Assessing constitutional performance

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How should we evaluate constitutional performance? What should count as “success” in constitutional design? Is there a universal benchmark against which all constitutions, regardless of local circumstance, can be evaluated? Or is constitutional design as idiosyncratic as a person’s choice in neckties? These questions, which are the focus of this volume, are necessarily raised by the emergent transnational practice of constitutional advice-giving and criticism. They are implicated every time a scholar, consultant, human-rights activist, or international organization expresses a position on a proposed constitution, whether in Somalia, Tunisia, Nepal, or the United Kingdom. They are thus necessarily questions for the governments and international organizations that fund such practices. And they are equally questions for the national publics engaged in the act of constitutional creation, who are often on the receiving end of international advice about what they should be doing. Finally, they ought to be puzzles for the growing coterie of scholars and jurists engaged in the comparative analysis and critique of new constitutions, a scholarly literature that often employs explicitly normative criteria in evaluating constitutional design. If we wanted to err on the side of grandiosity, we might even say they are questions implicated every time one decides that a constitution, as a going concern, merits our continued fidelity.

The contributors to this conference have been asked to respond, from a variety of perspectives, to the seemingly simple question of what counts as constitutional success (a term we will use interchangeably with constitutional performance here). By posing this concededly naïve question, we hope to draw attention to a normative terrain that has received surprisingly little attention from scholars and practitioners who assume, often implicitly, that there is a convergent consensus on what counts as “success” in constitutional design, and that therefore it is meaningful to praise or to blame a constitution for meeting or falling short of this desideratum. In so doing, we hope to provoke
more careful debate among legal and political theorists about the plural possible meanings of constitutional success or quality. The chapters assembled in this book, we think, provide a series of important landmarks and provocations in that debate rather than a singular, definitive answer to our threshold question. We thus make no pretense of consensus. The contributors sharply disagree with each other (and us) about the meaning of the question, and the method suitable to its resolution. Their ensuing approaches range across normative criteria in ways that illuminate the plurality of potential criteria of constitutional success. Yet in their myriad approaches they also advance a collective agenda by focusing attention on the issue.

The normative pluralism evidenced in this volume does not mean that accounts of constitutional performance will simply collapse into first-order normative theorizing. We are cognizant that much work in political theory can be described as an effort to clarify the legitimate foundations and goals of political society, and thus to evaluate “small-c” constitutional success. In the classical world, Aristotle offered both taxonomy and evaluation of constitutional families, while Plato sketched an ideal-type set of political arrangements. Historians from Herodotus and Thucydides to Polybius, Livy, and beyond provided further data and evaluative criteria. Perhaps the most influential modern tradition has been the use of the social contract as a heuristic, first by Locke, Hobbes, and Rousseau, and most recently by Rawls, to identify normatively defensible terms of social cooperation. This political theory literature offers a rich array of potential normative frameworks for approaching very general questions about the functions and boundaries of the state as an institution. It does not, however, focus on the specific role of a written constitution in a way that yields straightforward normative criteria of constitutional success or performance. Moreover, to simply assume that any one account of political society or the necessary role of the state, whether drawn from Aristotle, Rousseau, or Rawls, resolves the question of constitutional success would hardly be a sufficient answer for most participants in contemporary constitution-making. These actors need to make decisions on real-world questions of constitutional design under less-than-ideal circumstances of time pressure and political constraint (Horowitz 2002).

Instead of trying to reason directly from first principles ourselves, we hope that by framing a relatively naïve question, and then eliciting views from a heterogeneous range of scholars immersed in distinct disciplines, as well as regional and country-level experts with specific experience of recent constitution-making, we can clarify the contemporary framing and analyzing of “constitutional success” in a systematic way. We hope, that is, to elicit a deeper understanding of how that concept – which is implicitly at stake in
many practical and scholarly projects today – is in fact understood. Just as important, we hope to grapple with the open questions as to whether it even has a single referent when applied to constitution-making contexts, whether it is more or less informed by certain normative commitments, and whether it is a coherent ambition at all.

In this Introduction, we begin at a high level of generality by giving an overview of several different perspectives that might be brought to bear in constitutional evaluation. We also identify as potentially useful one possible distinction of general application between internal and external criteria. This is the distinction between evaluative benchmarks that those within a constitution-making process bring to bear, as opposed to criteria that outsiders apply. Drawing attention to this distinction underscores the possibility that constitutional success is a relative matter: One’s criteria depend on where one stands in relation to the relevant polity. We then go on to offer an answer of our own to the question of what counts as constitutional success. This comprises a set of four evaluative criteria that are intended to be applicable across a broad range of constitutional regimes and constitution-making circumstances (for an initial specification and discussion of this framework, see Ginsburg & Huq 2014). More specifically, we suggest that a plausible set of external criteria might include the following four goals: (1) the creation of public legitimacy; (2) the channeling of conflict into political venues rather than violence; (3) the reduction of the agency costs associated with government; and (4) the facilitation of public goods. We further suggest that these criteria are not by their terms limited to democratic systems. The observed set of constitutional regimes is broader than the set of democratic ones, and there is no reason to equate constitutionalism with democracy. Some authoritarian regimes seek to realize the very real benefits that can be obtained from constitutional governance (see Tushnet 2014; Ginsburg & Simpser 2014). In our view, there is no reason to define constitutional success in terms that arbitrarily foreclose the possibility of evaluation in nondemocratic contexts, even if some of our criteria (particularly the channeling of political conflict) are likely best realized in democratic rather than authoritarian contexts. After considering the general questions in this Introduction, we offer what we hope is a reasonably provocative analysis of the performance of a number of familiar and unfamiliar founding documents, including the 1787 American Constitution, the 2004 Afghan constitution, and the 1996 South African constitution, using our framework.

I METHODOLOGICAL CONSIDERATIONS

At a very minimum, any tractable method for evaluating constitutional success must be sufficiently sensitive to political, social, and geopolitical
context. This means that one should assess the overall objectives of the drafting situation (which may have been several), and realistically evaluate progress toward them. One cannot impose fixed universal standards that are not plausibly achievable. Juba will not be Geneva anytime soon, and no constitutional scheme could make it so. Still, it is feasible to evaluate what was in fact within reach in South Sudan in 2011, given the goals of the drafters and the prevailing circumstances. This requires that we articulate with a reasonable level of specificity what major issues are to be resolved in constitutional drafting, and what that project set out to achieve in a particular case. It further involves taking seriously not only what constitutions can do but what they cannot do.

Stated in this fashion, the task of evaluating constitutional success still faces important theoretical and practical challenges. We highlight here what we believe to be the two main methodological difficulties hedging this task: the problem of determining what perspective to use, and the difficulty of conceptualizing and analyzing “gaps” between constitutional text and observed practice.

A Internal v. external criteria

The evaluation of whether constitutions “work” or “succeed” is a surprisingly complex task (Pozas-Loyos 2012). Constitutions are (usually) written texts (although Erin Delaney’s chapter (Chapter 14) analyzes the success of the United Kingdom’s unwritten constitution) that were adopted in quite varied social, political, and geopolitical circumstances. A polity can reach for the instrument of a written constitution, indeed, with a wide range of purposes in view: Constitutions can be transformative, preservative, or even revolutionary. Some constitutions are designed to end civil wars. Others mark independence from a colonial power. Yet others make adjustments to ongoing institutions of governance, democratic or otherwise. These myriad purposes render the task of constitutional evaluation very complex, even pitched as a descriptive rather than a normative enterprise. In some cases, such as in South Africa in 1996, the purpose of a constitution may be relatively easy to describe (as we do later). But in other instances, for example Sweden’s consolidation of its constitution in 1974, that description may be much more difficult. There is, moreover, no reason to suppose that all members of a polity will converge on the same aspirations for a constitution. To the contrary, endogenous disagreement and conflict over normative priors and ends may be endemic to the observed circumstances of constitution-making. As a result, there may not even be a shared “goal” or a single “intent” behind any particular piece of constitutional
We can begin to discipline this complexity by observing that approaches to the task of constitutional assessment can roughly be divided by the perspective of the person engaged in evaluation, whether internal or external. First, on an internal view one asks whether the constitution has succeeded on the terms of the community to be regulated by that instrument. This species of stocktaking takes the objectives of the constitution as given, either by the document itself or by the relevant political community. It does not attempt to evaluate those goals from any independent vantage point. Instead, it relies upon self-declared or self-identified principles and goals, which might be defined in terms of institutional creation (e.g., has the constitution created a functioning election system? Has it led to the formation of a legislature or a government?), or in terms of desired policy goals (e.g., has the constitution allowed the unification of a geographic space, or fostered economic growth?).

Such an exercise at a minimum requires us to be able to discern relevant goals in the text of a constitution, derive such goals from the circumstances of its adoption, or deduce them from the writings of a specific constitutional framer. This is no simple task. It assumes that the relevant preferences of constitution-makers have been legibly expressed in constitutional text or can otherwise be inferred. When analyzing a joint product of multiple drafters, it assumes that their preferences can be cogently aggregated, notwithstanding the stability and coherence-related difficulties of collective choice mechanisms that have been identified by social choice theorists from Arrow onward (Arrow 1951; Huq Forthcoming 2016). Even in the absence of social choice problematics, it may not be possible to identify a coherent set of constitutional ambitions. Complicating matters yet further, constitution-making often unfolds against the backdrop of internal division and sharp, even violent, controversy within the relevant national polity. Under these conditions, it may well be doubted that stable internal criteria that are uniformly attractive to all contemporaneous participants in constitution-making are even available. What we take as such internal criteria after the fact may simply be the criteria most conducive to subsequent generations of political victors.

The identification and application of internal criteria, in short, raises a host of challenging normative and analytic questions. Several of the chapters that follow, including Martha Nussbaum’s and Roberto Gargarella’s, tackle these challenges head-on from the perspective of national or regional experiences. These chapters provide alternative, nationally inflected accounts of what it means to take seriously the internal perspective on constitutional success. In a similar vein, Ozan Varol shows that even if we focus on a specific
constitutional task – the management of civilian-military relations – internal criteria can vary dramatically even in respect to a single constitution, while Hanna Lerner illuminates the plurality of potential benchmarks that might be salient in respect to the single task of managing religious diversity.

Alternatively, the exercise of constitutional evaluation can adopt an external vantage-point. This means considering the question of constitutional success not from the perspective of a constitution’s designers, a founding generation, or some other participant within the relevant polity. Instead, it means assessing constitutional performance against a benchmark derived independently of local circumstances and contingent preferences within the relevant polity. It means asking, that is, not what renders this constitution a success but rather what makes a constitution in general a success. To frame the problem in this manner is to derive a definition of constitutional success from rather different materials from an internal perspective, but not necessarily to reach a different answer from internally oriented analyses. An external observer might converge on the same benchmark or standard as an internal observer, but he or she will likely do so for quite different reasons.

One set of external benchmarks proceeds from a normative account of desirable features or products of a constitutional order. For example, to many today, obvious and normatively attractive external benchmarks may include a constitution’s success vel non in facilitating democratic rule, racial and gender equality, individual liberty (e.g., from torture or cruel, inhuman and degrading treatment), economic growth, or aggregate national welfare defined in other terms. Another might focus on the constitution as a device for generating an engaged and self-critical citizenry (Barber 2014). Among the chapters here, Rosalind Dixon and David Landau’s contribution endorses democracy as a goal, while Aziz Huq advocates a minimalist benchmark of state stability. Their difference can be glossed, from one perspective, as reflecting the divergent accounts offered by Locke and Hobbes of the initial circumstances of social cooperation and contracting. While the Lockean perspective evaluates the quality of the social contract (at least for property holders), the minimalist Hobbesian view looks only at its (narrowly defined) efficacy.

External criteria can also be plural in character. Hélène Landemore’s chapter on recent constitution-making efforts in Iceland in the wake of the financial crisis develops a rich, multicriterial account of constitutional success that usefully blends several strands of liberal democratic theory. Landemore weaves these strands into a mid-level account that offers traction in the assessment of specific constitutions. She incorporates both formal criteria such as clarity and coherence, as well as functional qualities such as whether
a constitution helps resolve conflicts, expresses values, and protects rights. Hers is not the only such plural account available. Offering another set of external benchmarks that might provide traction in practice for evaluating constitutional drafts on the ground (so to speak), Yash Ghai (2014) has developed the following enumeration of benchmarks for a successful constitution: to ensure that power resides in state offices rather than individuals (i.e., the depersonalization of political authority); to create socially grounded structures through which the state can function; to separate the economy from the state so as to prevent corruption and monopolies; and to engender respect for human rights and the rule of law in the people. The possibility of a pluralist external benchmark of the kind that both Landemore and Ghai have proposed raises interesting questions of how to aggregate and prioritize different goals, and in particular how to handle conflicts between a constitution’s different aspirations.

Each of these two basic kinds of approach, internal and external, has its merits as well as its limitations. Each, we think, might play a role under appropriate conditions. On the one hand, an internal method takes serious account of the values, intentions, and aspirations of drafters and local political actors. As a consequence, it will often draw attention to matters directly within their control. For example, government officials can pass laws and hold elections more easily than they can in fact eliminate corruption and build democracy. Drafters may hence reasonably focus on the former rather than the latter. In addition, an internal approach may allow for more precise metrics tailored to the specific context and baseline condition of a polity at the time a constitution is adopted. At the same time, however, an internal perspective may fail to grapple with the quality of the constitution’s contents in any meaningfully objective way. It is hardly worth celebrating the perfect implementation of a constitution when all those external to that project would condemn it as harmful and perverse. Nor is a constitution plainly commendable if its drafters intend it to have no colorable effect on the world. After all, it is not clear that

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1 From these general evaluative criteria, Ghai derives ten more specific mechanisms by which a constitution contributes to democracy and the rule of law: (a) affirming common values and identities without which there cannot be a political community; (b) prescribing rules to determine membership of that community; (c) promising physical and emotional security by state monopolization, for legitimate purposes, of the use of force; (d) agreeing on the ways in which and the institutions through which state power is to be exercised; (e) providing for the participation of citizens in affairs of the state, particularly through elections, and other forms of social action; (f) protecting rights (which empower citizens as well as limit state action); (g) establishing rules for peaceful changes in government; (h) ensuring predictability of state action and security of private transactions through the legal system; (i) establishing procedures for dispute settlement; and (j) providing clear and consensual procedures for change of these fundamental arrangements.
celebrating the enactment of laws to reduce corruption or promote democracy is sensible if those enactments have no impact on the ground.

An external perspective, on the other hand, might be able to bear a greater normative weight by appealing to more general normative criteria distinct from the parochial interests and limitations of a particular class of constitution-makers. It might also overweight contextual factors that cannot plausibly be within the control of constitutional actors. That is, external criteria are more likely to have serious identification problems that preclude their serious application in explaining outcomes. This may well be especially the case with welfarist criteria, a point that Huq’s chapter develops. External criteria also necessarily assume that certain goals are categorically more important than others without regard to drafters’ or a polity’s aspirations. They thus embed at their inception an assumption that the distinctive ambitions and aspirations of a given polity are irrelevant. This might seem in some instances anti-democratic, and perhaps even redolent of the colonial past of many nations now engaged in constitution-making. More theoretically, the invocation of external criteria might be taken as inconsistent with the national-identity-shaping purposes of a new constitution.

The chapters that follow, as we have noted, alternatively take internal and external perspectives on the problem of assessing constitutional success. We think that this mixed approach represented by the volume as a whole points toward a basic fact about criteria of constitutional performance: Those benchmarks are perspectival insofar as they are necessarily embedded in specific attitudes and positions in regard to a given polity. Rather than reducing to a singular understanding, in short, constitutional success may be inevitably plural in character.

B Measuring the “gap” between text and performance

Whether an external or an internal perspective is adapted, an additional level of complication must be considered. This arises from the necessary multiplicity of analytic levels and purposes in play within any constitutional regime.

It is easy to assume that the assessment of constitutional performance would simply involve a comparison between written provisions with observed political practice at a given point in time. If constitutions are effective, the gap between textual aspiration and performance will be small; if the gap is large, the constitution should be deemed ineffectual. But this simple evaluative strategy runs directly into a problem engendered by the multiplicity of

2 Or a “sham” constitution, to quote Walter Murphy’s phrase recently revived by Law and Versteeg (Law & Versteeg 2013).
provisions contained in most constitutions. Let us say that it is possible to aggregate the complex intentions (short and long term) of all relevant participants in constitution-making to formulate a singular “intent.” Even then, not all provisions of constitution may be amenable to the same strategies of implementation. To begin with, different provisions require different time periods to effectuate. On the one hand, Bisarya’s chapter identifies “transitional” constitutional provisions that are designed to mediate the transition between old and new constitutional dispensations within defined time periods. On the other hand, Lerner’s chapter on religious liberty explores how durable constitutional arrangements can influence the formation of religious social life, reinforcing some identities while undermining others, over a long time frame.

Constitutional provisions might also interact in complex ways with the trajectory of other state institutions or exogenous shocks in ways that make simple analysis of the gap between text and performance misleading. This is most plainly the case, as the chapter by Tom Ginsburg, Zachary Elkins, and James Melton explores at length, with the rights provisions of constitutions. As they demonstrate, simply measuring the degree of rights protection (to take one example) is clearly inadequate. Some rights (e.g., a criminal procedure right such as the right to counsel or a right to health) may be beyond reach without major transformations of state bureaucracies; others (e.g., a right to form political associations) may be easy to implement without delay through simple changes in statutory text.

Yet a further complication arises when a constitution simply codifies already existing behavior, and so presents no “gap” between text and practice. On the one hand, the fact that it successfully describes extant political realities does not mean that the constitution itself has does any work. Perhaps it promotes the continued existence of those political conditions, but ideally, we want to know that the constitution has made a difference in political life (for example, by parrying some process of secular decline). On the other hand, when is it safe to assume that the function of a constitution is transformative as opposed to preservative? Positive theories of constitutional creation (Hirschl 2004) have underscored their “hegemonic preservation” function. That is, the reason some constitutions may be adopted in the first place is that they preserve and entrench the authority of existing power holders sufficiently to mute their resistance to change. It may well be that a specific provision of a constitution “succeeds” (at least from an internal perspective) if it operates as an effective friction on social or political changes. The elements of the 1787 US Constitution that preserved slavery and that undercut the ability of national institutions to confront head-on the moral iniquity of the “peculiar
institution” provide a useful reminder that such preservative elements of a constitutional text can play important roles in practice.

Because of this complexity, the most intuitive approach to evaluating constitutional performance – that is, taking snapshots at a given point in time – is likely to be inadequate, or even in some instances misleading. Rather, one needs to consider issues of trajectories of different institutions over time, and the difficulty of changing deep-rooted patterns of political and social behavior, when evaluating a constitution. Moreover, even a piecemeal evaluation of given provisions demands a theoretical framework to identify the ex ante desired direction of social, political, or institutional change.

C Summary

The evaluation of constitutional success cannot proceed without making certain theoretical choices. To begin with, it is necessary to choose between an external and an internal perspective. Criteria generated endogenously to a constitution-making polity may overlap with those developed for general, transnational, and trans-temporal application, but they will have different origins and different justifications. Having established a perspective from which to view constitutional performance, the person engaged in evaluation must then decide how to analyze the “gaps” between text and observed performance. With those problems under control, we proceed to set forth some threshold considerations about how to think about internal criteria, and then identify an exemplary set of external criteria. In both cases, our immediate ambition is relatively modest: To show that an approach based on either internal or external criteria is at least plausible, and thereby to demonstrate that the task of thinking hard about what counts as constitutional success is not without its rewards.

II THE DOMAIN OF PLAUSIBLE INTERNAL CRITERIA

Necessarily, the world of internal criteria will be large and heterogeneous. But is there anything at the threshold to say about how we can identify plausible internal criteria against which to assess implementation? At the most concrete level, they comprise the specific steps or policy goals articulated by the explicit terms of a constitution. Varol’s chapter on transitions from military rule provides useful examples of specific steps related to a quite particular, discrete goal. Rather more abstractly, Zaid Al-Ali uses the construct of “the people” as mobilized in specific contexts, as a source of internal criteria, in his chapter on constitutionalism during the Arab Spring. More concretely, we might instead
focus on the aspirations of the individuals who drafted or ratified the original constitution. Nussbaum’s analysis of the Indian Constitution from the perspective of Ambedkar is a useful example here. More broadly, many American judges purport to be “originalists,” in the sense of reading the US Constitution in light of either the original public meaning of its terms (i.e., the way its ratifiers would have understood it) or in terms of the original intentions of its drafters. This position is hardly uncontroversial or unproblematic when it comes to constitutional interpretation (see, e.g., Berman 2004). But is not obviously untenable, at least as a political posture.

In some instances, a threshold bundle of steps is explicitly set forth in a constitution’s transitional provisions. In Somalia’s 2012 constitution for example, the steps identified in transitional provisions as necessary predicates to stable governance were themselves not fulfilled. As Bisarya’s chapter eloquently explains, the first deadlines specified by the document were violated within a matter of weeks. Although the drafters had expected the deadlines to operate as a spur to institutional entrenchment, instead, their rapid violation, seemingly without consequences, rendered the whole constitutional scheme more or less stillborn. By contrast, in other cases, such as neighboring Kenya, a Constitutional Implementation Commission (CIC) created under the 2010 constitution worked as a kind of self-assessment device to measure progress on all the concrete steps required for transition and beyond. As Gathii explains in his chapter analyzing the Kenyan case closely, the Kenyan Constitution has indeed made considerable progress, in part due to the CIC, but also in part due to the good fortune of having a transformative chief justice. His account seems to be ambivalent about the probability that the view will be quite as sanguine in 2020 or 2025.

Once a constitution has navigated its threshold translation from the page to political practice, it will often stipulate yet further steps in respect to further institutional development. These can include the following: holding elections on a given timeline; passing implementing legislation or organic statutes required by the constitution (e.g., to create voter rolls, or facilitate the creation of political parties); establishing and funding new state institutions (e.g., courts, ombudsmen commissions, administrative agencies, electoral commissions); and making appointments to offices stipulated in the constitution and in newly legislated institutions. When a constitution directs these kinds of institutional start-ups, a simple evaluation of whether these steps have been pursued will reveal, at least in part, how much progress in constitutional implementation has been made, as well as potentially casting light on the location of constitutional blockages. That simple exercise, as a result, can generate useful recommendations for improvement or textual amendment on a going forward basis.
At a higher level of abstraction, constitutional texts will often articulate broader, explicitly normative principles and goals such as dignity (in the case of the German Constitution), liberty and the “general welfare” (the American Constitution), equality and fraternity (the Indian Constitution), racial justice and reconciliation (the South African Constitution), economic growth and poverty reduction, democratic government, and the accountability under law of former leaders. In each case, a general high-level ambition specified in the preamble or subsequent constitutional text can serve as an internal touchstone of constitutional ambition – a point developed by Gargarella using the concept of a constitutional “drama.” Since these ambitions tend to be abstract in nature, and hence necessarily dependent on a diverse range of social currents and institutional dynamics, the specific contributions of a constitution to their achievement may well be difficult to measure. For example, Nussbaum’s chapter explores the legacies of the Indian Constitution in respect to the caste system, and offers a nuanced consideration of why the drafters’ ambition of eradicating caste fell short.

Despite the difficulties implicit in any evaluative effort, any internally oriented assessment of a constitution’s implementation ought to at least catalog and consider these self-declared principles because these will often (albeit not always) reflect hopes and aspirations shared by many ordinary citizens. To define constitutional success in purely technocratic terms, focusing myopically upon institutional creation and operation, would be to ignore the politically constitutive function of organic documents, as well as (in appropriate cases) their democratic aspirations. At the same time, many of these self-declared principles will overlap with the external criteria we describe later.

III AN EXAMPLE OF MID-RANGE EXTERNAL CRITERIA

The range of potential external criteria against which constitutional implementation might be evaluated is as varied as the range of scholars, jurists, and philosophers proposing them. As we observed earlier, one way of reading much historically canonical work in political theory is as an extended, if sharply contentious, inquiry into what renders a constitutional legitimate, binding, or otherwise acceptable constitution. Our goal is not to canvass that enormous field here, or to adjudicate among its competing positions. Rather, we set aside here the standard set of ambitious abstract values articulated in many constitutional texts (e.g., liberty, dignity, equality, the general welfare) – values that are both controversial and susceptible to diverse interpretations. Instead, we postulate that mid-range metrics of performance will provide more
analytic traction. By “mid-range,” we mean to capture a set of concerns related to the successful ongoing operation of a political order over some extended period of time that includes not just the immediate translation of textual provisions into real-world institutions but also their operation for a period of some years or even decades.

In the balance of this Introduction, we develop and then apply one set of mid-range criteria of constitutional success. In so doing, we do not claim to have identified the only possible array of mid-range benchmarks, or to have described standards that are immune from criticisms – indeed, several of the chapters that follow, including Landemore’s, Delaney’s, and Nussbaum’s, offer pointed critiques of some elements of the mid-range quartet of benchmarks developed in this Introduction. We nevertheless believe that these metrics capture those aspects of institutional performance most likely to be salient to the successful operation of most written constitutions (although we cannot rule out the possibility of a constitution to which none applies).

Moreover, we develop these criteria with an eye to those values and norms that are most likely to be shared by external advisors to constitution-making processes today, as well as the local political elites and interest-groups that serve as their interlocutors on the ground. In particular, we think these goals can claim a tolerably broad reach, and capture most of what is generally thought to be desirable in a written constitutional scheme under the particular circumstances in which constitutions today tend to be crafted (e.g., after prolonged civil or international crisis; after violent domestic political disturbances; or at the end of long-standing military or authoritarian rule). Of particular note, all of these desiderata are capable of being secured even in nondemocratic regimes. In this sense our framework is not a conceptual replication of democracy but rather comprises a sketch of the functional metes and bounds of constitutionalism. As a result, we hope that our quartet of mid-range benchmarks possess some evaluative traction in a broad range of practical, real-world cases, and therefore have some claim to both utility and to general applicability.

The four generally applicable mid-range criteria for evaluating successful implementation of a constitution that we advance here can be summarized briefly: (1) sociological legitimacy in the eyes of the public; (2) the channeling of potentially violent political conflict into constitutional institutions and nonviolent forms; (3) the control of the agency costs associated with the institutionalization of government; and (4) the creation of appropriate public goods. To emphasize, this quartet of ambitions is not the only imaginable set of mid-range external criteria. To the contrary, different analysts are likely to come up with different lists, and, as we have noted, in Landemore’s and Ghai’s cases, have indeed done so. Moreover, our benchmarks are also not exclusive
of other potential ambitions, whether external or internal. They provide, in other words, a useful corner of common ground, rather than filling the field.

A Legitimacy

Successful states require some measure of legitimacy among the general public – i.e., a shared normative belief held by a substantial number of the public that the constitution warrants respect and fidelity. In the short term, popular disaffection for the state is likely to render policy initiatives difficult to carry out as a consequence of frictional resistance. In the long term, moreover, illegitimate states are much more likely to rely on expensive and destabilizing techniques of repression to sustain power. Constitutions are a potent source of popular legitimacy, diffusing the need for violence or repression, even if the need for state coercion is never entirely dissipated (Schauer 2014). The constitutional text can also serve as a focal point for emotional investment and attachment among the people, and therefore help forge a common identity among diverse people by reflecting or creating some quantum of shared normative sentiments (cf. McAdams 2014). At a very minimum, it can accrue symbolic value that can be exploited to engender popular loyalty to the state. Finally, in democratic contexts, it can also help facilitate participatory politics. Fidelity to the constitution provides a normative justification for democratic participation, as well as a framework for the quotidian operation of such politics.

Popular legitimacy, however, is not an inexorable by-product of constitution-making. Especially in highly diverse societies, a constitution may be legitimate among some populations and not among others. In 2015, for example, Nepal adopted a new constitution that sparked violent protests among the southern Madhesi communities that dominate the southern Terai plain below the Himalayas. Madhesis viewed the new constitution as unfairly tilting political power toward upland groups and, at least at the time of this writing, had succeeded in catalyzing a constitutional amendment that offered partial redress. A key question from an evaluative perspective, one closely related to the problem of sociological legitimacy, is whether the constitution successfully defines a set of overarching values and identities that can in fact create a sufficiently integrated political community. In particular, we might ask whether, especially under conditions of ethnic or religious diversity, a constitution provides a working solution to the problem of common governance without suppressing the causes of disagreement through illegitimate means (e.g., by installing persecution and political disempowerment, or engendering ethnic cleansing). A constitution might fail to offer a core of common
values or institutions. Alternatively, it might founder by proposing values that turn out to be divisive in practice. For example, a constitution can either define citizenship in an effective and nondiscriminatory way, or it can craft the bounds of citizenship in ways that deepen fissures in the polity. The degree of identification with the constitution, and the state it creates, therefore is one measure of legitimacy.

In addition, a sound constitution will produce a political system that is viewed by citizens as successful at an aggregate or institutional level, even if the citizens disagree with transient government policies or specific officeholders. In this sense, one good test of constitutional legitimacy might be the difference between citizens’ views of their constitution as a whole and their perspective upon a given government or class of officeholders. If a constitution remains respected and legitimate regardless of fluctuating evaluations of transient officeholders, this may count in favor of it being ranked a success. But if, as Ghai fears, citizens do not generally distinguish between officers and their occupants, then the constitution has not succeeded. Worse, as Huq suggests in his chapter, it may be that the failure to depersonalize political power entails a failure to create a state. To be sure, data about citizens’ normative views of the constitution, as opposed to specific officeholders, may be very hard to obtain in any particular context. Indeed, in societies recovering from large-scale social or geopolitical conflict, or where a single political grouping possesses a supermajority share of political power, citizens might have difficulty distinguishing between legitimacy of the constitution and the government it produces, at least in the short term. It may well be that systematic acquisition of such legitimacy-related data is needful and important for evaluating how constitutions are faring as going concerns, and therefore should be gathered in the future.

At least as a conceptual matter, then, it is plausible to think that we can assess constitutions by evaluating their ability to induce a belief among the diffuse public in the legitimacy of durable constitutional institutions (as distinct from temporary officeholders), and then to assess constitutional implementation by seeking evidence of such legitimacy. This evidence may take the form of survey evidence or analyses of popular protests and other forms of popular mobilization for or against the state. Such evidence may not exist now, but at least theoretically can be collected. That evidence may be hard to secure in some instances does not detract from the more basic point that it is at least a conceptually plausible benchmark for evaluating success in most instances.
B Channeling political conflict

All societies confront internal political disagreements of varying intensities. The question is how such disagreements are articulated and whether standing mechanisms exist for their resolution. Successful constitutions channel conflict through formal political institutions, as opposed to forcing antagonists to take disagreements to the street or the maquis. Constitutional institutions for channeling conflict are especially important in societies recovering from violent conflict. If political violence persists in the form of civil war, terrorism, or generalized riots, or if popular protests imperil a post-conflict government, then the flow of political conflict has not been effectively managed. To be sure, civil society (i.e., intermediating institutions such as parties, unions, religious organizations) can play a role in mediating conflict, as the recent bestowal of a Nobel Peace Prize on the Tunisian National Dialogue Quartet reminds us. Quite apart from the value of state mediation of potentially violent social conflict when civil society is weak, it seems unlikely that informal institutions can play a mediating role consistently and stably across time.

Again, there is no necessary linkage in practice between constitutional creation and the mitigation of serious political conflict. Episodes of constitution-making can sometimes exacerbate social cleavages, especially if some forces are excluded from the constitution-making process. Quite apart from the results of constitution-making, which generated discord in the Nepali case, the form of constitution-making process also matters. For example, Landau (2013) has developed an important and penetrating analysis of how constituent assemblies in Latin America have been recently exploited, for example, by the Chavez government to consolidate power in Venezuela in a way that engendered sharp division. In the same work, he also identifies a similar dynamic in the Bolivian context. Constitution-making in Egypt in 2012 and 2013 similarly revealed, confirmed, and perhaps even deepened sharp social divisions between the Muslim Brotherhood, the even more hardline Nour party, a fragile liberal and secular urban class, and the entrenched bureaucratic-military state. The constitution produced through that process did not reflect a substantive consensus across these sharply polarized groups. Nor did it involve an inclusive process in which differences were recognized, prioritized, and managed. Instead, it is plausible to think that the erratic and opaque constitution-making process deepened internal political conflict and accelerated a violent breakdown in civil-military relations. In contrast to that dismaying trajectory, it will often be the case that a “big-tent” approach to constitution-making can help lead even bitter enemies to agree on the fundamental rules, and thus channel their disagreements through formal political institutions.
The particulars of constitutional design matter here. Ghai has usefully emphasized the idea that a constitution must both facilitate the agreed-upon institutions through which state power is exercised, and also provide for the participation of citizens in affairs of the state, particularly through elections, and other forms of social action, including legitimate protest. He also argues that the document must also allow for modification of these fundamental arrangements when it is revealed that they are not working – a theme taken up by Delaney’s consideration of the unstable and unpredictable pathways for constitutional change under the unwritten British constitution. We agree with Ghai and Delaney that some channels to enable the expression of public sentiment are probably necessary. We resist, however, the further conclusion – implicit in Delaney, explicit in Ghai, and defended in this volume by Dixon and Landau – that these must be democratic in character. Recent Chinese history can at least arguably be read as evidence that popular responsiveness can be secured with only weak democratic paraphernalia. Observed forms of responsiveness under Communist rule in China might not be as normatively desirable as the parallel mechanisms observed in European and American democracies, but it may well be that they provide sufficient stability and predictability in nonpolitical cases to count as “successful.”

Assuming that a constitution takes a democratic path, moreover, it is likely not the case that merely establishing political fora that can operate as alternatives to open conflict suffices. The aspiration toward democracy can conflict with other ideals. Poorly designed parliamentary bodies or electoral rules may provide new forms of representation, but they can simultaneously deepen existing lines of ethnic or racial division, accelerating what would otherwise have been latent or dormant conflicts. Poorly drafted, ambiguous, or merely incomplete constitutional texts may instead generate new, alternative flashpoints for conflict. The task of the constitutional designer, in short, is not simply to install democracy. It is to fashion rules for institutionalizing extant conflict without exacerbating it.

A central cluster of institutions in this regard are those that resolve disputes about the basic rules of the political game. Constitutional courts have emerged as central players in many systems, not only in their paradigmatic role of protecting rights but also in coordinating and resolving conflicts between different government bodies (Ginsburg 2003). But many other such institutions can fulfill the same function of resolving disputes among power holders. These include independent commissions (such as those often tasked with resolving electoral disputes, allegations of human rights violation, or corruption charges), appointed presidents, and even hereditary monarchs (which, for example, in the Spanish transition from military rule during the 1970s, played a very important role).
The basic need, though, is that some kind of institution must likely be available to step up, resolve disputes between powerful factions within or around government, and thereby avoid the acceleration of political conflicts or a collapse into political paralysis. The particular form of this institution is secondary in importance.

One final strategy for containing and managing political conflict is worth flagging: Constitutions can lower the stakes of electoral defeat (or, in nondemocratic contexts, defeat within intra-elite political contests). One important mechanism that serves to minimize the costs of political defeat, and therefore to lower the stakes of governmental turnover, is the establishment and protection of constitutional rights. If a constitution permits some stakeholders – be they political factions, members of an ethnic group, or even a single dictator – to dominate through violence other groups after assuming office, those out of power lose the incentive to stay within the bounds of constitutional competition. If the costs of losing in politics are too high, incumbents will respond by entrenching their political power or otherwise refusing to vacate their offices. Examples of such entrenchment can be observed, as of this writing, in locales as diverse as Turkey, Hungary, and Malaysia – previously three tolerably well-functioning democracies. Such self-dealing is, among other thing, well understood as a form of agency cost – a more general topic to which we turn next.

C Limiting agency costs

A major ambition of constitutionalism is typically understood to be the promotion of government action on behalf of the citizens rather than of itself or transient officeholders. This aspiration fails, the result is termed “agency slack.” The ensuing agency costs, to use the economic terminology, come in many forms, but often arise when a government official exerts effort solely on his own behalf (e.g., by collecting bribes rather than taxes), violates citizens’ basic rights (e.g., by acts of predation or physical violence), or fails to do any work at all. A related risk is political entrenchment in which an officeholder or party seeks to remain in power beyond his or her legitimate term. Obviously, the larger the private rents from political office are, the more incentive officials have to hang on past their appropriate departure dates. And, as Kurlantzick (2013) has documented in respect to new democracies such as Indonesia, both governmental lethargy and corruption run the risk of engendering public dissatisfaction with a political order and a constitution. The net result can be a rush toward authoritarianism. In response to this risk, there are many constitutional institutions and design fixes, ranging from some sort of separation of powers to presidential term limits to counter-corruption commissions.
It is plausible to evaluate a constitution, therefore, on the basis of whether the mechanisms that it adopts are successful in practice.

How can agency costs be evaluated? A minimal indicia of high agency costs in democratic regimes, as Ghai has noted, is the absence of government turnover after poor performance. When a particular government performs poorly under some relevant metric, he plausibly argues, it should be removed from office. Turnover can be entrenched with term limits (although these tend to focus on individuals, rather than parties or factions, which can be sources of agency costs). When term limits provide that political figures must leave office, we can observe whether they do in fact leave (Ginsburg, Elkins, & Melton 2011). To be sure, sometimes term limits can be amended, and this is hardly a sign of constitutional failure, so long as the result is not the permanent entrenchment of the relevant officeholder. Their artful circumvention, as with Russian president Putin’s brief sojourn in the prime minister’s office earlier this century, is yet another signal of high agency costs.

Another warning sign for evaluating agency costs – and one available whether a regime is democratic or authoritarian – is the level of observed corruption, say, measured by the volume of dollars in private rents diverted from the public fisc. To be sure, in some contexts, petty corruption might be beyond the ability of any constitutional scheme to eliminate. But constitutional design might exacerbate the degree of corruption. Kurlantzick (2013), for example, has suggested that political decentralization of the kind associated with constitutional federalism can exacerbate the size of private rents by diffusing the number of choke points at which an official can seek bribes: In effect, corruption becomes a kind of anticommmons problem. Corruption also may or may not prove tolerable in the long term depending upon whether it engenders massive public dissatisfaction of the kind that catalyzed the 2011 popular uprising in Tunisia and, more broadly, the Arab Spring. In contrast, it is reasonably clear that large-scale corruption by high-level political figures and government officials is something that an effective constitution should be able to deter or minimize. Thus, we can expect improvement on corruption measures in successful constitutional schemes, while poor constitutional schemes might exacerbate such measures. One might also examine specific efforts to reduce agency costs. Parliamentary investigations, judicial inquiries, and the successful use of mechanisms to remove from office corrupt or law-breaking officials are all indicia of success in this regard.

\[ D \quad \text{Creating public goods} \]

The flip side of agency costs is what economists call public goods. These are non-rivalrous and non-excludable goods such as national security, the
infrastructural predicates of economic development, environmental protection, and the like. Such goods are likely to be systematically undersupplied through purely private mechanisms because private producers will not be able to capture all of the profits that reflect their social gains. On some accounts, it is the very purpose of the state to produce such goods (although the linkage between state-making and the provision of public goods is sometimes stressed to the exclusion of other plausible and important factors, see Huq 2014). To achieve this goal, it is likely crucial to have an effective regulatory environment and a public security system (e.g., police, intelligence services, and a military) that is non-predatory. While the precise mix of public goods in any particular context should, ideally, depend on the preferences of the citizens and so should be responsive to changes over time, it is nonetheless plausible to think that some rough evaluation of the extent to which constitutionally created institutions meet public demand for such goods is a measure of the underlying constitution’s success.

We do not mean to suggest, however, that all constitutions be judged against the same benchmark of public good production. As we have already noted, many constitutions are written in conditions of profound inequality and under pressure from deeply felt and broadly held socioeconomic aspirations. Constitutional rights in such countries do more than limit government predation. They also provide for affirmative duties and blueprints for government to move toward in the provision of health, education, and welfare. It would not be plausible to evaluate these regimes’ success in producing public goods using the same benchmark used to assess a developed, stable country undergoing constitutional change. (Constitutions in the former type of nations may be less successful in absolute terms, but it is plausible to think that they are able to quicken accelerations in the production of certain public goods relative to those of the latter nations.) Rather, the appropriate metric of a constitution’s success in producing public goods will take a realistic account of the baseline conditions at the time of constitutional adoption, along with the possibility of rapid gains, and only then consider how (if at all) the constitution has enabled an advance from a starting position. At the same time, it must be recognized that many of the outcomes relevant to an analysis of public goods (e.g., levels of law and order, the environment for doing business, and metrics of social and economic performance) have only a tangential relationship with particular constitutional choices. Exogenous shocks (whether positive or negative) can have a much larger causal effect on their variables. That being said, however, a careful and counterfactual inquiry might be able to establish some plausible relationships between the constitutional text and the observed level of public-good production.
To summarize, we have suggested a quartet of mid-level benchmarks of constitutional success that are analytically distinct, but surely related. In particular, we think that the four measures identified here are likely to be mutually reinforcing in practice. When government agents are unable to exploit the state for their own ends, more public goods may be produced, which in turn may enhance regime legitimacy. Greater sociological legitimacy can allow the state to produce public goods at a lower cost, and perhaps can dampen political conflict. When political conflict is channeled through legitimate institutions, people will be more willing to invest in these institutions, which may ultimately support the state (i.e., increasing sociological legitimacy), which in turn will prevent capture by one faction and thus diminish agency costs. The categories thus represent a set of external criteria that accord with intuitions about what constitutional government can and should do.

IV THREE CASE STUDIES: EVALUATING THE US, AFGHAN, AND SOUTH AFRICAN CONSTITUTIONS

We conclude by offering a sketch of how our four external criteria might be applied to three constitutions. Two are relatively familiar constitutions, at least to us, and, we suspect, to many of our readers: The US Constitution of 1787 and the South African Constitution of 1996. The third is relatively novel, we suspect, to many: the Afghan Constitution of 2004. By applying our quartet of values to such disparate and different circumstances, we hope to demonstrate how application of our four-factor mid-range framework can illuminate different elements of constitutional functioning, allowing for a more nuanced and careful evaluation of what counts as “success” in constitutional design.

A United States

Although often viewed as a success merely because of its extraordinary endurance, the US constitution of 1787 can plausibly be ranked as a success with appropriate qualifications on at least three of four of the grounds that we have identified. To anticipate our main objection up front, it is with regard to the task of channeling political conflict that we think that the US Constitution cannot be ranked a clear success – as the Civil War of the early 1860s was to show.

The success of the US Constitution in terms of eliciting popular legitimacy can be gauged in many ways. Most obviously, public polling by the Pew Charitable Trusts and other research organizations consistently finds high
levels of identification with the United States and its constitution. Outside of a handful of lonely voices within the ivory tower, there is no popular movement to rethink the Constitution. To the contrary, popular movements, to be sure, routinely mobilize to make claims under the Constitution, no matter how far removed their interests are from those of the Framers of the 1780s. Consider, for example, for the individual right to bear firearms (once labeled a fraud by Chief Justice Warren Burger), the right to be free of a federal healthcare mandate, and the right to marry a person of the same sex. Even if these are mobilizations aimed, at bottom, toward altering the constitutional order (in two of three cases, successfully), they were nonetheless framed and articulated as claims under the Constitution. In a more historical vein, one might further note that social movements and their leaders from Frederick Douglass to Rand Paul have articulated their claims for sweeping change in terms of fidelity to the Constitution. Perhaps because it is highly inflexible and difficult to change, that is, the Constitution may have engendered a distinct form of claim-making, somewhat loosely within the four corners of the constitutional text. This has the effect of ratifying the normative legitimacy of that text even while seeking to wreak effective change to its contents. The Constitution, in short, provides the grammar of national popular mobilization for social change in the United States. Perhaps ironically, the fact that the Constitution exercises a virtual monopoly on the vocabulary for radical claim-making is testimony not only to the deep plasticity of the American constitutional order but also to the tenacity of its grip, and hence its deep-rooted sociological legitimacy.

Similarly, the US Constitution should be ranked as a success both in terms of its ability to tamp down agency costs and also its catalytic role in the creation of national public goods, most importantly a common economic market across the several states and a military capable of resisting European depredations in the antebellum era, and then, after World War II, establishing the terms of Pax Americana globally. At the Republic’s beginning, corruption was almost a “national fixation” and a serious threat to the sort of civil virtue republican theorists had lauded (Teachout 2013). Hence, when King Louis XVI gave Benjamin Franklin, then ambassador to France, a diamond-studded snuffbox, it was the object of much controversy. From the corrupt Yazoo land deal of the 1790 to the Crédit Mobilier scandal of 1872 to the Teapot Dome scandal of the 1920s and more recent imbroglios such as Abscam, there is no shortage of evidence that individual politicians have abused their offices to obtain private rents. Yet while some contemporary American commentators bemoan the asymmetrical access and influence of the wealthy on congressional decision-making, there is little reason to think that corruption and rent-seeking have
fundamentally compromised the operation of ordinary American political institutions, at least for a majority of citizens. Indeed, it is quite possible to argue that those scandals of underprovision and neglect that most afflict, say, many urban underclasses are perhaps better chalked up to the success of democracy rather than to the failure of a Constitution that was partly prompted by fears of redistributive politics.

The case for applauding the US Constitution is only strengthened by considering its long-term effect on the production of public goods such as a national free market and a robust military apparatus. As ongoing historical work by Alison LaCroix on the antebellum period of 1800–1860 richly illustrates (2013, 2015), the second and third generations of American politicians labored under much uncertainty as to whether the Constitution allowed such measures as a national bank and interstate roads and canals. In time, and perhaps under the pressures of exigency, the Constitution was read to contain the necessary resources to build both a financial and a physical infrastructure of the sort needed for effectual operation of a unified national market. The long twentieth century has similarly witnessed no shortage of federal expenditures designed to keep this market working, even if Americans have widely disagreed on their necessity of wisdom. From the Interstate Commerce Commission of the 1880s to the New Deal administrative agencies of the 1930s and the Great Society social welfare programs of the 1960s right through to the massive federal liquidity injections deployed to stave off the 2008 financial crisis, the Constitution has proved a near-inexhaustible source of legal authority for public goods arguably needful to the national polity. The same can be said on the foreign affairs side. The rise of American military power, of course, needs no proof today; rather, what may warrant more careful consideration is the arguable excess of national resources assigned to military ends not in response to immediate threats but rather as a function of the political dynamics fostered by the Constitution’s division of war powers and the power of local-constituency preferences in the House (Thorpe 2014).

On the final metric of channeling political conflict, however, it is plausible to think that the US Constitution of 1787 should not be ranked a success. The issue, of course, is the sectional divide over slavery, which was left (at best) unresolved by the 1787 document, and in practice was staved off with legislative gag-rules and ad hoc sectional compromises through the first half of the nineteenth century. As Mittal and Weingast (2013) have cogently argued, while the issue of slavery threatened to unravel the constitutional order several times over that period, it was not until the Civil War of the 1860s that the issue was finally eliminated as a source of potential national dissolution (which is
quite different, we emphasize, from a just resolution of the moral claims of former slaves, or a solution for enduring welfare effects of slavery and race prejudice). On this accounting, the Constitution simply failed to supply a solution to the key sectional division. That it required war, not legal or constitutional arguments, to mend that seam is some reason to think that on precisely the most neuralgic point of national division, the Constitution failed.

Of course, it may have been a much better constitution that emerged after the post-Civil War amendments, one not merely designed to keep the peace but to transform the polity in a major region of the country. For the roughly one hundred years it required to begin to implement the vision of social and political equality, the Constitution did serve as a vehicle for channeling political conflict among elites, but at the cost of repressing minorities and outsiders. Constitutional protections did not prevent the maintenance and growth of a racially restrictive order sustained by both state power and extra-state violence. Constitutional institutions facilitated political cartels, such as the coalition of Southern Democrats and Northern Republicans that dominated national politics for nearly a century. But it is also the case that the Constitution provided language and law that led to inclusive transformation, through the courts and eventually through Congress. While the relative role of law is a hotly debated issue (Rosenberg 1992; Klarman 2005), it does seem that the Constitution has done a better job of channeling conflict than in the decades preceding the Civil War.

B South Africa

The South African Constitution of December 10, 1996, is unusual in that what Gargarella calls the central drama – the need to transform a society scarred by racial inequality in every sphere – was clear to all concerned, and was clearly demarcated in the preamble to the Constitution.\(^3\) As the Constitution turns twenty, there is much debate about the extent to which it has achieved those goals. The dominant narrative at the time of this writing is one of dashed hopes, in which unrealistic expectations met the hard realities of governance and the difficulties of reversing entrenched historical injustice.

\(^3\) The entire constitution lays out its own purposes quite explicitly in the preamble. The constitution, it notes, is adopted so as to “Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.” Constitution of South Africa 1996, preamble.
Our own framework helps to provide an external perspective on this debate. To begin with, the 1996 constitution seems to score decently on metrics of legitimacy. Political institutions enjoy moderate rates of legitimacy (Gibson 2014) with scores of both confidence and legitimacy improving over time. Mattes (2007) argues that public attitudes of African respondents are in fact quite complex, and did not conform to either the “unrealistic expectations” or “dashed hopes” of the conventional wisdom.

The 1996 constitution has also been reasonably effective in channeling conflict, perhaps better than could have been expected. Potential spoilers, be they recalcitrant Afrikaner fringe of the Nationalist Party or Chief Mangosuthu Buthelezi, the Zulu leader of the Inkatha Freedom Party, have all been brought into the fold. There has been little political violence, even if criminal violence remains at epidemic levels, as we will discuss at greater length momentarily. Territorial cleavages apparent at the outset of the constitutional negotiations of the 1990s have, by and large, dissipated through a combination of special accommodations at the outset of the constitutional order and also by virtue of the existence of a single dominant political party (the African National Congress, or ANC) that integrated and channeled diverse interests.

When it comes to control of agency costs, on the other hand, the very presence of a single dominant party confronting a weak and delegitimized political opposition has led to predictably disappointing outcomes. Corruption of both the petty and grand types is apparent from the troughs to the peaks of political life. But at least as of now South Africa ranks only in the middle of the pack in Transparency International’s annual corruption survey. Under President Jacob Zuma, moreover, public attention has turned to excesses of the ANC and of Zuma himself. And the fact that some corrupt schemes do result in trials – forty members of parliament, for example, were charged with fraud for misuse of official travel vouchers in 2005 – suggests the presence of some impartiality in the judicial system. Still, the overall assessment here depends very much on the baseline chosen. If one compares South Africa with Zimbabwe, it looks quite good, but it does not approach the levels one would expect in the ranks of the rich industrial democracies to which the country aspires.

Finally, the question whether the Constitution effectively enables the production of public goods such as security from crime, health care, and education has been central in the debates that have emerged around the twentieth anniversary. Across all measures, the social gaps between black and white remain severe, and progress is slow. For example, policing resources are woefully inadequate, with the wealthy (white and black) finding private
substitutes while the poor remain highly vulnerable. Recent empirical studies suggest that the perceived failure to remedy the deep physical insecurity of the Apartheid era has undermined trust and confidence in the state more generally across all social classes (Bradford et al. 2014). It is hence arguable that from the perspective of many South Africans on the ground, this element of the Constitution’s basic function has not been fulfilled.

It is beyond our mandate to explain how this pattern of successes and failures arose. Nevertheless, it is worth noting that in the eyes of many South Africans, the original sin of the 1996 constitution was to make peace with international capital and to provide for continued protection of (highly inequitably distributed) property rights. At the same time, by including many social and economic rights in the organic document’s text, the drafters invited an ongoing dialogue between political branches, as well as among the people at large, on the state provision of these kinds of public goods. Many of the most famous decisions emanating from the nation’s Constitutional Court – such as Grootboom on housing, Mazibuko on water, Treatment Action Campaign on health – have articulated a promising approach to adjudicating social and economic rights. Whether these judicial decisions have made a difference on the ground, however, is a difficult question, but some scholars suggest that they have been effective in calling attention to these issues and in mobilizing civil society (Langford et al. 2015). If the constitution has failed to supply public goods, therefore, it may well nonetheless have provided some tools for the people to demand them themselves.

C Afghanistan

After the Taliban collapsed in 2001, an international coalition led by the United States converged on Afghanistan to install a regime more closely aligned to its geopolitical and security interests. The resulting provisional administration, led by President Hamid Karzai, was responsible for installing a new constitution and managing new elections and a transition to a democratically selected government. The initial document, the December 2001 Bonn Agreement, was produced after a thin process of public consultation, and reflected a process of internecine bargaining between international players and different Afghan warlord factions that had been previously brought into government through appointments and regional spending. The Karzai administration midwived a new constitution in 2004, which led to a reinstallation of many familiar figures, including Karzai himself, in power (for more detailed accounts of this history, see Ginsburg & Huq 2014; Huq 2009).
Against this rather inauspicious beginning, Afghanistan scores surprisingly well in terms of sociological legitimacy – although recent military gains by the Taliban may cast this welcome news into doubt. The Asia Foundation’s annual surveys of the Afghan people, for example, show a population that believes the country is generally moving in the right direction, notwithstanding staggeringly high levels of corruption and state violence. Strikingly, in 2013 more Afghans registered a belief that their country was heading in the right direction than Americans when asked the same question. The data suggest that the Afghan people understand the myriad challenges their government faces (perhaps unlike Americans?), and also appreciate the current measure of political stability in the teeth of observed insecurity, violence, and corruption. As Robert Crews has recently argued (2015), Afghans well understand that they stand within a vortex of international forces well beyond their control. Moreover, notwithstanding the long tenure of President Karzai in office, Afghans can point to several successful exercises in democratic governance, ranging from the 2004 constitutional Loya Jirga (which was widely viewed as a success despite the machinations of Karzai and his foreign backers), to vigorously contested parliamentary elections in 2005 and 2010 under the 2004 dispensation.

Second, in its early years, Afghanistan’s constitution has provided a plausible framework for cabining and constraining the nation’s turbulent and fractious ethno-political factions. It is important to recognize that this project of crafting and managing a workable framework for governance and political negotiation has had to occur against the backdrop of a resurgent Taliban, which has benefited from Pakistan’s provision of strategic sanctuary (Guistozzi 2009). To begin with, cooption through offers of cabinet positions or gubernatorial appointments mitigated outright conflict, largely ending the horrific destruction of the 1990s civil wars. Some former warlords, such as Gulbuddin Hekmatyar, remained militarily active outside the national government. In contrast, many others, including Abdul Dostum, Ismail Khan, and Mohamed Fahim, were folded into the new dispensation. Paradoxically, peace was bought by tainting the very government that it enabled, as warlords decided they could make more money in the system than outside it. Worse, the constitution contains flashpoints that might generate future conflict. For example, confusion abounds about institutional roles because of some shoddy constitutional drafting. President and parliament thus have fought over elections and who gets to interpret the Constitution. At one point the parliament set up an alternative institution to interpret the document, snatching the job away from the Supreme Court. The result was a debilitating impasse.
Paradoxically, the Constitution’s success in drawing in potential spoilers has simultaneously raised agency costs denominated in terms of rights violations and financial corruption, both venial and venal. On the one hand, human rights abuses by government actors and allied powerful third parties (e.g., local militias; tribal leaders) remain grave and pervasive. Of particular important here is the serious failure to vindicate the gender equality commitments of the 2004 Constitution. That document’s guarantees of equality for women have been woefully unfulfilled, despite impressive strides in education, leaving many women highly vulnerable to the overlapping threats of family, village, and state. On the corruption front, moreover, the government’s response to endemic deceit, bribe-taking and outright theft in the new national administration has been at best anemic, in part because President Karzai intervened repeatedly in cases involving close associates. The result is poor performance on the third measure of our quartet.

Finally, the fourth metric of public-good production generates another disappointing assessment. Consider two key public goods: the national economy and human security. On the one hand, Afghanistan’s official economy is overshadowed by illegal economies – most importantly the opiates trade, but also trafficking in women (for prostitution), and a transit trade in goods purchased duty-free in the Gulf and smuggled into India and Pakistan. On the other hand, both the police and the army remain exceedingly weak, despite large infusions of international aid. The recent defeats of the Afghan national army in the north of the country suggest that the state’s apparatus for maintaining its integrity, as well as preserving public order, remains quite weak – in part because of the endemic corruption that the 2004 Constitution failed to stanch.

In sum, the 2004 Constitution is a genuinely mixed picture – scoring high for legitimacy and for channeling political conflict but faring poorly because it created new loci of internecine discord while failing to generate public goods.

V CONCLUSION AND OVERVIEW OF THE BOOK

We have aimed to demonstrate in this Introduction that constitutions can be evaluated either in terms of internal or external criteria. Neither is wholly satisfactory, and in all likelihood some mix of both should be brought to bear in most cases. We have further offered some examples of plausible internal and external criteria. Our ambition in so doing, however, has not been to demonstrate that these criteria are necessarily the wisest or the most normatively desirable exemplars of the genre. Much more modestly, we hope to have
demonstrated that there is some value to thinking systematically and carefully about the task of evaluating constitutional success.

We close with a brief overview of the structure of the volume. The first part of the book comprises four efforts to answer the question of how to evaluate constitutional performance by identifying, at a high level of generality, a generally applicable answer to that question. The contributors to this part, however, diverge as to whether the relevant criteria should be internal or external. They also explore different objects of inquiry, ranging from the effect of constitution-making on state structure, state stability, or democracy, to the quality of the text itself. To begin with, Aziz Huq draws on a strand of political theory going back to Machiavelli and Hobbes to identify state maintenance as a central function of constitutional design. This leads to a very narrow definition of plausible general criteria for constitution-making. Taking a very different approach, Hélène Landemore uses the availability of plural constitutional drafts from the Icelandic debates of 2008–2009, each of which emerged from a different sort of drafting process, to investigate what renders a constitution “good.” Rejecting the narrow normative grounds espoused by Huq, she offers a robust and comprehensive account of qualities that render a draft, at least ex ante, successful. These papers offer external criteria. In contrast, Roberto Gargarella urges an internal benchmark. Drawing on the work of famed Argentinian jurist Juan Bautista Alberdi, he proposes an approach that is primarily attentive to the threshold “dramas,” or problems, confronted by constitution-makers. He then illustrates this method with examples drawn widely in time and space within the Americas. Finally, Martin Shapiro offers a challenge to the measurement and assessment of success by raising the issue of political parties, which are both produced by but also interact with formal institutions to provide the lifeblood of constitutional action.

The next part of the book takes Gargarella’s observation that sometimes a constitution is designed to resolve a very particular policy problem as a starting point, and asks whether there is a general criterion that might be applied to evaluate success when different constitutions seek to resolve the same problem. Drawing on his extensive work on Turkish constitutionalism, Ozan Varol develops a general taxonomy for analyzing the role of constitutions in managing transitions from authoritarian, military rule and civilian, democratic regimes. Deeply informed by the Turkish context, Varol’s approach also provides a perspective from which to analyze the relative success (or failure) of other such transitions, for example in Pakistan, Indonesia, and South Korea. Next, Hanna Lerner considers how constitutions engage with the problem of managing religious conflicts and tensions. She entangles the role of constitutions in both protecting individuals’ right to
religious freedom and also their right to be free from religious dispensation. She then applies her analysis to a range of mid-twentieth-century constitutions that had to grapple with the problem of how to integrate (or not) religious preferences and divisions into the structure of the new state. Sumit Bisarya examines the general phenomenon of transitional provisions, which often serve as the bridge between an old constitutional order and new one. While relatively clear in terms of evaluation, they also present challenges and can often serve as points of crises. Drawing on close case studies of Tunisia and Somalia, he suggests a lens for evaluating these critical parts of written constitutional schemes. Zachary Elkins, Tom Ginsburg, and James Melton look at the challenge of implementing constitutional rights, and focus especially on the importance of time. They challenge, on theoretical and empirical grounds, approaches that simply compare constitutional text with performance on some human rights indicator at a single point in time. And Rosalind Dixon and David Landau defend and explore the possibility of a democratic criterion for constitutional endurance in democracies. They investigate the qualities a constitution must include to be effective as a democratic matter, using the concept of a constitution’s “basic structure” as a tool to explore how to evaluate both initial design and subsequent change.

The final part of the book turns to a series of case studies. The aim here is not to be comprehensive (an ambition that would, in any case, be infeasible) but rather to provide a rich counterpoint to some of the earlier chapters. In each case, the author explores the implementation of a given constitution (or in the case of Zaid Al-Ali, set of constitutions) and provides their own view about the perspective to be deployed in examining our core question. The four examples are different in timing and in the nature of the relevant bundle of founding aspirations. In each of these chapters, the author navigates between praising successes, and, perhaps inevitably, cataloging failures, in a highly contextual fashion that illuminates the limitations of generalizing analyses.

To begin with, Martha Nussbaum explores the 1950 Indian Constitution from the perspective of one of its key drafters, Bhimrao Ramji Ambedkar. Picking up on themes explored in Part II of the book, Nussbaum uses Ambedkar’s concern with the mitigation of caste-based discrimination as a platform to examine whether, and how, the Indian Constitution could promote the well-being of some of the most disadvantaged members of Indian society. A close observer of the drafting of the 2010 Kenyan Constitution, James Gathii explores the ambitions of that document. Considering the effects of five years’ institutional progress (rather than the half century in which the Indian Constitution has been in effect), Gathii identifies key personnel decisions and legislative choices that will
have an effect going forward on how the ambitions of the constitution for ethnic peace and accountable government will be achieved. Zaid Al-Ali takes a larger historical and geographic sweep by considering the effects of constitution-making in the Arab world after the Arab Spring. Al-Ali is skeptical about the availability of external criteria of the kind we set out here, but instead focuses his keen and close eye on two waves of Arab constitutions. Finally, Erin Delaney examines the recent period of change to the venerable and idiosyncratic British Constitution. She shows how a variety of forces have contributed to a rapid shift of the basic mechanics and pace of constitutional change, suggesting that constitutional success is elusive and that significant risks are emerging in seeking a balance between stability and flexibility. Her chapter furnishes a useful juxtaposition to, and perhaps confirmation of, the argument laid out in Dixon and Landau’s chapter, although the latter focuses more on consolidated written constitutions.

To conclude, it is apparent that the contributors to this book disagree, sometimes sharply, on the validity or either external or internal criteria either in general or in particular cases. Rather than settling this debate, the chapters in this book provide perhaps a collective analysis of myriad potential approaches to the task of evaluating constitutional success – an analysis that, we hope and expect, will be of interest and value to both academic experts on constitutional design, and also those engaged in the practical task of facilitating the creation of sound constitutional documents. It is up to the reader to assess our own collective performance in this regard.

REFERENCES


