embettsmen*, who by all evidence were predominantly driven not by class considerations but by a mix of political, patriotic, and even altruistic motives, especially in the early period. In the gradual development of the struggle between them and the populist-peasant mobilization toward late century, there again much evidence of orientation toward ever greater *inclusion* rather than distinction and exclusion. Thus, the latter movement, eventually coming out victorious in 1884, were led by a diverse set of intellectuals, poets, radicals, occasional leaders from among the landholders, all of whom,

⁷⁸ Note that, contrary to ‘essentialist culturalism’ discussed in Chapter 2 above, Eckstein’s reference to Viking culture is, for one thing, very aware of its speculative-ness, and for another thing, concerned with actual social-political processes and relations of those times – and the possibility of current relations being informed by those older patterns – as opposed to reifying a static cultural essence.

obviously, were champions of empowering the peasantry, the peripheries, and soon enough, the working class. The empowering of these strata encompassed not just getting them to participate in competitive politics, but also – and more importantly – their education. Education was an important issue on Norway's agenda from early on, underscored by previous reliance for higher education on Copenhagen until opening the University of Oslo in 1811. This latter event was an achievement not for a select elite, but for the people of Norway in general. Enrollment at the university was open to, and increasingly included, youth representative of all strata of the population, and eventually, this inclusiveness was reinforced by making primary – and equal – education available across the country. Thus, the culture of egalitarianism would have had a strong basis on which to bud.

Today, that egalitarianism is reinforced by the aforementioned large state sector. The provision of a generous and not very discriminating welfare is a potent equalizer that raises the floor for 'the least advantaged', whereas the high tax assessment would at least partially redistribute the wealth of the most advantaged downward. But it is not only about the redistributive effect of the large state. More generally, as Eckstein posits, Norwegian culture is characterized by non-competitiveness, which is possibly most evident in the economic sphere. A trivial recent fact is that in Norway, one of top five countries by GDP per capita, there were only five billionaires as reported in Forbes magazine (about 1000 worldwide), the richest man's worth estimated at just US\$ 5 billion, and four others situated closer to the end of the world list. The moral of this all being that, indeed, egalitarianism is not a superficial idea encouraged by the state, but a much stronger culture upheld by the citizenry themselves.

As noted above, the culture of egalitarianism would have a wide-ranging relevance for making a good constitutional order viable. It is capable of entrenching the idea of a *res publica* – the common good, of supporting social pluralism, of enabling the sense as well as exercise of popular sovereignty, and further cementing constitutional resilience. Norway’s experience suggests a wide variety of ways in which this culture can develop, from the effect of older popular traditions, to the role of national leadership, to the place of education, to self-reinforcing general popular climate of egalitarianism.

Crafting in the midst of historical and geopolitical setting. While the broader context of Norway’s constitution has already been appearing, it will not be superfluous to consider this as a separate theme. This fourth theme in Norwegian crafting is again a broadened derivation from Heidar’s last theme (first in his ordering), “a small state in the European periphery”. Where a country is located geopolitically and when its constitutional process is taking place at a given moment historically, are another rich facet of crafting. In several episodes of Norway’s development, these external circumstances stood in such prominence as to significantly modulate the manner of politics of the country.

The long period of the Denmark-Norway union, and then another incomplete century of a much more liberal ‘personal union’ with Sweden’s monarchy are the very obvious two large historical-geopolitical contexts. Norwegian self-awareness as a nation, and then development as a constitutional polity, were very significantly shaped by the circumstance of having been under these two schemes. But there were several other contextual considerations prominently at play.

The late period of union with Denmark, 1807-1814, is especially illustrative of the impact of the external context on constitutional crafting. Of Danish decision to join the side of Napoleon in 1807, historian Dyrvik writes: “It was a fatal choice. For the first time in 300 years the foreign policy interests of Denmark and Norway came into direct conflict,” (Dyrvik 1995: 204). While there could be no Norwegian “foreign policy interest” in a strict sense up to that point, that raw deal gave a strong impetus for Norwegians’ consciousness of their own foreign interests distinct from Copenhagen’s. It was caught between Great Britain and Sweden – the former being economically extremely important for Norwegian trade and livelihood, and the latter being a long-time rival and now enemy sharing a long and difficult-to-guard overland border. An unwanted, economically and militarily distressing ordeal, the war particularly sensitized the Norwegians to their subject status, as they became a mute matter of bargain among sovereign powers, including in the end a humiliating betrayal by the Danish Crown. The humiliation was the Treaty of Kiel of January 1814 which the Danish King was compelled to sign, and according to which, Norway would be ceded to Sweden. This is a fine illustration of crafting under fortuitous contextual conditions – a crafting of a sense for independence that may not have succeeded under normal circumstances.

As events progressed ever so fast toward 1814, the effect of the broader context seems to have been notable in another respect. As Crown Prince-cum-regent Christian Frederick assembled an elected group of representatives to draft a constitution in 1814, Norway’s founders found themselves in an opportune time for producing as progressive a constitution as they did. It was a time when they had good awareness of the American Constitution with its principles of separation of powers and especially the bill of rights. It

was also a time when the French Revolution had recently occurred, with both its positive and negative lessons, but especially heeded for its proclamation of popular sovereignty. It was, not least, a time when the constituent assembly, and especially Prince Frederick, could have assumed a positive political climate in Europe for recognizing the self-determination of a fellow European nation. Lastly, possibly unbeknownst to Norwegian founders, there must have been at least partial good fortune in having the French Marshal Bernadotte – an active participant of French revolutionary developments of the time – as their ‘enemy’. As Derry relates, Bernadotte had serious liberal inklings, and – not of least interest – was advised in a letter by his friend, Madame de Stael, that “that enlightened people believe that it would be wise for you to accept the constitution which the Norwegians recently gave themselves,” (Derry 1973: 14).

The external context can and often does play a very important role in shaping a country’s constitutional prospects. More recently, there has been much scholarship interested in the effect of regional patterns for a country’s democratization (Tudoroiu 2010; Stokes 2009), the effect of earlier revolutions on the likelihood and mechanisms of later ones (e.g. Beissinger 2007); the ‘availability heuristic’ and ‘representativeness heuristic’ more generally of existing examples on institutional changes in a given case (see Weiland 2008: 291-293). There is developing research more relevantly on constitutional patterns in the second half of the XX century, specifically highlighting the rise of judicialization of politics (Hirschl 2007; Stone-Sweet 2000). In the above few examples, Norway’s example makes amply clear how the external conditions are able to shape constitutional crafting. If one is to think of the more specific areas where Norway’s context especially informed its building of a good polity, those are possibly – once again

– in strengthening the sentiments for popular sovereignty, in making a mixed regime attractive, and – by proceeding at odds with the dominant powers – in imbuing the project with strong resilience early on.

This is only a limited, cursory consideration of Norway’s constitutional crafting. But even in this limited scope, this example shows a rich variety of ways in which crafting can occur. It illustrates the ways in which crafting is a situated and practical process, occurring within its concrete contexts, by virtue of the available civic capabilities and people’s constitutionally relevant sentiments. It suggests the various ways and mechanisms whereby the key generic properties of a good polity can be attained in a constitutional process. Norway today is a good polity, in fact, one of the best polities that are known. That is not to say that Norway does not have any more problems, or that its constitutional project is in some sense finished. The very poignant observations David Levy writes seem to be as pertinent to Norway as they are to Kyrgyzstan or any other case:

“In light of the ontologically aware philosophical anthropology, there is a single fundamental problem of politics that is both perennial and inexhaustible. It is perennial because it is tied to the unchanging conditions of man’s being in the world. It is inexhaustible because, however humanly satisfying a given *institutional order may be, its continuing existence remains dependent upon the same human factors that first created it and that could at any moment, by ignorance, negligence, or design, destroy it*. Nothing that results from human action can be maintained in being except by human care, and therefore *no institutional order, however securely it may seem to be established, can ever attain the degree of ontological security...*” (Levy 1987: ??, *italics added*).

There is one point of slight concern in this quote: the author’s depiction of a universally common and constant human nature, apparently. Just as ontologically important, it seems, is the fact of human capacity to cultivate in its midst certain modes of

behavior – a culture – that can significantly affect the degree of fragility of institutional forms. But the author is prescient about the dependence of any institutional achievement on human care for its sustainability. That observation applies to Norway as well as to any other constitutional order. There are a number of issues that Norway will be facing, including a growing cultural heterogeneity of its population due to immigration, the sustainability of its primary sector economy as Norway loses competitiveness due to high labor costs, and at some point further down, the possibility of sustaining both economic health and especially the welfare system without reliance on natural resources. These and any other possible issues, quite likely, will be met with the strong resources of political culture as described in these pages.

Unlimited variety of crafting

Constitutional crafting is a difficult matter for describing, let alone defining; but it is the manner of doing constitution in practice. There were a variety of strategies employed in this chapter to focus in progressively on how to understand crafting, from the example of saddle-making to brief conceptual delineation, to highlighting some opposites of crafting, to discussing the example of Norwegian constitutional crafting. Even after all this, however, crafting will remain incompletely explained. That is because, as indicated throughout, crafting is not something ever knowable completely, not something of which the details can ever be completely figured out.

But a wide variety of approaches in crafting is out there, and some of it has been depicted on the example of Norway. Some of the variety relate to the actors of crafting – the elites, the intellectuals, the masses (of peasants, workers, or parishioners); some relate

to sites of crafting – the institutions, the civic culture, the political economy; some are about the instruments of crafting – the Constitution, reforms, education; and some are the context of crafting – the neighboring states, the prevailing political mores, the particularly relevant personalities.

With these and other possible aspects of crafting, one may think of a wide variety of crafting strategies. One is crafting by use of symbols and exhortative rhetoric – something recognized long ago by Machiavelli, and more recently in following him, stressed by Viroli (2002: 18-19; 2003 more generally). Another is crafting through engagement and participation, claiming even more ancient ancestry in at least Aristotle, and more recently and famously, studied by Robert Putnam (both his 1994 and 2001). A third, related to previous, is crafting by institution-making, which may be most famously traced at least to the Publius and Tocqueville, and more recently elaborated much by the afore-discussed PEGS and Bloomington schools (Chapter 3). Another interesting avenue, of more recent origin and interest, is crafting by remembering and ‘judging the past’, most explicitly traceable to Karl Jaspers, but found in a burgeoning literature more recently (see, e.g., Habermas 1988; McAdams 2001; Tismaneanu 2009).

One more major mechanism of constitutional crafting should be mentioned: that of adopting, interpreting, and cherishing a written Constitution. The place of the Norwegian Constitution has been already observed. In a focal study of the ‘functionality’ of written constitutions, Beau Breslin offers a much wider variety of how these texts may help constitutional crafting, (2009). To appreciate this import of the ‘text’, Breslin’s argument needs to be put on its head: it is not the important roles that the text can play, but the important meanings it can be given by its authors – the constituent public – that he so

usefully elaborates. To use one of his favorite examples, when Nelson Mandela spoke in 1996 so reverently about the new South African Constitution about to be adopted, the solemnity evident in the words of Mandela did not inhere in the Constitution – the solemnity was given to the Constitution by Mandela (see Breslin 2009: 5). Said otherwise, Mandela engaged in an act of constitutional crafting by endowing the Constitution, on which the ink was not yet dry, with so much meaning. Kim Lane Scheppele rightly highlights some similar potentialities that Constitutions can have in bridging the past to the future, in mending tragedies into brighter hopes, forming important emotional and cognitive understandings among citizens in the very acts of Constitution-making, (Scheppele 2008; also 2003).

This variety is vast, and the listing can be endless, to include crafting by prevailing public mores and standards, crafting by specifically designed political and civic education, both of which are prominent in Norway's case. All of these are only a sampling of what constitutional crafting can encompass.

Lest it be suggested here that crafting is only good for describing what has already happened. The more important point about crafting is to equip aspiring constitutional projects and their authors with helpful ideas about their envisioned task. The discussion in these pages should alert such aspirants to the peculiar issues that require attention – the continuity, the context, the capabilities, the collectiveness, and many more. It should suggest some of the ways in which *not* to approach the task, or at least to be especially careful in approaching so. Not least, it should suggest some actual strategies of crafting observed for their consideration and modified resort. If such constitutional aspirants happen to be, say, from Kyrgyzstan, there are many ideas fit for their close attention here.

Chapter 6

Constituting Kyrgyzstan

Marquis D’Azeglio’s alleged words, “We have created Italy; now we must create Italians”, were an intelligent quip that sounded lucid but obfuscated much more. Italy could not have been created without Italians being there – the mere enclosing of a piece of territory and claiming it is a certain country is far from making it a country. Conversely and more probably, when Italy was declared as created, it already had Italians – just the way they were at the time. Said otherwise, there is no way to meaningfully separate one from the other, country from its people, constitution from citizens.

Today’s constitution of Kyrgyzstan is what its citizenry has been capable of creating and maintaining under its circumstances. The evidence suggests that there has been a shortage of constitutional capabilities to create and maintain a good order. What may be made of Kyrgyzstan’s constitutional pursuits so far and what may be proposed for a more productive constitutional project from now on from the pragmatic republican perspective? This chapter is an attempt to apply the perspective and conceptual ensemble of pragmatic republicanism to an actual case. The application is not a straightforward matching of the several key concepts elaborated in the preceding chapters to several discrete constitutional problems and elements in Kyrgyzstan. As remarked above in several places, while the concepts are elaborated in a seemingly clear, orderly and discrete manner, their actual working in a constitutional process is simultaneous, intermixed, and far from each of them being neatly observable. Below, in discussing the case of Kyrgyzstan, those several concepts do not pop up one after another in a clear sequence. A more appropriate procedure has been thought to discuss the case in a free

format, let its main themes and problems lead the story, and let the import of the pragmatic republican concepts enter the story as it proceeds. We will then return for a review of the application of pragmatic republicanism at the end of the chapter.

This dissertation, in Chapter One, began with an outline of Kyrgyzstan's 'constitutional malaise'. A number of general political problems were described in a survey of the country's recent political trajectory. In talking of constitutional predicament, Kyrgyzstan was presented as a case in point: a chronically unstable constitutional project, the country has elicited numerous ways in which the project has been compromised, even though it has also seemed to return to the constitutional aspiration each time. Commentators on Kyrgyzstan's case included both those who saw it as a glass half full and those who saw it as half empty – the greater numbers joining the latter view.

Is the idea of political constitution as re-conceived in this work, and specifically the idea of pragmatic republicanism, able to suggest ways of overcoming the stagnant constitutional project of Kyrgyzstan? The following discussion elaborates on the prospects of Kyrgyzstan's constitutional predicament. It approaches the case with a critical as well as constructive analytic lens of pragmatic republicanism. The chapter is divided into three parts. The first part briefly discusses some of the constitutionally relevant recent literature about Kyrgyzstan, highlighting several prominent themes that this scholarship has raised. The second part, based on the reviewed literature, engages in a stylized 'diagnostic' analysis of this case of constitutional malaise, where a nuanced, both more fundamental and more promising, conceptualization of this malaise is

proposed: one based on three constitutional ‘impediments’ – socio-political fragmentation, institutional subversions, and a bad form of egalitarianism. With that diagnosis in hand, the third part of the chapter elaborates some strategies – or simply, activities – that Kyrgyzstan’s constitutional crafting could feature. These activities are essentially practical speculations about possible transformations of problems identified as the three ‘impediments’ into more constitutionally conducive phenomena; speculations that adhere to the thin-normative orientations and basic empirical conditions that pragmatic republicanism stresses.

‘Searching Where the Light Shines’

In an article with this title, Lisa Anderson once wrote a critique of Middle East political scholarship for being so preoccupied with dominant themes that apply to Western political life, such as civil society, various attributes of democracy, and more (Anderson 2006). Thus, in searching for the familiar, Western-like attributes in the societies of the Middle East, this scholarship consistently overlooked phenomena that did take place and were no less important to political development, phenomena that may hold peculiar potentials for leading to better governance if noted properly. It searched where the light tended to shine, in other words.

Something like that can be claimed to be happening in Kyrgyzstan as well, especially when it concerns matters of constitutional relevance: too often, scholars have focused on popular research themes (such as ‘clans’, informal politics, transitional politics, state capacity/weakness, etc.), failing to see the overall working of politics and constitution as it all fits together. At times, such popular themes may have gone in a

different direction than Anderson's critique, tending to essentialize particular local phenomena – such as 'clans' – investing them with overly peculiar, if not mystical, meanings in the life of Central Asian societies.⁷⁹ In the following few pages, some of the recent and representative literature on politics in Kyrgyzstan is surveyed. This discussion of literature reflects both the wide variety of constitutionally relevant and salient problems that the country is beholden to and – in a more critical vein – the want of a more comprehensive constitutional perspective in the discussion of these problems by the scholarship. On the basis of the highlighted themes in these works, and some of the arguments on such themes, it is possible to formulate such a comprehensive constitutional view of the case. That comes in the two sections that follow after this.

Strictly speaking, there is very little consciously constitutional scholarship about Kyrgyzstan so far. A few exceptions may be mentioned. The one work most squarely dealing with issues of constitutional design is a book by a Kyrgyz legal scholar, Gulnara Iskakova on constitutional design of presidential-parliamentary relations in Kyrgyzstan (2003). The book, a rare achievement among the country's recent political scholarship, blends elements of legal and institutional constitutional approaches that were discussed earlier. Critical of prevailing institutions 'writ large', Iskakova fails to go far beyond an institutional critique. Another work, by Pauline Jones Luong, is a comparative study of three transitional countries, Kazakhstan, Kyrgyzstan, and Uzbekistan, on post-Soviet design of respective electoral systems (2002). Luong's work is a theoretical contribution to 'new institutionalism' in comparative politics, proposing a dynamic blend of rational-

⁷⁹ Kathleen Collins' work again comes to mind with her elaboration of a peculiar 'logic' of clan politics, (Collins 2003).

choice and historical institutionalism (and leaning more toward the former). Her argument is essentially that elites make rational bargains given the prevailing political context and the opening for institutional changes. Fascinating as such, the study is rather limited by its focus (on elite bargains over electoral design) and is not really a study of constitutional development as such.

More recently, an article by Henry Hale compared the role of formal constitutions in the context of informal politics following the color revolutions in Ukraine (2004) and Kyrgyzstan (2005), (Hale 2011). He argued that because Ukraine had adopted a decentralized, parliamentary form of rule in a new constitution *prior* to revolution, democratization had better chances there compared to Kyrgyzstan, where reform of a highly centralized constitutional system was left for after the revolution – which the new Kyrgyz leadership predictably postponed and ultimately never carried out. Note that Ukrainian democracy started to crumble just as Hale had drafted his article – and Kyrgyzstan went through another revolution and *then* adopted a much-more parliamentary leaning constitution, before the article was published. The events, in general, seem to have belied Hale’s argument about the role formal constitutions can play in structuring informal politics.

Perhaps the most interesting recent work from the perspective of the present argument is that of Johan Engvall (2011a; 2011b). In a research culminating in his doctoral dissertation, Engvall has argued for a revision of how Kyrgyzstan’s political development is understood, taking issue with approaches based on Weberian-style assumptions of what political development ought to include, and calling instead to look into how this state *actually* works. In what starts out as a refreshingly new kind of a

constitutional study, the argument eventually boils down to highlighting what the author considers the more accurate working of clientelist politics, a regime based on thorough corruption that has turned the state as such into a market with the greatest margins of profit in the whole economy. The argument ends with conclusions that generally foreclose the possibility – let alone specific ways - of effecting positive constitutional change. That said, Engvall offers an insightful analysis of how the country has evolved so far.

The greater majority of social science scholarship on Kyrgyzstan is less concerned with constitutional matters explicitly, even when they deal with unmistakably constitutional kinds of problems. All of them, as well as the above works, can contribute to grappling with the constitutional predicament if their often narrower and sometimes misleading arguments are relieved and instead their observations are heeded to.

One of the recently prolific students of Kyrgyzstan, Scott Radnitz, has argued in several works about a phenomenon he called initially ‘localism’ (2006) and then developed, focusing more on how it functioned, into ‘subversive clientelism’ (2009). It is the idea that the Kyrgyz society has been organized and mobilized in small locally-centered communities each led by a person who is a native of the community, but often a successful businessman and/or politician with clout beyond the community. When pressed in Bishkek (the capital, political and economic hub), such a leader is able to mobilize community support (vertical mobilization), and when many such pressured leaders join forces (horizontal mobilization), a revolutionary mobilization is born. The “subversiveness” of such clientelism is that, instead of being a sustainable democratizing force, the mobilization is both short-lived, ideologically thin or empty, and soon turns

into ‘dividing the pie’. In Radnitz’ assessment, because both of Kyrgyzstan’s recent revolutions happened by this mechanism, neither gave much hope for real democratization.

Studies focusing on similar or slightly different mechanisms of socio-political fragmentation are many. Somewhat close to Radnitz’ analysis, but focusing on government-opposition relations and on opposition development, are a pair of recent articles by Huskey and Iskakova (2011, 2010). Based on personal interview-based research, they find that Kyrgyzstan’s opposition forces – as persistent as they have been – faced multi-layered difficulties, only part of which were hurdles put up by the group in power, and several other reasons lying in intra-opposition relations and, as in Radnitz’s observation, in structural conditions of contemporary society in Kyrgyzstan. A study of mechanisms of electoral support and mobilization under ‘competitive authoritarianism’ (Sjoberg 2011) is another recent addition to findings about localist and clientelist mobilization.

A popular theme for some time, now somewhat ‘out of fashion’ for methodological as well as normative dissensions, has been clan politics. Possibly the most important contributor here is Kathleen Collins’ work (2006; 2002), arguing that in Kyrgyzstan, as well as Uzbekistan and Kazakhstan, there exists a somewhat fuzzy phenomenon of clans which provided a definitive ‘logic’ to politics in these countries. For Kyrgyzstan, ‘clan’ has been in essence (with inessential nuances) another term for tribalism – a term problematic in Western academe although very current in late-Soviet and early post-Soviet Russophone discussions. Another work on clans, focusing on Kazakhstan but applying to Kyrgyzstan as well, is a more constructivist take by Edward Schatz, who

argues that clans – without denying their presence historically – have been another political instrument, consciously deployed in shaping lines of loyalty and support by the ruling elite (2004). While providing a strong start for further research into the broader concept of ‘informal politics’ in Kyrgyzstan and Central Asia, the clan theme itself soon came to be rejected by many. One such critique, especially conscious of ‘orientalist’ connotations of the concept, came from David Gullette (2007).

Following the March 2005 ‘Tulip Revolution’, a number of scholars have looked at this event and its implications in making sense of Kyrgyzstan’s politics. A special double-issue of *Central Asian Survey* (v. 27, no. 3-4, 2008), a prime academic journal on the region, was devoted to analyzing multiple facets and implications of the event, examining its relations to regional cleavages (Ryabkov), state building (Lewis, Juraev), informal politics (Juraev, Temirkulov), crime (Kupatadze), and the working of mobilization and demonstration effects (Ortmann, Tursunkulova), among other themes. The overall assessment shared by these authors was, all things said, that the revolution did not have any far-reaching effect on the democratic chances of Kyrgyzstan (Cummings). That revolution was also included in several comparative studies (e.g. Bunce and Wolchik 2010; Tucker 2007), where the respective authors did not have sustained conclusions to make on Kyrgyzstan’s political development in particular. More recently, the second revolution was commented on by Kathleen Collins (2011) in a notably more hopeful light, described as an event that united the democratic politicians and civil society of the country in opposing a dictatorship, and thus ushered onto a path much more hopeful than before. On close scrutiny, this commentary was thin on substantive argument.

One more theme that is of relevance here, and related to many of the above themes, has been the idea of ‘state capacity’ (Cummings and Norgaard 2004; Schatz 2009). In this regard, Kyrgyzstan has always been described, predictably, as a weak state: relative to other cases – often compared to its northern neighbor, Kazakhstan – this state has consistently been poorer in its capacity to get policies carried out throughout the country, its authority has almost continually been contested, significantly uneven across regions, and of course, weak in delivering basic state services to the population. Explanations ranged from the obvious, such as lack of economic resources that Kazakhstan had – plentiful oil endowments – and weak industrialization in the wake of independence, to the less obvious but arguably more important, such as early decentralization and liberalization of both the economy and political life (as opposed to Kazakhstan’s and especially Uzbekistan’s more gradual and sequenced movement), subsequent lack of political resources to maintain a sustainable status quo, and the more pronounced preexisting regional and inter-ethnic cleavages against the backdrop of economically weak state. Radnitz’ argument about ‘subversive clientelism’ feeds into weak state capacity, ‘clans’ are able to compete with the state, and more generally, the supposed tension between formal and informal institutions (Helmke and Levitsky 2004; Grzymala-Busse 2010) plays in favor of the latter, and hence, against state capacity.

All of the above are very much constitutional themes. In their midst, they create a complex picture of where the country’s problems have been in its persisting failures in the constitutional project. The most general theme uniting the threads of all arguments is a high level of fragmentation of the polity, the numerous lines of cleavage that build up

one upon the other, making an ultimate settlement of all the differences a nearly impossible predicament. An accompanying key theme is that Kyrgyzstan elicits a highly problematic imbrication of formal institutions and informal ones, where the latter – widely varying as such – consistently succeed in subverting formal institutions. A third, much less consciously apparent but closely related theme, is that of a problematic kind of egalitarianism that constantly pushes different political groups, competing alignments, and even individual citizens, against each other, against recognizing each other's deserts, precluding chances of any cooperation across the various division lines.

Such disheartening conclusions on each of these three themes would only hold in a certain reading: one that views all of the divisions and subversions as essentially detrimental and in need of repair, and even suggesting that any such repair is likely to be futile. This reading comes with an implicit background narrative that a workable polity needs to settle any such differences, that the acceptable differences need to be only about policies, about the right or left persuasions. If differences are somehow made benign in that way, then only can a constitutional democratic order take root – and that would essentially come in the form of adopting the right formal institutional arrangements (such as a parliamentary system), the entrenchment of normal political contestation by means of political parties, and the establishment of a working, stable and legitimate rule of law – meaning, a good judiciary system. In a word, constitutional order requires compliance with the institutional and cultural profile of a modern European or 'Weberian style' state. That kind of a reading is what the great majority of Kyrgyzstan literature seems to imply. To put it in a risky metaphor, a constitutionalism is possible when the donkey becomes more like a horse (or vice versa).

Any such prescription is unacceptable. It is probably the seriously problematic shape of Kyrgyzstan's – and similar societies' – politics that invites such preclusive prescriptions. Indeed, the problem of constitution is a somber predicament. But if good constitution is a practically impossible concept, it would be worthless. The problem must be with the particular concept of constitution, and not with constitution itself. This work, therefore, has been an attempt to rethink the concept to allow thinking about constitution in a possibilistic and pragmatic way.

In such thinking, constitutional success in Kyrgyzstan need not require a magical disappearance of the country's problems. The high level of social and political fragmentation in Kyrgyzstan is, by any sober assessment, here to stay. And more importantly, the fragmentation, insofar as it means diversity and competition of interests, is in general a necessary condition for viability of a constitutional order, and ought not to be 'harmonized', (if such harmonization is even thinkable).⁸⁰ Similarly, overcoming the streak of problems arising from the cleavage-driven formal-informal institutional clashes cannot be sought by aiming at normalization of politics in the manner of established Western polities. A workable, sustainable institutional capacity needs to, and can, emanate from within the Kyrgyzstani polity, from the nascent political culture. Effecting such an outcome is a long-term and complex process, obviously, but it is the only option available. That is what has been called here constitutional crafting, a pragmatic quest in the midst of the given context.

⁸⁰ There is of course the large of body conflict theory. See the classic by Georg Simmel (1955) and Stuart Hampshire (2001) for a sociological and a philosophical argument, respectively, for the irreducible and even positive place of conflict in human society.

Tapping the basic empirical conditions of Kyrgyzstan's constitution

Problems of coordination, difficulties of modeling

In a much-cited article, Barry Weingast proposes to look at constitutionalism (stable democracy and rule of law) as a problem of coordination (1997). His model – developed in two stages – posits a ‘sovereign’ and two groups of ‘citizens’, A and B. The sovereign is willing to transgress limits on his power, and thus violate citizens’ rights, if he can go unpunished for that. But citizens can punish him for transgressing by putting him out of office. Sovereign sees such punishment as much more serious than any gain he can have by transgressing, so that if punishment is more or less certain, he would clearly refrain from transgressing. Since citizens are divided into two groups, only a concerted challenge can have effect; a single group’s challenge will not suffice. Challenging does have a cost to citizens even if successful (Weingast’s numeric weights for costs and gains in the model are quite random and potentially problematic). The sovereign can be smart and only transgress against one group and then share the spoils with the other, thus making acquiescence the dominant strategy for one group. Only in a reiterated coordination model, where each citizen group risks being retaliated against by the other for prior transgression, is here a hope for cooperation. In such a scenario, Weingast proposes, a constitution (or treaty, or elite pact) can play the role of a coordinating device, letting all citizen groups clearly see their stakes in the long run, giving them clear inducements to cooperate and thus to prevent the sovereign from transgressing. If such a mechanism works, he suggests, a constitution can become *self-enforcing*. In this suggestion, he should probably have meant ‘constitutional order’, or simply, cooperation, to be self-enforcing; for surely the formal provisions of a constitutional document, which is what he

clearly means to start with, cannot be said to be self-enforcing – that would be quite meaningless.⁸¹

Weingast's argument is a useful point of departure for understanding the case of Kyrgyzstan. Here, too, the problem is essentially that of inter-group coordination – or more accurately, of difficulty of cooperation, of competing and antagonistic agendas among the numerous groups. But his argument is particularly interesting for the reasons for which it cannot work in Kyrgyzstan; or to put more carefully, it can only work if seriously expanded and revised – which is to say, if parsimony of the model is sacrificed. Weingast offers a 'test' of the theory using the example of Britain's Glorious Revolution, with the King facing the Tories and the Whigs in late XVII century. Without trying to get into details of that history – which may be a rather well-picked case for demonstration – it might be suggested that another, possibly more nuanced, period spanning mid-XVIII to mid-XIX centuries, as discussed brilliantly in an essay by Charles Tilly, elicits a much richer, complex development of constitutional cooperation in Britain (Tilly 1997; especially, see figures in 230 and 231). The point being that, just as that later British episode, Kyrgyzstan's present situation posits a picture of much more plural, unequal and indiscrete divisions among the citizenry, much less clear stakes for each actor, less discrete separation between the sovereign and the citizens, and as a result of all this, such

⁸¹ This point is indeed of interest. Weingast writes, "limits become self-enforcing when citizens hold these limits in high enough esteem that they are willing to defend them... To survive, a constitution must have more than philosophical or logical appeal; citizens must be willing to defend it," (1997: 251). The second half of this quote could not be more agreeable. However, it seems to contradict the first part: if citizens are defending the limits, then the limits are not self-enforcing, they are enforced by the citizens. Neither does it help if "self-enforcing limits" mean "it must be in the interest of the sovereign to abide by them" (ibid). The interest of the sovereign is not to be punished but to be rewarded by the citizens, and that hovering promise of punishment is what enforces limits. A pact or a constitution is only an instrument that helps the coordination game by letting all relevant parties know what those limits are. 'Self-enforcing limits' is a misleading myth.

a heavy discounting of any future payoffs that the game looks more like a series of one-off games rather than a continual, reiterated one.

If Kyrgyzstan's situation can be expressed in a model, it may be something like the following. It is a rather different setup from Weingast's, and very simple, and the order of payoffs is based on the story of recent Kyrgyz political life as related in the preceding pages. To note right away, the model is extremely simple, does not suggest its own resolution, and is intended more to help discuss problems attending any such modeling than to find solutions within its terms.

		Sovereign	
		Not transgress	Transgress
Citizens	Reward	A B	C A
	Punish	C D	B C

In this payoff matrix, with A being the best payoff for both the sovereign and citizens, there are two Pareto optimal outcomes: [not transgress + reward] and [transgress + reward]. The first of these outcomes should be obviously what everyone wants: for the sovereign to work well, and for citizens to reward the good work. But this outcome suffers from being not a Nash equilibrium one, because the sovereign would be tempted to transgress. The second Pareto optimal outcome, [transgress + reward], is similarly unstable because the citizens would be always tempted to punish. So neither Pareto optimal outcome is stable. There is an outcome which holds the Nash equilibrium, [transgress + punish], which is not Pareto optimal. The outlook in this model is that the

sovereign – who moves first but without certainty of citizens’ move – will consistently choose to transgress, and the most likely citizen strategy would be to punish.

Now on to some issues involved. What do ‘transgress’ and ‘not transgress’ mean in practical sense? In Kyrgyzstan, transgressing means engaging in illegal and corrupt uses of public authority: from straightforward embezzlement of funds, to diverting public resources for private gain, to applying clan or other favoritism in making appointments – hence, accumulate wealth and power beyond what office could legally offer. Not transgressing, correspondingly, means not engaging in any of these activities but to serve the public interests as expected from the office, and being satisfied with what the position offers. A public position in Kyrgyzstan offers rather limited material rewards – salaries are rather low, and other perks are insubstantial. ‘Transgressing’ is clearly worth a lot. As Johan Engvall has argued, public offices, especially at the higher ends, are much like business, and even the most lucrative of them all (Engvall 2011b: esp 36 ff.). The differences between the two strategies are further highlighted by the actual meaning of the citizen strategies.

The ‘reward’ strategy, just like the reward that Weingast’s sovereign gets for not transgressing, means keeping the sovereign in office – or reelecting, when time comes. Other, less substantial rewards can be some public awards, public esteem, not much else. The ‘punish’ strategy means, correspondingly, not granting reelection, toppling even before a term expires, and if it goes far enough – to persecute for ‘transgression’ crimes by law.

Now on to how it has worked in Kyrgyzstan so far, in accord with above discussions. The citizens have rarely failed to deny reelection to an incumbent president – in fact, never; it has also granted reelection to most members of parliament when single-member district system was in place – the much more decisive power for MP (re-)elections was always exercised by higher authorities, the president, and not by the citizens. At the same time, the alarmingly fast public servant rotations at the ministerial and other high and middle level administrative levels have been well beyond citizen's efficacy, and so, visited upon public servants by the president mostly regardless of 'transgressing' or 'not transgressing'. That is, an honest minister has had about the same chances, or possibly worse, as a corrupt one of being replaced within a year or two at most – as a result, 'punishment' generally has lost its weight as such. Add to this the fact that very few public servants have ever been punished by law for transgression crimes, and also the very high probability that any public official, in office once, would be returning to similarly high offices repeatedly after dismissals, and 'punishment' as a strategy becomes a very immaterial thing.

Complicate the picture further by adding that 'citizens' is a highly divided bunch – as shown in so much of the literature discussed above. They are rarely broadly in agreement about punishing or rewarding an official, let alone in what way to punish or reward. Add also that the 'sovereign' is not a unitary actor but a changing set of alignments, mostly centered around the president's office – which effectively does the punishing or rewarding of ministers and others – and sometimes around the prime minister, especially in the last year. Add another aspect: instead of referring to 'sovereign' and 'citizens', one could simply say 'agent' and 'principal' and thereby mean

that a great many coordination games take place in various settings: within political parties, within regional and local administrative units, within large organizations, and so on. This multiplicity means that any choice situation for any actor is highly complicated, multi-layered, and messy.

While these complications are numerous enough, there is one more set that needs to be noted. Namely, some episodes of successful, coordinated punishment of the sovereign did take place in Kyrgyzstan. The most obvious examples are the two ‘revolutions’ within five years when large enough mobilization could happen to oust two presidents when they became blatantly transgressive. Smaller scale successfully coordinated challenges of authority do happen rather routinely, sometimes reversing bad policies, more often at least keeping authorities on alert. However, more importantly, such challenges have not been sustained, have not deterred further governmental transgressions, and have failed to generate lasting citizen cooperation, contrary to what Weingast’s argument seems to expect.

The point of all this is that Kyrgyzstan’s is a highly complicated coordination/cooperation problem where nearly every element of an imagined game model is bound to be too fuzzy, fragmented, and ultimately preclusive of a neat and sustainable resolution. Weingast suggests that his model provides an answer to three puzzles related to the working of democracy, of which one is particularly relevant here. It is the puzzle of whether an accommodating democratic civic culture makes stable democracy possible – attributed to Almond and Verba – or, conversely, stable democratic governance leads to rise of such a culture – attributed to Brian Barry. Weingast argues that it is the successful resolution of the coordination problem that gives rise to both

democratic culture and democratic governance (1997: 253). On the basis of Kyrgyzstan's case, it appears that all three answers can only partially be correct, and that the actual development and stability of democracy is a process that makes it impossible to separate the problem into two or three or more discrete parts of which some are clearly the cause and some clearly the effect. And contrary to what the title of Weingast's article suggests⁸², the entire complex of a democratic society is political, not just its 'foundational' moment of solving the coordination puzzle.

Three themes of contemporary Kyrgyz 'modus vivendi'

The predicament facing the case of Kyrgyzstan, as far as constitution is concerned, is to grasp the source of its persisting failures without overly simplifying its reality, in a way that does not reduce the problem to some singular causal mechanism, and also so that any hope for constitutional development need not become lost in essentialist, static concepts. The many competing explanatory arguments, such as those concerning informal institutions (Temirkulov 2008; Hale 2011), systems of clientelism and patronage (Sjoberg 2011; Engvall 2011b) or 'strongman' politics (Sjoberg 2011), clan politics (Collins 2006, Schatz 2004), localism (Radnitz 2005, 2009; Huskey and Iskakova 2010), institutional instability (Huskey and Iskakova 2011) or weakness (Cummings and Norgaard 2004; Schatz 2009), competing identity claims and frames (Murzakulova and Schoeberlein 2009; Marat 2009) and so on, are all effectively some partial aspects of a whole. On the basis of these findings, as it were, the need is to articulate the problem in a more general and more constitutionally helpful manner.

⁸² "The Political Foundations of Democracy and the Rule of Law"

One overarching theme that appears to unite most of these themes is the fact of high *social fragmentation*. In place of trying to pin down the precise single cause of it and refute others, especially if the point of interest is not detached social scientific analysis but a practically-attuned constitutional quest, it is of some value to retain this conclusion – high social fragmentation – despite its seeming generality. The fragmentation is highly multidimensional – economic, kinship, professional, ‘clan’, ethnic, regional. The lines of fragmentation are relatively dynamic, not set at a constant, more so in some respects than others: party affiliations and allegiances shift all the time, loyalties to particular leaders often change (when leaders change), intensity of differences rise and fall, albeit, for example, regionalist fragmentation is rather stable, tribe/clan-centered loyalties are relatively also stable, as are the localist networks of which Radnitz speaks. Not least, the fragmentation is very multi-layered, with partial overlaps, so that, for example, the North and the South are made up of several layers of sub-divisions, but not all those subdivisions are either cooperative with each other on all issues, nor are many of them strictly northern or southern. Given this, the question remains as to whether this fragmentation is capable of sustaining in its midst a workable polity, one that is not in danger of falling apart and not wholly incapable of pursuing a common political project. The answer, of course, cannot be an automatic negative.

The various nuances of social fragmentation suggest another general observation that concerns the theme of informal institutions and the formal-informal institutional dichotomy; let us call it the problem of *informal-formal fusion*. What one learns from most of the recent literature about Kyrgyzstan, considered all together, is the ubiquity of so-called informal institutions per se and of supposed tensions and points of juncture

between them and formal institutions. The conclusion that offers itself, again if the concern is not with 'scientific' analysis, is that this dichotomy is not helpful because it tries to see discretely two worlds of institutions where no such discrete division exists in practice. Thus, there are no 'elections' in a pure and formal condition separate from local and regional allegiances, no formal 'institutional authorities' separable from the person who occupies the office and uses authority, and no formal, legal idea of 'citizen' separable from family, kin-based, ethnic-based, and/or religion-based identities of a person. Instead of speaking about informal institutions (as the problem) and formal institutions (as the abused ideal), it is necessary to see more simply the many ways of actual social governance that fuse together all available institutional devices to produce networks of communication, languages of cooperation, and capabilities for solving common problems. The point in recognizing this informal-formal fusion, at least in the first move, is not to judge it normatively, certainly not to suggest it to be an unmixed blessing, but rather to stress its almost organic mixing that makes it meaningless to speak of its one half being infected by its other half.

A third related general theme that recent Kyrgyzstan scholarship taken collectively suggests, but never quite recognizes, is a kind of *an egalitarian attitude* among the society. This is not the same as a fact of equality; there is actually a growing degree of inequality, albeit not quite at the level of some other societies. It is also not a mainly individualist attitude; while such an individualist-egalitarian attitude is present, it is common to observe rather hierarchical cooperative networks where leaders lead and followers support them rather uncritically. It is also not clearly distinguishable along the egalitarianism of opportunity vs. that of outcome. Instead, this somewhat latent attitude is

amorphous, existing at very different levels and sites, and manifested in the playing out of the phenomena of social fragmentation and informal-formal governance. This attitude seems to lie behind across-the-board claims people make for jobs, education, awards⁸³, and ranks⁸⁴, for recognition of one of their own, for appointments of their own to positions that ‘others have got’. This egalitarianism attends political processes more specifically, such as starting an own political party by hundreds of politicians instead of joining together, or for over eighty persons to self-nominate or be nominated by their communities to run for the country’s presidency (in 2011), or for the notable absence of any case when a politician would praise one of their colleagues as particularly good and deserving of praise. Egalitarianism is also seen among communities, where each ‘tribe’ or region, or the northern and southern halves of the country, claims an equal share of any national-level common good, the most important of which being positions in state power.

Exploring the origins and working of this phenomenon would be a fascinating subject for a separate research. It may only be suggested here that it is probably not a recent thing. Old Kyrgyz epic tales, from the world’s longest orally transmitted tale of Hero Manas to more junior ones, are filled with episodes that elicit egalitarian mores, from shared authority, to contestation of leadership, to factionalism in war strategies, to women-heroines often standing up against and standing alongside men-heroines. The historical novel *The Broken Sword* by the late Tologon Kassymbekov, one of the better

⁸³ There is an interesting institution of state awards and recognition that remains from the Soviet system and has spread so widely as to become meaningless. Thus, handing out of state awards such as ‘Distinguished Professional’ (*otlichnik*) of education, culture, medicine, science, law enforcement, and so on, or ‘Recognized Leader, or Worker’ (*zasluzhennyi deyatel*’, or *rabotnik*) of the same spheres, or of metallurgy, or sports, or agriculture, and so on, was one of the most visible work activity of ex-President Roza Otunbaeva. While excellence may deserve praise, decisions about such awards have become a matter of undisguised bargains and demands, and few people remain unawarded by state in some way or another.

⁸⁴ There is a ‘true-joke’ in Kyrgyzstan that by the number of generals (military rank) per capita, ‘we are number one in the world’.

works of modern Kyrgyz literature, is a rich showcase of such egalitarian – and mostly problematic – attitude, as it tells the story of the Kyrgyz under the Kokand Khanate up until the annexation of the region by imperial Russia. The culture of nomadic and semi-nomadic life depicted in all this folk and modern literature, when the Kyrgyz lived in small, kin-based groups obeying no real higher authority, must have some bearing on contemporary outlooks, not unlike Eckstein's suggestion of Viking cultural continuity in contemporary Norwegian culture. The experience under the Soviet culture, with its cornerstone ideology of egalitarianism, which manifested itself in widespread hypocrisy and pretense, should certainly have entrenched this attitude further, if only in even more problematic ways. Thus, egalitarianism *a la* Kyrgyz is certainly not a clear blessing, if at all; it is a complex and 'unbridled' variety that now manifests itself in the phenomena of fragmentation and informal-formal institutions.

These three general attributes of contemporary Kyrgyz society make up some of the main conditions facing a constitutional project. High social fragmentation is an important contextual category, representing in its multidimensional makeup the human material that stands to be constituted into a common project. It suggests the presence of a potential for pluralism, even though that is only a potential so far hidden in many layers of divisiveness. The fusion of informal and formal institutions in the actual governance is especially directed to the question of civic capabilities. In the wide variety of such institutions, including resolutely criminal institutions in its most problematic parts, it is difficult to see much positive potential, looking as it does rather more dominated by capabilities for deceiving, obstructing, and short-sighted competition. But as suggested above, underneath this unpleasant thicket, there seems to be present some real potential

of capabilities for self-governance, for social networking and cooperation. The attitude of egalitarianism, in its turn, seems to be directed – more than anything else – at potential normative orientations. It, too, is generally a problematic phenomenon, one that seems to lead to states of denial and to refusal of recognition to others, one that encourages envy and unfounded claims of entitlement. However, as a potentially transformable phenomenon, it may be hiding some weak beginnings of an orientation to shared goods, as well as a culture of vigilance, opposition to domination, and maybe even, given the close link of egalitarianism to an idea of balance, a potential for a moderate culture. In a word, then, the Kyrgyz society has not been ‘a system of fair cooperation’ of John Rawls, but neither has it entered the Hobbesian state of ‘war of all against all’. If human society is a dynamic, changeable bunch, it may as well have chances of moving farther from the latter and closer to the former.

To avert misreading, the point here is not to draw clear-cut and necessary linkages between the particular conditions of the Kyrgyz society and some particular elements in the idea of pragmatic republicanism. Such linkages are not guaranteed, and if they materialize, they would appear in ways very far from clear-cut and discrete. Rather, the more important point here is to propose to see these obviously problematic phenomena, in line with Karol Soltan’s call, not as prohibitive “*causal determinants but [as] impediments*” capable of being transformed through imaginative constitutional engagement, (Soltan 2011: 117; italics added).

A thirst for ‘res publica’

What is missing in Kyrgyzstan’s constitutional project, given these general socio-political conditions, is an idea of *res publica*. That is, what obtains is a non-constitutional,

unconstructive kind of *modus vivendi*, a mode of life lacking a uniting political vision, or a sense of a common project. Transforming the three currently problematic general social characteristics into positive, enabling capabilities for constitution of a good polity requires an accepted, practical vision of such a polity.

In this regard, Johan Engvall points to a very relevant problem in discussing Askar Akaev's presidency, especially early on. He suggests that underneath the radical and widespread institutional and economic reforms, the question of state-building went missing (Engvall 2011b: 27). What he means by state-building is not fully clear, although one can imagine it to be about constitution in some sense.⁸⁵ Unfortunately, he does not sustain that discussion to some conclusive, clear statement, letting his attention get diverted to – and end with – the themes of clientelism and corruption. Still, in the limited discussion that he opens up, in his critical remarks about the error of applying modern Weberian-style state criteria to a case like Kyrgyzstan, and in his suggestion that a better understanding of such cases requires a closer (and open-minded) 'listening' rather than speaking (from preset conceptions), there is a call for a different, more nuanced understanding of constitutional development. In a comparable argument, John Heathershaw takes issue with the idea of 'state failure', offering a well-thought set of problems involved in this concept, and indicating the nuanced ways in which the state of Tajikistan, thought to have been 'on the road to failure'⁸⁶, has exhibited both a degree of robustness and peculiar ways of mal-governance (Heathershaw 2011). Engvall's

⁸⁵ "[T]he functioning of the most basic components of the state" is his explanatory line, and not very precise, p. 27.

⁸⁶ A 2009 country report, "Tajikistan: On the Road to Failure", by the International Crisis Group was the immediate occasion for Heathershaw's critical article (2011). See: <http://www.crisisgroup.org/en/regions/asia/central-asia/tajikistan/162-tajikistan-on-the-road-to-failure.aspx>

somewhat similar conceptual criticism seems to be belied by the title of his work, “Flirting with State Failure” (Engvall 2011b).

In that vein, Kyrgyzstan’s problem of the missing common political vision needs to be understood in its nuances. It is not a matter that could have been resolved by simple declarations. The constitution of the country, in all its versions, declares a rich set of political visionary commitments, from democratic government, to sanctity of human and citizen rights, to preservation of cultural and historic values, to upholding ethnic, religious and other manners of diversity, to securing a ‘social state’ that promises decent conditions of life to all. Moreover, some of these commitments, such as the idea of a ‘social state’ in drafting the first independent constitution of 1993 (see Anderson 1999) and the concept of ‘secular state’ in one of the later drafting occasions, were adopted through lively debates. But as it often happens with such declarations – as in constitutional preambles, for example – they failed to command any sustained attention and heeding in later public life.

If Engvall meant ‘nation-building’ or development of certain unifying cultural outlooks when he speaks of ‘state-building’, critiquing Akaev presidency for ignoring it, such a charge would not be entirely true. Two broad ideas of relevance in this respect were promoted by Akaev. One was the idea of ‘Kyrgyzstan – Our common house’, launched early on in his period, aiming at promoting inter-ethnic peace and tolerance, especially salient in the aftermath of 1990 Kyrgyz-Uzbek conflict but also encouraged by processes of mass emigration of Russians and other ‘non-titular’ groups from the country in the wake of independence, spurred on by awakened rhetoric of Kyrgyz nationalism,

especially activated around the question of language.⁸⁷ The other idea was that of celebrating the Manas epic as the highest cultural achievement of the Kyrgyz, practically turning it into a depositary of everything about the nation, from its history, to culture, to identity, to – ultimately – its state ideology. The high point of this project was the celebration of the 1000th anniversary (of birth or death, or of composition of the epic – not known) of Manas in 1995 – historically, of course, a date of questionable truth but one that was aimed more to assert the age of the tale, thereby implying the long history of the Kyrgyz.

Some other similar projects, although less sustained and ambitious, were launched during his presidency, all aimed at generating ideas and feelings of unity, national identity and pride.⁸⁸ Some of these were apparently at odds: ‘Kyrgyzstan – our common house’, aiming at ethnic inclusion, seemed to conflict with projects centered on the Kyrgyz. But more than anything, and certainly more than these seeming contradictions, the reason for failure of all these initiatives to take hold on the imaginations and civic senses of Kyrgyzstanis was rather banal: they remained mere declarations, surreal festivals, and not credible against the backdrop of the actual life of the people. Thus, the celebrations of 2100 years of Kyrgyz statehood – prompted by discovery of a mention of probable Kyrgyz polity by an ancient Chinese historian – were empty sound in a situation

⁸⁷ The language issues still remains a point of painful contention. By the time of Soviet collapse, it was revealed that Kyrgyz language was a distant second to Russian, neglected in education, sciences, and media. Ethnically non-Kyrgyz peoples almost never spoke it, and a large percentage of ethnic Kyrgyz also did not. Against this background, more nationalistic groups saw the continued prevalence of Russian in many spheres of life as irresponsible and humiliating. More recently, within advocacy of spreading Kyrgyz language, some groups have been vocal in their opposition to use of Uzbek (such as offering SAT-like tests in that language). For Uzbeks, granting their language a constitutionally recognized ‘official status’ has been one key political demands.

⁸⁸ Those include celebrations of 2100 years of Kyrgyz statehood in 2001, 3000 years of the city of Osh in 2002, anniversaries of numerous less famous (often previously not known) old Kyrgyz national and tribal heroes – many of the latter, of course, being heroes only for some, and traitors and backstabbers for many others.

where the state was weak, poor, and subject to vivid encroachments on its sovereignty by external powers. Similarly, celebrations of the 1000th anniversary of Manas did not resonate widely with a people who were mostly ignorant of the story, many not having read any of it, and – again – it being a story of greatness of an historic people that bore little relation to the same people now suffering and undignified. ‘Kyrgyzstan – our common house’ was soon mocked by nationalist opposition as Akaev’s invitation for non-Kyrgyz to rule the country, and the institution that it generated – the Assembly of the Peoples of Kyrgyzstan – became a weak, un-authoritative mouthpiece for the government when needed.

In the period since the ‘Tulip Revolution’ of 2005, no comparable major ideological projects were undertaken. There have been a few projects of a different sort, albeit poorly conceived – celebrations of contemporary topics, such as the 2005 revolution itself (marking 24th of March a national holiday and non-working day), the introduction of parliamentary democracy (although that would be, strictly speaking, a misnomer so far), and the fact of people’s refusal to be dominated by dictators now proven twice – possibly the one topic in best position to carry the day, but overwhelmingly marred by that ‘popular refusal’ soon turning into unruly anarchy, maraudery, and divisiveness.

Thus, Kyrgyzstan stands in need of a common political idea. That is not to say that a full-blown theory of a good state is wanted, or an even better, detailed and aspirational Constitution is to be adopted. But some general idea of a good state that everyone wants, something like the generic sketch of a good polity proposed in Chapter 4, is in need of being articulated and broadly accepted. This is to say that the people of this country lack a sense of being engaged in a common work, for a purpose shared by them all, and such a

sense is necessary for them to be oriented toward constitutionally sustainable, productive objectives. Articulation and acceptance of such a common vision will need to be done very differently from, say, a polite conference where someone makes a presentation and everyone in audience applauds and unanimously votes in its favor. That common vision will need to arise from the midst of the actual life of the public. How to make that happen is the question now posed. What follows is an attempt to propose some practical, concrete activities that are realistic and would be clearly contributive to such a project.

Toward transformative practices: constitutional crafting

To begin, there is some good news, even if not resoundingly strong. The people of Kyrgyzstan in general do want democracy. That is what the outcomes of a recent opinion poll show: to the question of whether they thought Kyrgyzstan needed democracy, almost 80% of respondents replied positively.⁸⁹ It is not a consensus of 100%, but most likely among the 20% there are many who have come to view democracy as synonymous with anarchy and ‘no limits’ (*bespredel*) based on what they have seen recently in the country. Such disenchanted people, it is credible to suppose, would quite probably want to have a functional democracy in the country. Besides the polls, the two occasions of revolution also suggest something quite positive: that people in Kyrgyzstan do not like tyranny and are capable of standing up against it once it hits a certain level. That is, one may safely assume that for this society the desirable polity would have to be a democratic state that secures their freedom from oppression and kleptocracy. The problem so far has been their

⁸⁹ *Kyrgyzstan National Opinion Poll*, commissioned by the International Republican Institute (USA), February 2012.

not taking this objective seriously, acting upon it in concert over sustained periods, and maintaining a regime of self-governance amongst them that does not fall into self-destructiveness. In other words, this society is in need of uniting behind a common and general political objective, of becoming an actual *body politic* from its present condition of an unstable multiplicity of antagonistic and weakly cooperative relations. This is a task of political constitution *par excellence*.

One way to imagine the task at hand is to think of the need to transform the normative thrust of the three general social conditions in Kyrgyzstan that have been specified above. That is, transforming social fragmentation from its prevailing thrust of divisiveness into one that embodies a constitutional pluralism; transforming the informal-institutional fusion from being a word for corruption and subversion into an idea for civic creative capabilities and resourcefulness; and transforming the egalitarian attitude that now means mutual denials of recognition, envy and narrow-mindedness, into an attitude guided by common purposes, vigilance against power abuse and of recognition of the role of all as co-creators in the common project, the *res publica*. This is very clearly a position that views problems such as these three not as conclusive ‘causal determinants’ of fateful social outcomes, but as ‘impediments’ that can be overcome or changed by imaginative and practical engagement, (Soltan 2011). This view, in turn, makes the task – or predicament – at hand one that calls for a ‘civic studies’ approach: an approach to the question of constitution oriented to the potentialities of desirable change and to citizens’ possible role in effecting such change. This is the perspective of a co-

creator, a ‘designer’s perspective’ (Soltan 1993a), or – as preferred presently – the perspective of crafting.

To remind, the perspective of constitutional crafting stresses certain conditions and suppositions: the importance of taking the context seriously, the need to proceed from what is present to what is realistically possible, the understanding of social dynamism as opposed to static views, and the disciplining condition of continuity. That means understanding that any social change is carried out by and with extant civic capabilities, where the effecting of change in turn must create still higher, stronger levels of capabilities to sustain the change.

In the present case, that is to say that the project of transforming the constitutionally problematic conditions of fragmentation, informal-formal fusion and egalitarianism into good ones needs to be imagined and carried out from within Kyrgyzstan’s social context that contains them. Within that social context, there are those who are to imagine and carry out those transformations of the problems into constitutionally conducive processes. The impetus, the want of positive changes, will need to come from the public as a whole. The leadership in envisioning and actualizing those changes will come from various social leaders and activists: those in the relatively vibrant ‘civil society’ associations, leaders of some of the political parties, various public figures with renown and intellectual clout, the socially active leaders of the private sector, and some people among the political leadership. They all will need to be helped by those intellectuals and academics who make understanding political life and its reform their occupation. There are, today, people fitting all of the above descriptions – people possessing the initial capabilities to launch a different constitutional story of Kyrgyzstan. What specific

activities and projects could these people imagine and realize? Some such activities are suggested under the following three headings.

From divisiveness to a pluralist social culture

The multidimensional condition of social fragmentation in Kyrgyzstan is a ‘fact’ but it is a lived, continuous fact that need not remain constant. Contrary to the implications of much scholarship, which highlight a competing variety of divisions as ‘causal determinants’ from a spectator’s perspective, there is no basis to claim that these divisions are permanently subversive and counter constitutional development. It is thinkable, and necessary to think, that the fact of high fragmentation is capable of changing into a positive condition. What this amounts to is exchanging the perspective of fatalism to that of possibilism. In their popular work *Getting to Yes*, Fisher and Uri diagnose some reasons for situations of protracted failures to agree, scenarios of zero-sum interactions (Fisher and Uri 2001). One of their advices is to approach bargain situations not from ‘positions’ but from ‘interests’, and to consider what configurations of agreement are capable of advancing a party’s interests, (ibid: Ch 4). It stands to be objected that ‘positions’, too, need not be viewed as constant and therefore preclusive of agreement; however it is their broader invitation to think of more possibilistic strategies that is of the greatest import. As idealistic as the slogan ‘*e pluribus unum*’ may sound, it is not necessary for it to remain a utopia. A number of concrete projects are possible to breathe life to this changed, possibilistic perspective in face of Kyrgyzstan’s social fragmentation.

One very obvious thing in this regard is the need for much greater interaction of citizens across the country. The deeper-seated lines of cleavage, such as the North-South

divide and the tribal-regional lines are there in large part due to very limited physical interaction, not least because of lacking communications infrastructure until very recently across the formidable mountain ranges that divide the country horizontally into two halves. Given the recent positive changes in both infrastructure and economic life in general, a much higher level of mixing of citizens around the whole country is very apposite. This could include a wide variety of programs, from semester-long high school students and teachers exchanges, to shorter-term work experience exchange among professionals, farmers, to conference-style mixing events for larger groups of ordinary community members. Importantly, such a program would need to focus outside of the capital city, which is a mixing place by itself but very impersonal, and outside the hotels of lake Issyk-Kul, which has also become an impersonal conferencing routine. Exchanges among smaller urban and regional centers have been very rare, and that is where more genuine meeting of differences will be seen.

A related and necessary facet of healing the divisiveness is design and implementation of special educational programs, especially at the high school level, but not to be only limited to there. Because high schools are located throughout the country and in rural, naturally more parochial communities, they stand to benefit from such curricula the most. An added possibility at such high school level education is involvement of parents and families. Such a special curriculum would be centered on learning the country, the larger society of fellow citizens and communities, and appreciation of the diversity contained in it. Such programs are generally absent today, and the somewhat related discipline of 'Man and Society' (*Chelovek I Obschestvo*) is a

dry course, based on outdated materials, mostly about public law. There is a rich and exciting array of themes and methods available for the proposed new program.

On the topic of education more generally, a project of critical reevaluation of the society's Soviet experience remains still on the agenda. Until now, every time the topic is raised, it has shown serious differences of opinion and general refusal to engage beyond one's preconceived views. But as the older generation emotionally invested in the Soviet experience gradually exits the center stage, and a younger generation with little or no knowledge of that history comes to dominate, this extremely important formative age in the country's history has the potential to introduce a common theme for all – not for unanimous agreement, but for critical reflection from diverse perspectives. In particular, examination of the Soviet experience can provide a wealth of more historically situated, constructed backgrounds to the social diversity that is too often thought of as static and age-old enmities and incompatibilities.

While a reevaluation of the Soviet experience can be an exercise of somewhat distant and mostly depersonalized memory, there are several more recent and more painful experiences that Kyrgyzstani society has on its agenda, such as the two biggest Kyrgyz-Uzbek ethnic clashes in the city of Osh and its surroundings, in 1990 and in 2010.⁹⁰ The preferred approach of the government on the former instance, now being repeated after the second, has been to keep silence, not to discuss, and instead – with a good degree of disingenuous effort – to speak only of the bright sides and happy futures. The suppressed memories of losses and hurt, unresolved and unaccepted differences put on hold, have failed to magically disappear. Animosity, or at best always guarded

⁹⁰ On re-evaluating both the Soviet and the post-Soviet histories, or “pasts”, the idea here is that of “judging the past” or “coming to terms with the past”, referred as *Vergangenheitsbewältigung* in German. See, generally, Habermas (1988), James McAdams (2001); Tismaneanu (2009).

rapprochement, between the two sides has persisted. Kyrgyzstanis will need to face these experiences, to acknowledge the tragedies, and come to terms on which common life between the two communities can pick up on the basis of mutual respect and recognition. There are many ways and themes on which such a process of atonement may proceed, and it will have to be a work of sustained deliberation and reflection. Some stories of personal and family experiences, of members of one community helping and defending members of the other, of members of one side standing up in criticism of their own fellow members, have now and then appeared and never widely noted. Such stories are certain to be a cornerstone of any constructive ‘coming to terms’.

These are only a few proposals for crafting a sustainable pluralistic society: they are concrete and practical, specifically arising out of the current life and condition of the society. To date, such activities have been neglected, either for being too costly, for lacking support, for being sensitive issues, but more generally, simply for not having been given a thought. What such activities – and more of them are possible to imagine – promise is to provide opportunities for members of the larger Kyrgyzstani society to learn about their many communities, to understand and recognize their differences, and acquire abilities to communicate across differences on sincere and respectful terms. In the language of ‘constitutional aspects’ of pragmatic republicanism, these activities are oriented to engendering a culture of moderation, of guarding against immoderation and intolerance, and also to people’s identification and pursuit of common, shared goods.

From corrupt practices to institutional creativity

The project of transforming the negative, counter-productive manifestations of so-called informal institutions into positive, constructive practices, of grasping the possible

and benign continuities between formal and informal institutions is not easy. Informal institutions is an extremely broad category, from rather positive traditions of community self-governance and sources of moderate authority to more negative practices of nepotism, corruption, and, ultimately, criminal schemes. In considering the possibilities of positive transformation of the formal-informal nexus, it is not necessary to view the latter variety – objectively criminal practices – as candidates for betterment. The project of such transformation, instead, will have to directly target such negative phenomena, build civic capacity for opposing them, and thus, provide a strong citizen support for the legal means of countering them. Therefore, this project will need to be especially oriented toward developing a culture of vigilance, of alertness to abuses of power and office. In the process of such development, the formal-informal nexus itself, whenever the two sides of it mesh together positively, can evolve into *sui generis* relations of effective governance. Again, a number of specific themes and activities can be proposed.

One important and most immediately possible avenue for exploration is community involvement in local self-governance. Kyrgyzstan is still mostly a rural society (~60%), and even the urban centers outside of the capital city and a few larger towns are mostly rather close-knit, familiar communities. A package of administrative reforms now under way is directed to further empowering institutions of local governance, giving them greater leeway in managing their revenues, granting more authority in resolving local economic issues such as land distribution and rights, and cutting the layers of concentric subordination that have so far made accountability a difficult issue. The city mayors' offices and village government offices (*ayil okmotu*) are administrative units covering an average of 5,000 to 10,000 (some are smaller or larger than this range) citizens. The

citizens in these units have real ability to engage in direct participation, and with family respect and reputation of governors and other office-holders directly involved, they have the capacity to enforce genuine accountability. What is needed is creating more chances for direct citizen participation, be it through public budget hearings, special open sessions of local councils, deliberation sessions on particular issues of local salience, and so on. Such engagement is capable both of directly affecting the quality of local governance and of being a training ground for community activists and citizens at large for higher level participation and vigilance.

Participation of citizens at the higher, and especially national, level is certainly not possible in a direct format, and will require an effective system of representation. A practical development in this regard that is possible, and quite likely to appear soon, is a reform of national representation system. The present system of parliamentary elections is 100% proportional based on a single nation-wide electoral district. That is, each political party runs with a list of its proposed candidates throughout the country, and to be represented, must win at least 5% of vote nationwide and at least 0.5% of vote in each of nine territorial units (two cities and seven provinces). The nine units being much larger than the local self-government units, there is very weak incentive for parties to put up a cast of candidates that is locally representative. As a result, people end up voting based on the most famous candidates at the top of a party list, and with little hope that such candidates will ever come to meet them once elected. Once in parliament, the winning parties form each their own caucuses and speak – generally – in one party voice. Thus, communities vote and elect representatives who have little incentive to actually represent their views and concerns once in the parliament.

What seems to be developing, based on anecdotal evidence, is a move by parties toward recruiting locally known, representative leaders to their ranks, in the hopes of securing more local-level support and votes. While the move is good for party strategy, it is also capable of correcting the previous representation creep. Such a development would be a middle-course between the country's rather impersonal current practice and the much more personal systems found in the United States and Britain. Besides improving representation, this process is also likely to improve parties which so far have been one of the weakest, least stable links in the political life of the country.

There is yet another weak development under way, in danger of being rendered another formality. It is the institution of *kurultai* – a nascent tradition of popular deliberation, much like the *jirgas* and *shuras* of Afghanistan. The formalization danger comes from advocacy by some groups to recognize *kurultais* by a formal law, and especially, to give it constitutional recognition and powers. If that were to happen, this institution would quickly turn into another site of narrowly political abuse, aimed at exerting pressure on elected organs by factions that were not elected, as has been occasionally happening. The potential of *kurultai* for positive constitutional impact is highest if it remains an informal consultative forum, an institution of people meeting and deliberating on issues (or sets of issues) of enough importance to call a *kurultai* together. The effect of *kurultai* on immediate policies and behavior of government need not be the primary objective; it should remain a venue for expressing the consulted, considered opinions of people on relevant issues, and should be held at various levels, from villages to country-wide. That way, its greater benefit would be in forging (or resurrecting from old times) a tradition of civic mind-sharing, one that excludes intolerance or disrespect

and instead encourages moderation, listening, and reason-giving. This would be a potent avenue to meshing formal and informal civic consultation that is constitutionally productive in a broad sense.

Besides the activities concerned more explicitly with public governance issues, there is one more very important area for exploration. This is the community-business relationship. One of the worst sufferers from the negative informalities, from the culture of bribes, foul play, and nepotism, is the legitimate private business sector. With their property insecure, market subject to artificial monopolies and other manipulation, tax and regulatory system obscure and open to infinite abuse, and all this in a small economy where any business success is soon spotted by predators, private business has rarely breathed freely. A project of fostering stronger community-business relationship can be in direct interest of both sides, and open the way to appreciation and protection of good business by the citizenry. Many concrete activities can be envisioned, from celebrating the best entrepreneurs and companies, to regular reporting of business achievements and performance, to funding (and actual participation in) community development projects by businesses, and more. At present, there is almost no awareness or any opinion among ordinary citizens, especially in rural areas, about businesses. A project in this regard is capable of introducing immense positive change in the political-economic climate of Kyrgyzstan, regarding not only the place of private business in society, but more broadly about property, market, and economy for a better polity.⁹¹

Better community-business interaction, the *kurultai*, the improved system of national representation, the better formed political parties, and the stronger citizen

⁹¹ See a brilliant critical discussion of the ignored place of property in recent 'civic republican' political theory of democracy in Erik Olsen, *Civic Republicanism and the Properties of Democracy* (2006).

participation in local governance, are some of the possible ways of engendering a climate of political transparency; their effects are compatible and complementary. Transparency is a key missing ingredient in Kyrgyzstan's governance, and its lack is the best condition for proliferation of negative informalities. With greater transparency comes greater capability among citizens for demanding accountability, and when necessary, for challenging transgressors and even punishing them. When transparency is in deficit, a coordination model such as Weinstein's is destined to be meaningless.

From self-centered egalitarianism to recognition of common membership

The third aspect of Kyrgyzstan's constitutional woes is the peculiar attitude of egalitarianism. As observed above, it is a probable basis of a wide variety of social ills, collectively leading to lack of a sense of sharing a common project. One of the main negative meanings of the concept of '*kyrgyzchylyk*' ("Kyrgyz-ness", or "Kyrgyz way of doing/being") is this egalitarianism: its factor as an obstacle to recognition of others' achievements, to respecting others' interests and arguments, and to cooperation with one's others, (e.g., Imanaliev 2009). Egalitarianism as a general concept is not a negative idea, but quite to the contrary, a key necessity for viability of democracy itself. The task here is to transform the presently mostly counter-productive, counter-constitutional civic attitude into one that can positively contribute to and support a common constitutional project. In other words, through this transformative project, constitutional crafting would aim at aligning the citizenry toward pursuit of shared, common goods and interests. It would, of course, also be majorly relevant to orienting civic capabilities toward a culture of vigilance and a culture of moderation.

One practical proposal, possibly somewhat strange, is about writing a public story of the country's national flag. Of late, in a society that seems to have an allergy for anything long-standing, even this object has become a point of dispute and calls for replacement. The flag is in fact rich with positive interpretive meaning, and is fit for serving as the most vivid symbol of a common constitutional project that unites the diversity of Kyrgyzstan, that makes '*e pluribus unum*'. So, a crafting project in this case may be one of defending and arguing the power of this symbol.



The flag is a red canvass, and originally the color was chosen because in the text of the aforementioned *Manas* epic, the color of Hero Manas's flag was red. More contextually, however, the color appealed in part because it was continuous (familiar) with the Soviet flag, both of the union and of the republic, and in part because an alternative design that featured blue as the dominant hue was objected by southerners because for them it is the color of mourning. Regardless of the story of this choice, and without abandoning the link with Manas – which, as mentioned above, does not excite a universal allegiance due to lack of familiarity – it is possible to argue for still stronger and evocative meanings of the red. It can be the symbol of people's hard, blood-won legacy, the color of more recent trials of its freedom, as well as the symbol of continuity

with Soviet as well as pre-Soviet (Manas) history – something that a people cannot erase but only carry into better futures.

At the center of the flag, there is a golden (not yellow) sun with stylized ‘*tunduk*’ (sun/light inlet and smoke outlet of a yurt, the traditional Kyrgyz house) at its heart. From old times, *tunduk* has been a symbol of love of life – as long as it is open, it means the yurt has life in it, if smoke comes out of it, it means its occupants are warm and fed, and if sunlight is entering the yurt, there is light in life. The forty rays of sun around the circle represent the forty tribes that make up the Kyrgyz nation. The number is not exactly proven (the principle of counting the multi-layered tribes is never quite established), and its meaning is, of course, exclusive of the non-Kyrgyz. A better interpretation would be that these many rays represent all the various groups – tribes, ethnic groups, regions, religious groups – living in this country. All these groups are joined together in the common center of life, common project of securing and keeping good, bright life in the country. For some reason, such imaginative interpretations of the flag have lacked, and its symbolic potential has never been seriously tapped. A project of spreading and highlighting this symbolism is very realistic, and is capable of infusing some level of belonging in a common project among all citizens.

To go on with crafting through symbolic activities, a potentially very interesting project would be the writing and adoption of personal civic statements, or call it constitutions, by all citizens. These statements would have to include a number of sections, such as the author’s ambitions, regard for one’s family, the place of relatives and local community in one’s life, and the vision of the author for their country. With such channeling, a citizen-author would be induced to think directly and responsibly

about the society in which one lives, and about the bonds one has to the society. Further 'required' sections may include an accounting of what the person's contribution would be to the welfare of family, community, and country. Another section may include the person's expectations from the society. What makes such an exercise interesting is that each person would be reflecting and writing from their own personal position, from the basis of their knowledge and understandings; that would be very different from having someone else, such as John Rawls, imagine their life for them.

In working on such personal civic statements, the authors would be induced to face the question of responsibility. A good citizen of a good society is a responsible one; she acts with an accounting for likely consequences of her actions, and acts with awareness that any other fellow citizen may act likewise, and therefore, acts well. On a related note, Karol Soltan recalls Vaclav Havel's notion of 'responsibility for the world', which seems somewhat not fully clear (Soltan 2011: 104). But a little earlier, Jean-Paul Sartre – not as impeccable a person as Havel, but a grand intellectual of the twentieth century – wrote in a similar vein about a person's responsibility before the world for every action and decision one takes, (Sartre 2001). In the [anti-essentialist] existentialism of life, what people do and how they act is all there is that makes a society – and if society is to be good and likeable, then each of its members must act in a manner that, if reproduced by all others, would produce that good and likeable social order. That is the meaning of existential sense of responsibility before the world. The relevance of Sartre's idea is underscored by another of his writings, *The Anti-Semite and Jew* (Sartre 1976). There, in a polemic about the anatomy of French anti-Semitism, he depicts the anxieties, envies, and unfounded jealousies of lower middle-class French who found escape from their

unfortunate social status in vilifying the Jew. This story is quite reminiscent of the recognition-averse, envious egalitarianism that is observable in Kyrgyzstan, where anti-Semitism per se may not be notable because there are not many Jews.⁹²

It is quite possible – especially in the possibilistic perspective of crafting – that the exercise of writing one’s civic statement is capable of awakening that sense of broader responsibility, the responsibility contained in the question “what would it be if everyone acted as I do?” There are many ways of organizing or targeting such a project. It could be done with all adult citizens who cared for it, could be done with just college students, or include grade school students for a simplified version of it. The subsequent use of such ‘personal constitutions’ can also be imagined in a variety of different ways. The worst thing that can happen is that most people would not do it, and those who do it would forget about it the next day. But there can be some thousands who take it seriously, and now and then return to it.

The family was mentioned here, and this is an important institution in its own right. For constitutional crafting in Kyrgyzstan, family deserves the most pointed attention both because it is traditionally one of the strongest organizing institutions in the society, and because recently, this institution has also been weakening. The Kyrgyz society, excepting some parts of the urban society, is very much family-centered and family-oriented; individualism in this society is very weak compared to Western societies. What family does is discipline a person’s moderation, develop her other-regarding attitudes such as caring, and makes her more careful in view of any possible consequences of her actions

⁹² But on occasion, when certain persons of Jewish identity could be pointed out as culprits, anti-Semitic rhetoric has been quick to rise, and lacking the awareness of the stigma that such rhetoric now has around the world, such occasional bursts are generally allowed to enter the media without scorn. Recently, such rhetoric was observed when the son of the second runaway president, Maxim, was found to have dealt with several people of Jewish identity in his corruption schemes.

for the family. In an environment of economic hardship on the one hand and of Western pop-cultural influence on the other, the strength of family has been steadily waning. Constitutional crafting must make the family a pivotal theme of its focus, and promote civic valuation of it as central to the strength of good constitution.

Another traditional institution that is highly attractive for constitutional crafting is that of '*ashar*' (collective work). *Ashar* is very akin to Harry Boyte's idea of 'public work' (e.g. 2001) – engagement of members of a community in common projects – and is therefore capable of being tapped into without being an alien idea by 'some American'. Usually *ashar* means very concrete activities: residents of a village will come to *ashar* to build a house for one of them, women-neighbors will help finish the carpet of one of them by *ashar*, the youth of neighboring houses will come for *ashar* to prepare wood and food at a house that is preparing to host a large event such as a wedding. But the concept has been already picked up in the name of a political party, which has now become extinct. It was the party of squatter settlers, young and mostly unemployed people who migrated to outskirts of Bishkek in search of better livelihood, illegally seized land plots and built themselves mud houses (by method of *ashar*, hence the name of the party), and when pushed around by authorities, organized into a party to defend their interests and make demands on government.

The concept is pregnant with great potential for constitutional crafting. The literal meaning of the concept is precisely what is lacking in the country's civic life: common purpose, common interest, common work. There are infinitely many concrete projects thinkable under the rubric of constitutional *ashar*. One such concretization, albeit a symbolic one, might be mentioned: spreading the narrative of all citizens in their

everyday productive lives being involved in the greatest of *ashars* of all – the building of a country. Rarely does a person think in such terms when they do publicly relevant activities; their public relevance is not so readily vivid. But every instance of ‘doing the right thing’, such as caring for someone, doing one’s work better than expected, even keeping one’s own house repaired and clean, are the small things that contribute to a bigger thing – and when a person is aware of this, it is likely that she will be encouraged to do more, feel more dignified, and have a sense of belonging in a larger project.

Through these and many other thinkable avenues of crafting a better egalitarianism, the society is capable ever so slowly to identify with a constitutional project as both its authors and beneficiaries. Ever so gradually, the extant, unhealthy egalitarianism of zero-sum perceptions can give way to what might be called a ‘value-added’ egalitarianism: the understanding that all the diverse members of the society, including oneself and one’s communities, are adding some positive value to the common project, to *res publica*. It need not, and even should not, be some singular and concrete goal that occupies the imaginations of all citizens and groups. It is sufficient that all citizens agree on some more general shared goods, such as democratic governance, absence of coercion, stability of government and laws, opportunities to work and excel without having to engage in corruption. All of these together can make up that realistic ideal that bonds the society together and orients it to collective strivings.

By way of conclusion

Kyrgyzstan’s constitutional story so far can be described as one of a malaise, a persisting condition of sickness, or more plainly, one of stable instability. It is easy to be

overtaken by the magnitude and multitude of problems that make up the amalgam of Kyrgyzstan's problems and to fail to see anything constitutional in it. However, at every level of the country's political activity – from presidential politics down to village-level mobilization – the question of constitution, and especially the idea of 'constitutional reform', has been all too persistent in people's thinking. 'Constitutional reform' has been the constant but little-understood vague response of the government, the opposition, and the ordinary people in the civil society to the thicket of socio-economic-political problems facing the country. The concretization of constitutional reform has, then, all too often been too concrete: remaking of the country's written Constitution, rewriting the authorities of the several governmental branches, redesigning their structure, and then doing all of that yet again and again. These superficial constitutional reforms have been symptomatic of what some of the mainstream constitutional scholarship and policy circles have advocated.

The more real arena for *possible* constitutional development has been elsewhere, in the midst of the thicket of problems. While the Kyrgyzstani public, from ordinary citizens to high officials, were being overwhelmed by the multiplicity of concerns all competing for attention, the scholarly community studying the whole process has been occupied with *analysis* of discrete problems – taking the constitutional complex of problems into separate parts, ultimately contributing to still greater confusion and loss of a sense of the constitutional predicament. Thinking in terms of the pragmatic republican framework, it has been suggested, it is possible to bring the many threads of seemingly disparate problems together into a few constitutional themes.

At the most general level, it is suggested that a key problem that is responsible for the ‘stable instability’ is the lack of a sense of *res publica* among the citizenry. Kyrgyzstanis have lacked a clear sense of being members of a larger, common project, being instead pulled in disparate directions toward narrower group and individual interests and identities. In the language of pragmatic republicanism, this is to say that there has been little to no identification with a vision of the good polity to which Kyrgyzstan is oriented. The several elements of the good polity sketched out in this work have only weakly been realized or understood in Kyrgyzstan but envisioning of a good polity as a complete whole has been clearly lacking. Thus there have persisted a wide variety of broadly held views of where Kyrgyzstan should be going as a polity, many of those views mutually exclusive, but also few if any of those views enjoying any considerable intensity of allegiance, (see Murzakulova and Schoeberlein 2011). Reviving putative political forms from the Kyrgyz past, moving toward a more Muslim statehood, returning to a likeness of the Soviet Union in a reunification with Russia and others, and establishing a democratic state – this view being held by a stable majority – are some of the rather diverse variety of political imaginations.

This deficit of a vision of *res publica* is conceptualized in three rather broad constitutional impediments: a high-degree multidimensional social fragmentation, a widespread occurrence of institutional subversions, and a bad kind of egalitarianism. These are the basic conditions of constitution, primarily making up the relevant context, and shaping the requisite kinds of civic capabilities.

A pragmatic republican perspective takes these negative phenomena as the actual starting point, and considers where the path of constitutional development may lie.

Elaborating such a path must heed to the disciplining ontological condition of continuity – the idea that between a given bad condition and an imagined good or improved condition there is a continuum of actual, practical transformation. If a proposal for reform or improvement cannot account for that continuum, then it is obviously a very poor kind of constitutional proposal.

The proposed transformative activities for Kyrgyzstan try to comply with this expectation. For each of the three themes of transformation – fragmentation into pluralism, institutional subversions into institutional creativity, self-centered egalitarianism into sense of membership in a common project – there are several realistic activities that can be taken up to effect that transformation. Said another way, these proposals are very different from simply proposing to change social fragmentation into social pluralism without elaboration of the actual ways and processes that may produce such a change.

The problem of the lack of a sense of *res publica* in Kyrgyzstan can be mended in the process of undertaking these transformative activities. In activities that encourage generally anti-constitutional citizen capabilities and outlooks to change into ones conducive to and supportive of constitutionalism, the guiding principles are those we have called thin-normative procedural principles, or orientations. Pursuit of overlapping public goods, development and maintenance of an attitude of political vigilance, and cultivation of a culture of moderation are the guiding principles, and they are filled up with more specific, concrete content when applied to the particular problem areas in Kyrgyzstan.

All of these considerations and proposals together are what amount to constitutional crafting. The careful understanding of the existing problems as constitutional problems, an understanding of why it is so, and where the source of the problems lies, the realistic assessment of basic given conditions, and the thinking up of realistic ways in which those basic conditions may be transformed under the thin-normative procedural principles, and envisioning of a possible good polity through the activities that should change the basic conditions – all of this together is constitutional crafting.

Thus, all key elements of pragmatic republicanism are involved in the story of Kyrgyzstan. They are involved not in a mechanical, improbably neat process of check-marking the application of each individual criterion or concept, but are instead relied upon in a somewhat implicit, or rather integrated, manner in the development of the problems and prospects of Kyrgyzstan's constitutional predicament. While the concepts themselves could be explained and outlined in a neat flow, it was warned that in actual constitutional process such neatness is hardly to be met. But the importance and relevance of the different constitutional perspective – that of pragmatic republicanism – that this conceptual ensemble enables is clear and instructive. A further specific elaboration, including the best and likely key actors, the desirable kinds and sources of external support, the realistic accounts of needed resources, all the way down to engagement in practical crafting of this nuanced constitutional project, remains with the constituents of the envisioned good polity of Kyrgyzstan.

To conclude these remarks on application of pragmatic republicanism on a broader note, recall the kind of constitutional thinking that has been defended and advocated throughout this work. The many ways of constitutional crafting elaborated for

Kyrgyzstan propose ways of dealing with this society's several most widespread and fundamental problems. It invites to view these problems not as forever settled and fatalistic givens, but as practical impediments that obtain at this period in an otherwise changeable and always changing social life. Crafting directs people's energies to engagements that can enable them to overcome those impediments. It does so from a situated, contextualized position, taking its departure from the impediments as they are experienced, and thinking of engagements to which people can relate from their situated experiences. Elkin writes in a very relevant passage: "The essential problem of republican government, then, is to prevent free men and women from doing that which could destroy their own rule. There is no greater force than themselves to prevent this from happening. If there were, the people would be neither free nor sovereign, and a republican regime impossible," (2006: 5).⁹³ The point here is that constitution is the work of people, and securing a good order, maintaining it, and developing it still more, is only to come from the people themselves. Constitutional crafting, therefore, must remain always alert on this point. It must be an activity of enabling the citizenry to be all co-creators of their own polity. It must be a continuous work of developing citizens' constitutional capabilities, so that the question of coordination does not need to be left to a rational model or be tied to a formal document or a circumstantial elite treaty, always lingering in suspension. The bottom line of this chapter, beyond some critique of the latter kinds of fallacies, has been to illustrate how such a citizen-capability centered constitutional crafting may be realized.

⁹³ There seems to be an unintended contradiction here, when it is the government's problem to prevent men and women from destroying their own rule, but those men and women are the only eligible force for preventing that, and that any other force – such as a government – called to do that preventing is the end of people's freedom and sovereignty. If this is true, it is certainly unintended.

Conclusion

It cannot fail to be obvious by now how very broad-based, or even ambitious, this project is, possibly at times much too ambitious for what it could actually bite off. It is concerned with a problem of serious urgency – the question of constituting good polities – and that urgency is at least some excuse for being ambitious: a meeker approach, a less broad range of considerations, would be unfit for engaging the problem. The ambition of the work, however, is somewhat compensated by the incompleteness that pragmatic republican political constitution accommodates: in part because it could not be more complete within the scope of this dissertation, but especially because it *must* retain a principled margin of incompleteness even when the project is carried to a greater degree of specification and elaboration. The breadth of the discussion can be organized along the three main facets that Peter Levine identifies in Elinor Ostrom’s work and as descriptive also of ‘civic studies’: *facts, values, and strategies* (Levine 2011: 5). Both in its critical parts, and especially in elaborating the idea of pragmatic republicanism, this work attempts to address the problem of political constitution as comprising these three facets. In its principled incomplete elaboration of constitutionally relevant facts, values, and strategies, this has been animated by a normative bias, or rather, by a hope: a hope for the possibility of creating, maintaining, and improving good political life around the actual world, one that serves common interests of its members, opposes arbitrary applications of power, upholds social diversity, and is capable to last. In all of this, this work represents a nod toward a different kind of political science, critical of some of its mainstreams, and

possibly, one that is identifiable as a contribution to the emerging discipline of ‘civic studies’ that Levine invokes (see also Soltan 2011).⁹⁴

This work leaves much further work to be done. As noted at the beginning, this is more of a preface to a more elaborate, comprehensive, and more complete product. Thus, it remains to specify in more detail, and preferably based on concrete cases, who the supposed craftsmen and craftswomen would be, in what relationship they would stand to each other and to the state. The concept of the political may benefit from a more focused discussion vis-à-vis the quite rich literature on the subject, with a fuller critique of that literature. It will also be important – albeit opening up a vast and nearly untouched body of work – to discuss the political economy of pragmatic republicanism. These are just some of the possible tasks that subsequent work should undertake.

But some important amount of discussion, including some of the above topics, has been presented as a beginning toward a more complete and accurate political conception of the problem of constitution. The following few pages briefly recapitulate the several threads of discussion held in this work: its discussion of ‘facts, values, and strategies’ – the existing problems in grasping and dealing with them, and the remedy that political constitution as pragmatic republicanism proposes; its import vis-à-vis constitutional political science; and the hopefulness that accompanies its incompleteness.

What is the problem this work addresses?

Out of the nearly 200 countries in the world, some three quarters officially call themselves *republics* – states that define themselves as in pursuit of the good of all its

⁹⁴ See the Institute of Civic Studies *Framing Statement* authored by seven political scientists committed to ‘civic studies’, a brief and powerful statement. At: <http://activecitizen.tufts.edu/circle/summer-institute/summer-institute-of-civic-studies-framing-statement/>

members, governed by legitimate laws and ultimately answerable to the single source of sovereignty, the people as a whole. But only a small part of these countries can be recognized as genuinely adhering to these principles, without hypocritical stretching and twisting of these ideals. Almost all of the nearly 200 countries have by now adopted written Constitutions – fine documents that outline fine principles by which the countries undertake to govern themselves. Again, the greater majority of these documents can safely be assumed to be either shams or only minimally adhered. Put differently, it seems like almost all of the countries in existence know *what* makes a good society, but far fewer of them know *how* to make a good society.

The problem that lies at the heart of this work is a very practical one. As we enter the XXI century, despite all the talk about achievements of human civilization, despite all the gadgets millions carry that were unthinkable only recently, and despite the mind-boggling possibilities of communication and sharing about the civilizational achievements that those gadgets allow, there remains a vast diversity in terms of how well various peoples live around the world. What are rightfully described as constitutional polities are concentrated in north-western hemisphere, with a few ‘outliers’ thinly scattered in other regions. Yet, this is not to say that all the remaining societies are about to disappear or otherwise en route to some terminal loss. Except for very few – such as, probably, Somalia, parts of Sudan, and parts of Mali – the majority of those societies have had rather steady records of some form of governance, have been reproducing and living on. Only, those societies cannot be described as constitutional polities in a meaningful sense. Put otherwise, the peoples of those societies have not been

enjoying a decent life and have not been able to pursue the kinds of lives that they could otherwise want.

The practical problem, then, is about understanding the predicament of these steadily non-constitutional societies. This is already not a point in intellectual history to have to argue that human societies are capable of changing, that they are not ‘doomed’ to the kind of social order they happen to have at a given period. The puzzle is, if societies are capable of change, why so many societies go on putting up with the barely bearable existence that they have had for so long. That is, why they have not made the constitutional progress that they, by nature of human life, are capable of making. Understanding this puzzle means being better positioned to suggest workable ways in which that innate capability for change can be positively activated.

This is not to say that until now political science – the science in the business of understanding and explaining problems and prospects of good constitutional order – has not asked these questions or has not attempted to answer them. Rather, it is to suggest that a good part – the much larger part, really – of scholarship that has engaged these issues has done so in flawed, misleading ways. Since some of the mainstream political science problems relevant to the problem of constitution are taken up below in a separate section, it may suffice here to only note that too often its handling of the substantive problem has tended to be compromised to its pursuits of methodological rigors, generalizability and parsimony of its theoretical propositions.

As a result, what such scientific efforts have continuously overlooked is the kind of problem that good constitution presents. It is a political problem. It is political in the sense that no abstract, a priori, general solution, in the form of formulas, laws or

equations, is capable of capturing its actual working. It is political in the sense of being generated, forever, in the bosom of the very societies that require good constitution, the human societies in their multiplicity, dynamism, cognitive burdens, real and potential capabilities, and collectivity. That is, this problem is not external to the otherwise automatically well-constituted human societies, such that once it is removed, the society returns to the good normal life; it is an inherent liability of human societies. In view of such qualities, therefore, it is better described as a predicament – the kind of problem whose always tenuous solution is to be found in its own conditions. So it is not, strictly speaking, a puzzle that can be resolved by applying the power of intellect alone.

What is the remedy?

This work has attempted to face the predicament of political constitution by, first, reconsidering the scope and kind of ‘the political’ implicated in constitutional thinking, second, putting forth a particular formulation of political constitution thus reconsidered under the name of ‘pragmatic republicanism’ made up of four essential components, and third, proposing some ways of pragmatic republican constitutional crafting, applying the idea particularly to one of the steadily non-constitutionalizing societies, Kyrgyzstan.

The meaning of politics must be significantly revised and broadened, if the predicament of good constitution itself is to be properly understood. In the growing recent literature self-identified as ‘political constitutional’, there have been a number of ways in which this definitive concept has been too narrowly construed, such as implying it to be a matter reserved for elites, suggesting it to be normatively neutral, imagining it

as being in opposition to law, but the most prominent of them being the equation of politics with unceasing antagonism, or more substantively, with struggle for power. If politics is understood in these ways, then its remedies would be correspondingly narrow and ultimately incapable of grasping the constitutional predicament. Examples of such remedies, when offered at all (e.g. Mouffe doesn't seem to: 1993), have included better deliberative reasoning (Rawls 1993; Cohen 1998), better procedures more generally (Habermas 1998; 1996); various institutional measures – such as party-based competition, balance of powers, and electoral channeling (Bellamy 2007, Thomas 2004), more participation (Barber 1984; Urbinati 2010); or less participation (Pettit 2004; Huntington 1975). If politics is understood in any of the narrow ways, how any of these constitutional remedies might be an answer (except intellectual) remains generally an open question.

A more accurate understanding of politics, if only too messy and imprecise for political scientists (Salkever 1999), will need to begin from realization that constitution is a holistic project, incapable of being compartmentalized into more discrete parts, some left for lawyers, some for economists, some for public administration experts, some for sociologists, and some for political scientists, (Elkin 2010). If divided up in any such manner, the parts cannot be later put back together to produce a neat edifice like Lego bricks can. Constitution so understood is political, then, in the sense that politics concerns the whole of a polity. It is not a trivial thing that these two terms share a root: they have the same referent.

Secondly, it is unnecessarily problematic – narrow, reductionist, hopeless, and plainly not very accurate empirically – if political is understood as always about elite

struggles for power. To a degree, of course, this is true – and in that sense, it would be almost the same as saying ‘water is watery’. Certainly, elites in some sense are always leading in politics, including constitutional politics, and certainly, different ideas, interests, and abilities compete for the end of ‘authoritative allocation of values in society’. These essential properties of politics, however, are better conceived in a language that allows for changing possibilities and capabilities, for shifting make-up of those who count as elites, and for the indeterminate line that divides the elite from the non-elite. In largely avoiding the language of ‘elites’ and ‘power’ without denying the actuality of their meanings, this work has attempted to conceive constitution as a predicament – and task – of situated but open possibilities.

Hence, the next point is to situate politics, underscore its condition *in media res*. This has to encompass at least three different considerations: the midst of historical continuity within which politics is found and conducted at any given time and place; the midst of an obtaining but changeable context that gives politics at any instance its shapes and colors; and the midst of actual and potential human capabilities which ultimately are all that animate or even make up politics as such. These are to say that politics, insofar as this is a reference to human activity, always and only occurs within the actual and variable conditions that obtain at a time and place of concern. It cannot be meaningfully, or at least usefully, spoken of in the abstract.

Now, at some basic sense, political engagements are always purposive. This is not to say they are purposive in some strong teleological sense; rather, it is to say the societies do not engage in political transactions ‘just so’, with nothing intended. If so, the task for constitutional thought is to consider ways in which these ‘mid-purposive’

political activities may be oriented toward producing, ever so steadily, a polity that is better than the status quo. This necessitates a somewhat specific articulation of such constitutional orientations – not as specific as to exactly ‘tell’ what a society must do, because for *situated* politics such specificity of general orientations would be irrelevant, but specific enough to orient the thrust of politics toward an acceptable vision of good polity. To proceed with the task, then, one requires an idea of that vision first.

An acceptable vision of good polity has to be acceptable on account of its goodness but also on account of its feasibility in the given world. A utopian vision produced through intellectual imagination, then, would probably not do. A better source for deriving the vision is the patterns of good polity that exist or have existed in real world; while every individual case has its own flaws, the contemporary political civilization can be plausibly supposed to have arrived at a general consensus on what makes a good polity. Based on the available real patterns, and on literature devoted to explicating those patterns, it is possible to sketch a realistic but at the same general enough vision of a good polity, organizing it – for convenience, at least – in terms of five elements: commitment to serving common goods, upholding of a mixed regime, preservation of social pluralism, adherence to the principle of popular sovereignty, and pursuit of constitutional resilience. Each of these elements, in combining to make up a single polity, will be filled with somewhat variable normative core and institutional frame in every specific society’s pursuit of good constitution.

Equipped with this thin sketch of a good polity, it is possible to suggest some normative political orientations – that is, some procedural norms to guide where political engagements need to be directed. In view of the situated-ness of every constitutionalizing

case, these orientations would need to also be thinly conceived, leaving greater concretization to an actual constitutional project to author it for itself. Being conceptually economical, three broad thin orientations can suffice to highlight: an orientation to engaging and pursuing common goods, an orientation to minimization of arbitrary uses of power, and an orientation toward a principle of moderation. If the outlined vision of a good polity is admitted as their objective, and if these three thin-normative principles guide the content of actual political engagements, the aspiring constituents of a good polity can be expected to be on a workable route.

“Can be expected” is not a very strong way of putting, but it cannot be put more strongly. Politics, as already stressed excessively, is not a machine-like process that would work as intended once all the several elements have been plugged in. These several elements by themselves are just ideas, disembodied concepts. Putting them together into a dynamic and productive political life is the territory of constitutional crafting. When a society is engaged in constituting itself into a good polity, engaging in collective interactions at high as well as low level politics, or ‘constitutional’ and ‘normal’, as individuals, groups, leaders and followers, what they are engaged in is *crafting* of their polity. They undergo debates, disagreements, compromises, rule-setting, education, story-telling, remembering, and countless other variety of crafting engagements. In the end, on each instance or issue of collective engagements some compromise, argument or institutional ordering gains a more authoritative status among the public over alternatives, never quite permanently but for as long as the public manages to hold it as authoritative. Some of the actual ways of crafting, set within real political contexts as it should, are illustrated on the example of Norway, one of the best

constituted polities today, and that of Kyrgyzstan, one in somewhat erratic quest for a good polity.

This particular formulation of political constitution, with the three parameters of observing its situated-ness (the basic empirical conditions), the three parameters of its normative orientation, the thin sketch of a vision of good polity, and the conception of the activity of constituting in accordance with these elements as constitutional crafting, is what is called pragmatic republicanism. Pragmatic republicanism, as noted above, is an instance of political constitution, implying that other ways of conceiving political constitution may be possible. However it is conceived, any such alternative would require to be based on a proper understanding of the political-ness of the whole enterprise. In trying to succinctly formulate that proper understanding, it has been proposed here that “*politics is the whole complex of a public’s engagements in pursuing authoritative public interests*”. Different ways of formulating it are certainly possible, but the key points of it – its breadth, collective-ness, relation to authoritative public interests, and situated-ness within a public (within its given context) – must be observed.

What does the idea of political constitution imply for political science?

The idea of political constitution, and its instance in pragmatic republicanism, is a call for a much more problem-driven and practical approach in political science of constitution. It is a call to be guided by the nature and scope of the predicament, and in pursuing answers to it, to be unhindered by either inter-disciplinary boundaries, or methodological strictures. For some, this may be equivalent to a call for modesty in

political science. Aristotle said very much about the kind of subject politics is, and the degree of certainty it can ever allow. To heed to his warnings, constitutional political science will need to be a discipline of *phronesis*, as Bent Flyvbjerg (2001) has very eloquently championed it, and as much of PEGS and Bloomington schools of constitutional thought exercised it (albeit, not always calling it so, and often preferring to speak of a ‘discipline of civic studies’).

What does political science in the manner of *phronesis* argue? For illustration, take the famous Lijphart-Horowitz debate that was mentioned above several times (see Choudhry 2008: 15ff; O’Flynn 2007). Both Arend Lijphart (e.g. 2004) and Donald Horowitz (e.g. 1993) took up the problem of governance in divided societies – a highly pertinent, urgent constitutional issue in contemporary world.⁹⁵ Based on his extensive comparative research, in which for him cases such as Belgium and Switzerland were especially rich theoretically, Lijphart argued that societies caught in the chronic problems of ethnic or other ‘segmental cleavages’ would be best advised to opt for constitution that accommodates those differences: that is, by various institutional means such as federalism, parliamentarism, proportional representation, they need to aim at accommodating the differences – ‘consociational constitutional’ in Lijphart’s language. Horowitz, on the other hand, with his extensive research on much more problematic experiences of African and other ‘Third World’ divided societies, argued that a more integrative accommodation would be the wiser strategy: the constitution should instead aim at bringing the divided parts closer to together, having them cooperate and thus become moderate, especially on the electoral plain – what might be called a convergence-

⁹⁵ For an extended bibliography of Lijphart’s and Horowitz’s works on the subject, see Choudhry 2007: 15, fn. 32.

oriented constitution. Both propose rather detailed, elaborate institutional schemes – electoral politics being their most pronounced sphere of debate – for pursuing their respective alternatives. Both agree that disintegration, anarchy, or assimilation, are not acceptable options. For neither side, of course, there is no guarantee that one of these unacceptable options would not materialize.

To see the problems of Lijphart and Horowitz, let us first bring political constitution onto the table. Political constitution, too, is not the kind of enterprise that involves guarantees. Danger of unintended outcomes always looms upon the horizon. The answer to this from political constitution is in the cultivation of strong civic capabilities and a culture of moderation and political vigilance – constitutional resilience, in a word. For constitutional resilience fit for securing a constitutional order to emerge and obtain, the constitutional order itself must be a product of the resilient public, one that is crafted through trials and errors, through debates, quests, compromises and settlements. Only such a product has the best likelihood of being valued enough by the public and, in the process of its development, of engendering its own resilience mechanisms. That would be so, because that constitutional order would cohere – over the period of its probably uneven evolution – with the pertinent conditions of the society, its history, context, civic capabilities; the constitutional order would grow, as it were, together with the public itself in all its characteristics. It would, as a result, be a whole system of institutions, rules, and laws (if these are any different), and of civic culture, whose manifest contours would not be possible to imagine with any precision before it happens.

The problem in the kind of constitutional political science that Lijphart and Horowitz exemplify is that the scientists engage in predicting the best ‘manifest contours’

of a constitution for a certain class of societies. Their proposed contours are generalizations based on sets of previously seen patterns, some predominantly in the developed West – as with Lijphart, and some mainly from the less developed South and East – as with Horowitz. Because the constitutional forms they recommend are thus preconceived for any particular society in need of one, the resilience that such forms require can only be gained by fitting the society to the constitution (or, to grant more agency and awkwardness, by the ability of the society to fit itself to the constitution). This is a rather crooked, inflexible logic. The presence of such logic is evidenced by the very fact that a Lijphart-Horowitz debate should even take place, as if it were imaginable to ever establish the correctness of one side and mistaken-ness of the other. It is also reinforced by the class of societies the debate involves, the divided kind, as if every divided society in regards to its constitutional concerns is just about the same as any other divided society. Lijphart and Horowitz, eminent scholars that they are, are only invoked here as a convenient example, whereas the kind of political science they exemplify is rather populous.⁹⁶

To return to the question that interests us, what political science as *phronesis* argues is that political constitution defies the kind of scientific manipulations that some more exact or natural sciences can afford, (see Flyvbjerg 2001: passim) The concern of political science is ultimately good political order – a problem that David Levy, as quoted above, very rightly identifies as a perennial one because of the particular ontology of human life: that we are political animals, and that nature has not provided for permanence

⁹⁶ See Michael Bernhard for a cogent critique of four works in ‘institutional choice’ type scholarship, including Lijphart; “Institutional Choice after Communism: A critique of theory-building in an empirical wasteland”, (2000). See also McGarry, O’Leary and Simeon for a discussion of Lijphart and Horowitz as well as a broader range of other scholarship in the tradition; “Integration or Accommodation”, in Choudhry (2007).

of our order the way it provides it for other animals (Levy 1987). The political animals are left to come up with the political, or constitutional, order on their own; and just as they are capable of creating it, they are also capable of losing it.

If so, then the best way to secure a political order is by letting it be the product of the concerned society itself. It is nearly impossible to introduce political order completely from without (except maybe some rare cases of colonial rule), but even proposing somewhat finished schemes of political order for free adoption – the way non-*phronesis* political science can be said to proceed – is flawed. Doing so, as was observed early in this work, has led generally to the captivity of political science to a terse, inflexible model of political order, what has been called ‘the Weberian-style state’. Some political scientists have started to battle this captivity in very welcome directions, such as Joel Migdal (2001), James C. Scott (1998), and Lisa Anderson (2004), among others. They have, specifically, argued for viewing state and society as one continuous whole, one belonging to and in the other, as opposed to seeing them as an object and a subject, or as otherwise discretely divided. To understand the shape, the capacity and chances, the problems, of a state, it must be viewed within its social (and cultural) context. A workable state is one that arises out of its social context, and coheres with it. By ‘political order’ one can only mean the whole of that society and its state. Less clumsily put, it is constitution. What these critical scholars have engaged in is a political science in the manner of *phronesis*. *Phronesis* would hold, as suggested here, that the only legitimate captivity that political science ought to work with is the actual situated conditions of a society.

For constitutional scholarship, this means taking the political-ness of constitution seriously and, especially, more accurately than it has tended to. It needs to adhere more to ‘a politics of a different kind’ that Harry Boyte has promoted, to the perspective of ‘citizens as co-creators’ that Soltan and colleagues have held, or to understanding constitution as crafting that has been proposed in these pages.

The hopefulness of the idea of political constitution

In closing, to bring the discussion back to something it began with: the *practical* problem of constituting good polities. In the end, it is for the peoples of the United States, the United Kingdom, and Norway to keep and improve the good polities that they have constituted for themselves. It is for the peoples of Egypt, Afghanistan, and Kyrgyzstan to constitute better politics than they have now. Political scientists, in their capacity as such, can only be of limited, or incomplete, relevance in meeting this predicament. That margin of relevance, however, can be increased by the degree to which political science approximates the practical-ness of the predicament.

In this regard, the idea of political constitution as proposed here can be viewed as a hopeful idea; it approximates the practical-ness of the problem by being guided by a practical kind of hope. It is a grounded kind of hope, not the kind that sees it appropriate to intellectually contrive the best political order thinkable and hope that it sticks to life. It is a hope situated within the actual political life itself. It is encouraged by the evidence throughout history that human societies are capable of changing, even if at widely varying paces, capable of discerning their own best common interests, even if through trying and often erring, and capable of holding on to their achievements in ordering their

lives, even if that is always subject to revision. It is a hope based on the actual prevalence of order over chaos, on the evidence – even if it is sometimes weak – that most human societies operate on some stable foundations of common understanding.

This hope is a sober kind of hope. It is aware of dangers in political life, and therefore recognizes the sobering power of being guided by fear, as Judith Shklar advised (1998: Ch. 1). It is aware of the real possibility of political order imploding into despotism, if that is how Montesquieu's discussion of the matter is to be understood (Robin 2000). But this hope is not dominated by such fears, and does not privilege fear to dictate constitution of good polity. Neither is it an overly optimistic hope. While it is enthused by Roberto Unger's ideas of amalgamating ideas and practice into a hopeful politics of experimentation (1998), it is more careful than joining him in a call to 'smash all contexts' (cited in Soltan 1993b: 75).

It is a hope pegged to the limits of *the possible*, then. Put otherwise, it is a pragmatic hope in the manner that some of the pragmatic thinkers have held it, Dewey most importantly (1954), and Rorty more recently (1999 generally). These pragmatists underscore the importance of human experience – the sturdiest basis of knowledge and judgment; they resent the *a-priorism* of ideal theory, the hopelessness of essentialism, and the unfounded-ness of foundationalism. It is these important perspectives of pragmatist thought that the idea of political constitution shares. It holds on to a responsible kind of hope, one that constantly keeps in check the linkage between the actual and the potential, the real and the possible. On all of these understandings, modern pragmatists themselves trace their ancestry much further back – the ancestry that the idea

of political constitution itself claims – to Tocqueville, Montesquieu, Machiavelli, and many more.

The idea of political constitution builds on this hope. If all of these moderate hope-giving characteristics of human life are right, then crafting more desirable political orders is within human capabilities. If there is one rubric on which to base the hopefulness about political order, it is probably the human capability to learn. It is this capability to which, for example, Machiavelli – the realist of all – singularly appeals by his ‘wholly new route’ of teaching about ways of keeping a free republican order. It is this hope-giving capability that even Hobbes – the seemingly hopeless positivist of *The Leviathan* – can be argued to appeal in his other book, *The Behemoth* (Vaughan 2001).

A much more recent turn to the capability to learn within the theme of constitution is the idea of ‘civic studies’.⁹⁷ ‘Civic studies’ is a hopeful initiative concerned with the development of a constitutionally capable and responsible citizenry. It is proposed as a different kind of educational program, or even discipline, one where the knowledge of some is not transferred neatly onto the brains of others in a classroom setting, but where civic learning is acquired by common critical pursuits in reflective mixing of theoretical and practical material. The present idea of political constitution can be said to be a contribution to civic studies. Only it is not to be therefore tied to a classroom or other limited setting of teachers and learners. So it can be put in a broader, more ‘constitutional’ scope, by referring to our two examples: the idea of political constitution draws on the lessons from the constitution of the Norwegians, where they – guided by a sober hope – learned by doing; and it is encouraged by those lessons in thinking of the

⁹⁷ See the preceding footnote, and the articles by Peter Levine (2011) and Karol Soltan (2011).

possible Kyrgyzstani constitution, where they will require to learn – from the Norwegian example, as well as their own successes and failures – as they build a better today.

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