

## Constitutional Culture, Constitutional Parchment and Constitutional Stickiness: Matching the Formal and the Informal

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### Abstract

Most countries in the world teeter between too little government and too much, or between Anarchy and Leviathan. This paper employs a formal-informal paradigm to study constitutional stickiness, failure and success – with a particular emphasis on the congruence between the underlying constitutional culture and the formal constitutional parchment. The theory is then illustrated by examples of constitutional success and failure: after World War Two, the Philippines adopted an idealistic constitution that failed, whereas Japan tailored foreign ideals to local realities, and faced great constitutional success. Argentina, in 1860, adopted an ideal constitution that failed to guarantee stability and growth; Mexico, after its revolution, blended foreign ideas with domestic, and faced the greatest stability in Latin America.

*Naturam expellas furca, tamen usque recurret.*<sup>1</sup>

*Monsieur Diderot, j'ai entendu avec le plus grand plaisir tout ce que votre brillant esprit vous a inspiré; mais avec tous vos grands principes, que je comprends très bien, on ferait de beaux livres et de mauvaise besogne. Vous oubliez dans tous vos plans de réforme la différence de nos deux positions: vous, vous ne travaillez que sur le papier, qui souffre tout; il est tout uni, souple, et n'oppose d'obstacles ni à votre imagination, ni à votre plume; tandis que moi, pauvre impératrice, je travaille sur peau humaine, qui est bien autrement irritable et chatouilleuse.*<sup>2</sup>

### Introduction: The Paradoxes of Constitutional Constraint

Constitutionalism is fraught with paradoxes and challenges. At the very foundation we have what we might, with Ostrom (1980, 422) call the Faustian Paradox:

the very nature of government involves the legitimate use of force in ordering human relationships. The use of force in human relationships is of the nature of an evil. The use of instruments of evil as a necessary means to realize the

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<sup>1</sup> You may chase nature away with a pitchfork, but it will come running back. Horace, *Odes*.

<sup>2</sup> "Mr. Diderot, I have heard with the greatest pleasure the inspiration of your brilliant mind; but with your lofty principles, which I understand very well, one would make beautiful books and bad deeds. You forget in all your proposed reforms the difference between our two positions: you work only on paper, which suffers everything; it is unified, supple, and does not oppose any obstacles to your imagination or your pen; but I, poor empress, I work on human skin, which is rather irritable and ticklish." Catherine the Great to Diderot on his proposed Polish constitution (Ségur 1826; translation my own).

advantage of ordered social relationships creates a fundamental moral dilemma that can be appropriately characterized as a Faustian bargain. A reasonable expectation, given the Faustian bargain, is that government will fail.

How are we to prevent the state Mephistopheles from claiming his due – and somehow ensure that the Faustian bargain of government does not end in tears? Even in the best case scenario, we are next faced with the Liberal Paradox (see Locke 2002, Hayek 1960 or Rothbard 1978). Is there no way, other than coercion by the state, to prevent coercion? Lest anarchy prevail, we must have recourse to the state to protect our rights, or coercion to prevent coercion. Finally, moving to a more practical level, we are faced with a third problem, the Weingast Paradox: a government strong enough to bind itself is also strong enough to break its bonds; see Weingast 1995. How, then, do we enable government to provide an environment conducive to human liberty and flourishing – while also constraining it, so it does not violate the very rights it was established to defend? How do we avoid constitutional failure, as frustrated actors use unconstitutional means to seize power? These are the challenges of constitutionalism.

Alas, a simple and sobering glance at the world tells us that constitutionalism is rare and fragile. And that the challenges of constitutionalism are not mere academic preoccupations for constitutional political economists. Indeed, according to the *Freedom in the World 2014* survey, less than half the world's population (45%, living in 88 countries) is considered to be free; the balance is ranked as partly free (30% of the population, living in 59 countries) or unfree (24%, living in 38 countries).<sup>3</sup> Likewise, according to the 2014 *Index of Economic Freedom*, a mere six countries (of 165 ranked) are listed as economically "free", with 28 "mostly free," 56 "moderately free," 61 "mostly unfree," and 28 "repressed" (Miller, Kim and Holmes 2014). Everywhere, we see the consequences of poor constitutionalism, as the world teeters between too little and too much government – or, in the words of Buchanan (1975), between anarchy and leviathan. Neither extreme is conducive to human flourishing (see Scully 1998): one sixth of humanity currently subsists on \$1/day, while one half ekes out a living on \$2/day. Constitutional government is precarious and rare. Nor is this challenge anything new: for a history of attempts at controlling the state through constitutional constraints, see Gordon (1999).

How, then, do we enable government to do useful things while restraining it from doing ugly things? Borrowing from Adam Smith, how do we encourage the human propensity to "truck, barter and exchange" while thwarting the nastier proclivities to "rape, plunder and pillage."

This paper proposes that successful constitutionalism – a system that walks the fine line between too little and too much government, or between Anarchy and Leviathan –

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<sup>3</sup> See [www.freedomhouse.org](http://www.freedomhouse.org)

depends on the match between the formal parchment and the underlying constitutional culture.

Section One proposes the concept of constitutional culture and presents a paradigm for constitutional stickiness, based on congruence between the formal and the informal. Section Two discusses the mechanics of constitutional stickiness and rejection. Section Three offers four illustrative case studies. The final section concludes.

## **I. CONSTITUTIONAL CULTURE AND CONSTITUTIONAL SUCCESS**

### **1. Formal and Informal Constraints**

As important as constitutions are for liberty and human flourishing, the answer to the challenges of constitutionalism lies not in formal mechanisms. It cannot. After all, constitutions are ultimately mere parchment. Ordinary contracts rely on a combination of internal constraints and external enforcement mechanisms; but a constitution, by definition, is the formal enforcement mechanism of last resort. Alas, the literature in constitutional political economy is mostly quiet on the subject of informal mechanisms. Instead, the emphasis is predominantly on formal, contractual mechanisms; see *e.g.* Buchanan 1990, Buchanan 1975 or Brennan and Buchanan 1985; for commentary and critique, see also Hardin 1988, Gordon 1976 and Voigt 1997).<sup>4</sup> Useful as these are, there is something missing.

Instead of a contractual approach, I employ Hardin's (1999) basic view of a constitution as a coordinating mechanism among the "interests that matter" within a polity, rather than a contract (see also Hardin 1988 and Gordon 1976).<sup>5</sup> There can be no outside appeal to any other formal institution beyond the constitution; hence the importance of informal constraints in maintaining constitutional order. Hardin (1988) explains that "without support from relevant people, perhaps often in the grudging form of those unable to co-ordinate in refusing support,...rules would not be worth the paper on which they are recorded." Similarly, Alexander Hamilton noted of the US Constitution that it would be a "frail and worthless fabric" in the hands of the wrong people.

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<sup>4</sup> One wonders why constitutional culture receives such scant attention in the literature. I offer two speculations. First, I suspect there exists a "measurability bias" of sorts in economics (which is, after all, the mother discipline of constitutional political economy): culture does not fit into tidy models or econometric regressions, so it is simpler to assume it away (see Evans 2007, commenting on Boulding 1974, Chamlee-Wright 1997, Tilly 2003, and Lavoie and Chamlee-Wright 2000, 42). Second, with Hayek (1967), I blame the intellectual legacy of "rationalist constructivism" and legal positivism (although, to be sure, James Buchanan, the father of contemporary constitutional political economy, is a contractarian, without being a legal positivist).

<sup>5</sup> Parenthetically, the coordination approach fits within the greater "evolutionary" approach. Voigt (1997) explains that "whereas Buchanan is clearly leading the contract notion of the constitution, Hayek (*e.g.* 1973, 1976, 1979, 1988) is almost as clearly leading the notion of the constitution as the result of cultural evolution."

Informal constraints thus hold a central importance for constitutionalism. If a critical mass of individuals refuses to be bound, if it rejects constitutionalism generally or the constitution specifically, if it does not accept the deferral of current power for long-run stability, the entire constitutional undertaking will fail. Expediency will trump principle. Power will prevail over rules. And short-term gain will win over long-term coordination. In the words of Franklin and Baun (1995, vii), "in the constitutional state the rule of law prevails, not because the courts or police say it should, but because there exists a general acceptance of and confidence in the law."

## 2. Constitutional Culture

The relevant ideology and culture – the limits of the willingness to be bound (see Elster 2000 and Hardin 1999) – are best captured in the concept of "constitutional culture," the general attitude towards the nature, scope and function of constitutional constraints. This culture will be the key to successful constitutionalism.

As a coordination mechanism, constitutionalism requires "relatively wide agreement on core issues" (Hardin 1999, 84). North (1981, 14) writes that "compliance is so costly that the enforcement of any body of rules in the absence of some degree of individual restraint from maximizing behavior would render the political or economic institutions non-viable – hence the enormous investment that is made to convince individuals of the legitimacy of these institutions."<sup>6</sup>

Existing attempts at defining constitutional culture offer a useful start. See, *e.g.* Ferejohn *et al.* 2001, especially 10 and 14, Mazzone 2005, Friedman 1975, Kahn 1999, Lupu 1990, and generally Levinson 1988; see also Merriam 1931. Furthermore, it should be noted that the difference between formal and *de facto* laws is covered in the legal literature. For example, Lasalle (1946[1862] in Santiago 2003) distinguishes between the "real constitution" (actual power structures) and the "juridical constitution" (constitutional parchment). But these approaches all share the same major shortcoming, as they limit the concept of constitutional culture to situations where the polity accepts constitutional constraints. Defining constitutional culture as a culture that accepts constitutionalism is simply too limiting; not only is it tautological, but it does not shed light on constitutional failure (which is, after all, much more common than constitutional maintenance).

Adopting a broader definition, constitutional culture captures an attitude about constitutional constraints and constitutionalism. Constitutional culture includes the implicit and explicit, stated and unstated, conscious and subconscious, thoughts, feelings,

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<sup>6</sup> In a rehash of the famous Noble Lie, if the acting citizen *thinks* of the constitution as a contract, and is thus bound that much more strongly by it, then so much the better for successful constitutionalism (even if the theorizing constitutional political economist sees beyond the constitution as contract).

beliefs, impressions and norms a group holds about the nature, scope and function of constitutional constraints. What if Hardin's (1999) "interests that matter" reject constitutionalism completely? What if they are willing to suspend constitutional constraints, if temporarily, in the face of a crisis? How do individuals, or groups amounting to "interests that matter" feel about balancing political expediency with constitutional principle? What relative weights do they assign to popular will (majoritarianism) versus constitutional principles agreed upon in the meta-stage of institutional design (especially when such principles provide an undemocratic brake on democratic excess)? Generally, how do individuals, or groups of individuals, feel about constitutional norms (whether explicitly and rationally, or implicitly and emotionally)? Do individuals trust each other? Do they cooperate? And, if so, do they cooperate only within their community, or also with strangers? Do they internalize rules, in a virtuous circle of reinforcement? Or do they attempt to cheat, defect or shirk, in a vicious circle of anomie?

Different groups in society (*e.g.* educated versus uneducated, élites versus masses, legal practitioners versus politicians, politicians versus the street, *dirigiste* versus *laissez-faire*, etc.) can have different constitutional cultures. As North (2005, 2) emphasizes, a "belief system may be broadly held within the society, reflecting a consensus of beliefs; or widely disparate beliefs may be held, reflecting fundamental divisions in perception about the society." In cases of relative national homogeneity, I will refer to the dominant constitutional culture as *the* national constitutional culture. See, *e.g.*, North (1999, 11) on dominant beliefs as "those of political and economic entrepreneurs in a position to make policies."

Thus, constitutional culture reflects the most basic beliefs and attitudes about general organization, that is, not just the constitutional text itself, "but the entire network of attitudes, norms, behaviors and expectations among elites and publics that surround and support the written instrument" (Burnham 1982, 78). For details on constitutional culture, see Wenzel 2007 and 2010a.

### 3. A Theory of Constitutional Stickiness, Success and Failure

This paper develops a simple classification for a complex problem: formal-informal constitutional matching. It ties in with the overall literature on institutional change (where matching is alternatively referred to as stickiness or embeddedness; see, *e.g.*, Boettke *et al.* 2008, North 1999, Rodrik 2000 and Roland 2004) – with a particular emphasis on constitutions. In sum, for a constitution to be successful, the formal parchment must match the informal constitutional culture. But, first, we must define constitutional success.

North *et al.* propose that human history can be classified in three social orders: foraging, limited access orders (also known as a closed access order, or natural state) and open

access orders (2009, 2). Setting aside foraging as pre-civilization, they focus on the latter two. A closed access order "manages the problem of violence by forming a dominant coalition that limits access to valuable resources... or access to and control of valuable activities... to elite groups" (30). Such an order is characterized by slow growth and vulnerability to macroeconomics shocks; politics without generalized consent of the governed; a relatively small number of organizations (in the market and civil society); small and centralized governments; and personal social relationships (privilege, hierarchy, lack of rule of law, etc.) (11). There are degrees within this category, ranging from fragile and barely sustained orders (Haiti, Iraq, Afghanistan) to basic orders with a durable and stable organizational structure (Bolivia, Venezuela or Russia), all the way to mature closed orders, with a durable institutional structure and elite organizations outside the immediate framework of the state (Mexico is a prime example) (41). By contrast, an open access order is one in which "political management of violence is based on impersonal rules and organizations, not, as in the natural state, on the manipulations of economic privileges. As a result, open access societies adjust to economic and social change without necessarily making adjustments in the political arrangements dealing with violence" (122). Open access orders manifest high levels of political and economic development, less negative growth, rich and vibrant civil society with many organizations, big and decentralized governments, and widespread impersonal relationships (such as rule of law or property rights) (11). Examples of open access orders include the US, UK and France (which all made the transition from closed to open in the early 19<sup>th</sup> century), or South Korea and Taiwan (1950s-2000) (27).

In the framework proposed by North *et al.*, "the big question... is how natural states make the transition to open access societies" (25-26). They remind us that the transition occurs within the natural state, and must thus follow natural state logic, while giving elites incentives to make the transition to impersonal exchange. Transition occurs when elites transform personal privileges into personal rights. But transitions do not happen immediately; first, relations within the dominant coalition must transform from personal into impersonal; then this change must extend to the larger population. There are three "doorstep" conditions for the transformation (151): (1) rule of law for elites; (2) perpetual organizations in both the public and private sphere; and (3) consolidated control of the military.

Different countries go through different details and different orders of doorstep conditions. But, in order to make the transition, all countries must fulfill the three doorstep conditions. Now comes the importance of constitutionalism. We can think of constitutions as facilitating or hindering the transition from closed to open access order. North *et al.* (2009, 2) emphasize that "transition [from closed to open access] entails a set of changes in the economy that ensure open entry and competition in many markets, free movement of goods and individuals over space and time, the ability to create organizations to pursue economic opportunities, protection of property rights, and

prohibitions on the use of violence to obtain resources and goods or to coerce others" – in other words, a constitution that limits government while enabling productive exchange.

These conditions essentially match Hayek's safeguards for individual liberty under a "constitution of liberty" (1960, 205-209): rule of law; equality before the law; separation of powers; and absence of discretionary powers to administrative authorities. In sum, we can define a successful constitution as one that: (a) provides a check on government, just as it empowers it to defend individual rights; (b) provides a space within which markets and civil society can flourish; and (c) supports the shift from a closed-access to an open-access order, or helps in the maintenance of an open access order.

In order to be successful, a constitution must match the underlying constitutional culture. This matching can be seen in the degree to which the constitutional culture is reflected in the constitution, and the degree to which the constitution serves as a vehicle for the state to deliver the public goods desired by the people and assumed in their constitutional culture. Details include such things as the extent to which the constitution is entrenched (or responsive to changes in the popular will); or the scope of governmental power (is it limited, thus matching a suspicious constitutional culture, or is it broad, maybe moving beyond public goods to outright redistribution)? In sum, a constitution matches the underlying constitutional culture if the governmental reality matches the vision of government contained in the constitutional culture. Naturally, there will be different degrees of matching, just as there are different degrees of success.

Having discussed success and matching, I turn in the next section to failure and mismatch. Simply stated, a constitution must match the underlying constitutional culture. If it does not, the informal will reject the formal.

## **II. MATCHING THE FORMAL AND THE INFORMAL**

The short-term stickiness and long-term robustness of a constitution will depend in large part on the formal constitution's compatibility with the underlying constitutional culture. A constitution will fail if it is perceived as a foreign graft onto a constitutional culture that rejects it. If constitutional culture and the formal constitutional system are radically mismatched, the "patient" will reject the foreign transplant completely; if the mismatch is minor, compromise can occur.

Throughout the theoretical possibilities below, I weave in brief illustrations from case studies of constitutional stickiness and constitutional history. I expand on four such case studies in section Three.<sup>7</sup>

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<sup>7</sup> For details on Mexico and Argentina, and Japan and the Philippines, see section three. See also Wenzel 2010b and 2010c, respectively. On France, see Duverger 1998, Stone 1992, Skach 2005, and Wenzel (2017) *J. Juris.* 61

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### 1. Formal-Informal Mismatch: From Change to Rejection

Three types of constitutional rejection and change can ensue; countries can experience different types of mismatch (as well as success) over their constitutional history.

*a. Marginal constitutional change.* Rather than changing its constitutional system fundamentally, a country may opt for significant change within existing constitutional structures. In the words of an anonymous reviewer, "it is not necessarily the case that stability is the best outcome here (although it is surely not the worst). A more dynamic relationship in which the culture and the constitution may change over time, but in step with each other, may... be at least as valuable to one where the culture and constitutions persist in rigid symmetry." Over time, formal laws and informal culture can be involved in a tango of sorts, as they influence each other (see Jones 2006, Roland 2004, Hardin 1999 and Posner 1997). Marginal constitutional change thus exemplifies the shades of grey in constitutional success. Indeed, a marginal constitutional change could be seen as a rejection of the initial constitutional arrangement; it could, conversely, be seen as a flexible improvement, as the constitution is "strong enough to bend." Examples include the US 17<sup>th</sup> amendment (which altered the nature of federalism by shifting to direct election of US Senators), Russia in 1992 (which moved from a Madison-style constitutional court to a Kelsen-style council; see Epstein *et al.* 2001) or France in 1962 (which changed to direct presidential election four years after moving from a parliamentary to a semi-presidential system; see Wenzel forthcoming-1).

*b. Radical constitutional change.* A country may simply drop its existing constitution and adopt a radically different form of government – while staying within the general confines of rule by constitution. This appears to be a national sport in much of Latin America (the Dominican Republic, for example, has had 32 constitutions since 1844; Venezuela has had 26, Haiti 24, and Ecuador 20 since their respective independences; see Cordeiro 2008). France, with its emphasis on the constituting power (the Nation) over the constitution, has mastered this art, as constitutions periodically reflect shifting national identities, experiments or majorities. Thus, since 1789, France has had 21 constitutional regimes, including five republics, two empires, two restorations of the monarchy, and a bevy of temporary constitutional charters (see Duverger 1998).

*c. Full constitutional rejection.* Finally, instead of amending an existing arrangement or shifting constitutions radically, a country may drop constitutionalism entirely, via military coup or constitutional suspension. Argentina suffered this fate 11 times in the 20<sup>th</sup> century (see Wenzel 2011). All Latin American countries have suffered it at least once (generally, see Kolesar 1990 or Garcia Hamilton 2005). This was also the case in

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forthcoming-1. On Italy, see Wenzel 2015, Sabetti 2000 or Zibblatt 2006 . On the US, see Ferejohn *et al.* 2001. On Russia, see Epstein *et al.* 2001. On constitutional transfer generally, see Wenzel 2014, Billias 1990, Boettke *et al.* 2008, and Kolesar 1990.

Germany's transition from the Weimar Republic to National Socialist dictatorship, or France's summer 1940 suspension of the Third Republic through a grant of full powers to Marshall Pétain (see Skach 2005). Such a full constitutional rejection occurs mostly in dramatic situations of crisis or when the mismatch between constitutional parchment and culture is fundamental, and the cultural patient flatly rejects the constitutional graft.

## 2. REASONS FOR CONSTITUTIONAL CHANGE AND REJECTION

A formal constitutional system will not stick (and will thus fail) if it does not match the underlying constitutional culture. If there is only a slight divergence, the two will reach a focal point of compromise, within the dynamic circle of formal-informal institutional complementarity. However, if the two diverge sufficiently, the informal body will completely reject the formal transplant, leading to constitutional rejection rather than compromise.

I use four categories to classify constitutional change and rejection:

*a. Cultural incompatibility – constitutionalism generally.* The dominant constitutional culture may not be amenable to constitutionalism, favoring instead an "institutional *ad hocery*" of expediency over principle. Franklin and Baun (1995, 4) for example, write that "a political culture is capable of promoting constitutional or non-constitutional public policy." At a more fundamental level, constitutionalism presupposes a willingness to be bound and a willingness to defer current income or power – in the name of stability, order, growth, the constitutional undertaking, etc. If the prevailing constitutional culture rejects compromise or exhibits hyperbolic time preferences, constitutionalism as a whole will be rejected. If a country's constitutional culture is impatient with compromise or inflexible in its pursuit of stability, constitutionalism will not survive – a spirit exemplified in the ominous Latin American saying, *la constitucion es una cosa; los militares somos otra*.<sup>8</sup> Likewise, if the world is seen to be alien and uncontrollable, it would be foolish to make any sacrifices for a long-run that may not exist and can certainly not be predicted or controlled. This attitude is exemplified by Banfield (1958, 85 in Putnam 1993, 88) on the prevailing vision in the Italian village of Montegrano, showing that fatalism leads to passivity, and thus the absence of behavior required for successful constitutionalism: "maximize the material, short-run advantage of the nuclear family; assume that all others will do likewise." Generally speaking, a constitutional culture must incorporate a willingness to be bound – even by an unpalatable opposition – for constitutionalism to prevail. Argentina (as well as all of Latin America, except for Mexico since the end of its revolution) has faced this, as the military repeatedly suspended the constitution (see

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<sup>8</sup> The constitution is one thing; we the military are another. Turning to popular literature, I recall the comment made by a character in Latin American novel: "There is nothing at all wrong with our laws and institutions and our constitution, which are all democratic and enlightened. What is wrong is that they are enforced by people who do not consider themselves bound by them" (Bernières 1990, 306).

Wenzel 2010b). The same happened in the Philippines, with the 1972-1981 Marcos dictatorship (see Wenzel 2010c).

*b. Cultural incompatibility – the specific constitution.* Short of rejecting all forms of constitutionalism, a constitutional culture can reject a specific constitution. For example, Evans (2007), working off the theories of Thompson *et al.* 1990, Schwarz and Thompson 1990 and Wildavsky 1998, offers an analysis based on four ideal cultural types. The "individualist stresses equality of *opportunity*... The egalitarian prefers equality of *outcome*, because differences lead to power imbalances. The hierarchist believes in equality *before the law*... The fatalist has no ideal of fairness, because it's not seen to exist." The implications for constitutional culture and constitutional choice follow, starting with the basic idea of economic organization: "If the economy is a pie the individualist will require as large a slice as possible...; the fatalist will accept any portion offered...; the egalitarian will seek to convince all parties that they can make do with smaller slices; and the hierarchist will seek control of the knife, and determine the cut of the pie amidst competing recipients." Such basic economic views will spill over into constitutional political economy. If a constitution does not match the underlying culture, the constitution will be rejected. Likewise, if a country is culturally fragmented among types, and if the constitution favors the vision of one type to the exclusion of others, the document will be rejected by the other types – who may then attempt to seize power through extra-constitutional means. A hierarchist will not suffer the inefficiencies of an egalitarian constitution; an egalitarian will demand redistribution under an individualist constitution, etc. And, in any case, a fatalist will not accept the constraints of constitutionalism if it jeopardizes a certain present for the sake of an uncertain future. Italy, for example, has largely rejected a centralizing constitutionalism that quashed its tradition of local autonomy. Before World War Two, Italy endured fascism, which stepped into the bureaucratic system implemented by its 19<sup>th</sup>-century constitution. Since World War Two, Italy has been spared military intervention, but the country has lapsed into chronic political instability, heavy bureaucracy, and widespread corruption (see Wenzel 2015 or Sabetti 2000 and Zibblatt 2006 for broader histories). See section three on the cultural mismatch in the Philippines and Argentina.

*c. Philosophical incompatibility – the specific constitution.* Successful constitutionalism presupposes certain philosophical foundations (which are a component of constitutional culture) – and compatibility between those foundations and the formal constitutional arrangement. In many ways, this matches the above argument about cultural incompatibility, but it is important enough to bear separate mention. Institutions rely on philosophical claims about the world in which we live, about the morality to which we should aspire, about the rights the institutions are designed to protect. A given constitutional culture may be hostile to a specific constitution that reflects a competing philosophy. Indeed, a constitution represents the political expression of an underlying philosophy. If the written constitution reflects a philosophy that conflicts with the

philosophy encapsulated in the underlying constitutional culture, there will be trouble – the constitution will be seen as inappropriate or downright bad, as it delivers the "wrong" political goods. For example, Rousseau's thinking, if not explicitly, is still on the lips of the average French citizen; in the French-Rousseauian tradition, constitutionalism is secondary to democracy – and the state, far from being a threat to individual rights, is seen to represent the expression, and implementation, of the popular will for the common good.<sup>9</sup> By contrast, the American political tradition is infused with the thinking of the Scottish Enlightenment – both implicitly, in mental models, and explicitly, as Adair (1988 [1951] and 1988 [1957]) so crisply demonstrates (in the words of Thomas Jefferson's US Declaration of Independence – as a representation of one particular philosophical approach to constitutionalism – "*to secure these rights* [of life, liberty and the pursuit of happiness, among others], governments are instituted among men" (emphasis added). Where *dirigisme*, rational constructivism and obsessive infatuation with majority rule took hold of minds and institutions on the Continent, the Scottish tradition of respect for spontaneous order and bottom-up emergence captured American minds and constitutional parchment. An adherent of Continental thought will not accept a Scottish document – and vice-versa. This is exactly what happened at Argentina's founding (1853/1860), where a Scottish document (copied almost verbatim from the US) was imposed on a Continental-Rousseauian constitutional culture (see Wenzel forthcoming-2). Likewise, France struggled from 1789 until 1958 to balance its underlying culture of Rousseauian majoritarianism with the expediency of strong leadership. It took more than 20 constitutions for France to find balance (see Wenzel forthcoming-1).

*d. Inefficiency and Instability.* Even in the face of cultural and philosophical compatibility between parchment and mental models, if the government does not function and does not deliver basic services – order and security for starters; public goods; or some level of wealth redistribution, depending on the details of the dominant constitutional culture – there may be calls for constitutional change. This appears to have been the case in Argentina throughout the 20<sup>th</sup> century (along with every other country in Latin America except Mexico), as the military periodically stepped in to clean up after civilian mishandling of economic or military crises). Likewise, France's Third Republic (1870-1940) and Fourth Republic (1946-1958) proved inefficient at dealing with crises, and were replaced by subsequent constitutional arrangements. Fundamentally, the question

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<sup>9</sup> In a recent example of economic anthropology, Declercq (2006) studies press references on the Constitutional Council during the (mostly) political and (somewhat) constitutional crisis surrounding France's 2006 attempts at labor law reforms. First, the study shows that a scant 83 articles mentioned the Constitutional Council, out of a total of 12,000 articles on the projected reform published in the period covered by the study. Second, the study shows the polity's general indifference towards and ignorance of the constitution and the Constitutional Council (a number of articles even contained primers on the Council's role, something unthinkable in the US, whose population is often obsessed with Supreme Court rulings). Finally, the study concludes that "neither venerated nor shunned, the constitution has become irrelevant" (translation my own), and secondary to majoritarian considerations.

comes down to a tension between expediency and principle. If the government is not delivering basic services, what is the tipping point when the people will reject constitutional compromise in favor of a new constitution through which the state will (hopefully) deliver those desired services? At a very basic level, one can imagine frustration with anarchy or civil unrest; or recurring economic stagnation or chaos; or the state's failure to protect basic individual rights. To be sure, there is an element of cost-benefit analysis (see Tullock 2005 on the social dilemma). However, there is also a strong element of constitutional culture: at what point will even the most dedicated of constitutionalists accept extra-constitutional means to obtain the desired political goods?

### III. Illustrative Case Studies<sup>10</sup>

Constitutional culture is so varied and so rich that an ounce of example is worth a pound of definition. Four case studies illustrate the paper's central proposition: Mexico and Japan exhibit constitutional success, as the framers sought to match the parchment with the underlying culture; the Philippines and Argentina failed constitutionally, because the underlying constitutional culture rejected the parchment.

#### 1. The Philippines after World War Two: Individual Rights? How Nice

The Philippines started its modern history as a Spanish colony; as a result of the Spanish-American War, the country passed from Spanish colony to US protectorate. After World War Two, the Philippines attained statehood with a new constitution adopted in 1946.<sup>11</sup> By the 1960s the Philippines was a stable democracy, with established rule of law and constitutionalism (see Overholt 1986, Tate and Haynie 1993 and del Carmen 1973). Naturally, economic growth followed;<sup>12</sup> "from 1950 to 1965, the Philippines' average economic growth rates exceeded all of Southeast Asia, Taiwan and South Korea" (Overholt 1986). In sum, by the 1960s, the Philippines "was viewed as one of the great models of Third World political and economic success" (op. cit.).

Alas, serious problems lurked under the veneer of success: a large disenfranchised underclass subject to the whims of large landholders (Vinacke 1947); "some of the world's worst social inequality" (Overholt 1986); institutions that favored the oligarchic minority; high levels of corruption; and rampant crime. First came economic decline; by the end of the 1960s, economic growth had slowed (Overholt 1986). Then came increasing social unrest. As a result, democratically elected President Ferdinand Marcos imposed martial law, and stayed in power beyond his constitutional mandate, suspending elections and rewriting the constitution in his favor.

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<sup>10</sup> For details on the case studies, see Wenzel 2010b and 2010c.

<sup>11</sup> There is apparently some debate as to exact dates. For example, Blaustein (1992, 53) refers to the Philippine constitutions of 1936 and 1948, whereas Vinacke (1947) writes of the constitutions of 1935 and 1946. I suspect such minor technicalities come down to drafting versus ratification dates, or the like.

<sup>12</sup> See Scully (1988 and 1992) and the New Development Economics literature as justification for this glib assertion.

What happened? How could such a successful system have lapsed into constitutional suspension? The many sociological, political and cultural explanations (see Tate and Haynie 1993, Overholt 1986 and del Carmen 1973) still beg the fundamental question. After all, "the political system in the Philippines before martial law was institutionally patterned after that of the United States" (del Carmen 1973). Such a system should have protected the country from martial law, military coups and other constitutional suspensions; perhaps details could change at the margin, but surely the constitution would prevail. As del Carmen (1973 writes): "The spectre of the Philippines, long ballyhooed as the 'show window of American democracy in Asia,' unreservedly repudiating constitutional niceties would have been traumatic to Americans as well as Filipinos. Rejection of the American brand of democracy – yes; but the total absence of a constitutional process – no." Yet that is exactly what happened. In blunt summary, the US-inspired constitution of 1946 failed. I turn to the adoption to explain why the constitution, while ideal on paper, was unsuited to Filipino constitutional culture, and thus a bad choice, doomed *ab initio* to be rejected (if after an initial honeymoon) by the cultural recipient.

The Filipino constitution was fundamentally inspired by the US constitution (see Billias 1990, 9-10, del Carmen 1973, Vinacke 1947 and Smith 1945). It established a presidential system with a bicameral legislature and US-style judicial review. This is not surprising, since US authorities worked closely with the Filipino drafters: "the constitutional system..had been planned, in agreement with the United States, for the independent Philippines as well as for the Commonwealth period" (Vinacke 1947). To be sure, there was US influence – but not US imposition (see Smith 1945). In fact, several foreign commentators and Filipino politicians emphasized that the constitution was a Filipino document – inspired by US and other foreign sources, but fundamentally Filipino. Thus, Hayden (1942, 59) asserts that "viewed as a whole, the Constitution of the Philippines reflects the Filipino, Spanish and American antecedents which have made the Filipino people what they are... Above all, it is a Filipino and not a foreign instrument and provides the constitutional foundation for a genuinely Filipino government." Filipino president Quezon (in Vinacke 1947) echoed this, explaining that the new constitution had its own, indigenous philosophy.

Applying the concept of constitutional culture, I take strong issue with these assessments. While the Filipino Constitution may indeed not have been a direct US constitutional import, it was certainly not compatible with the underlying constitutional culture – a disconnect which goes a long way in explaining the underlying socioeconomic and structural woes of the 1950s and 1960s, as well as the 1972-1986 suspension of constitutionalism.

Garcia Hamilton (2005) writes generally of the inherent conflict between the Spanish colonial tradition (personalism/*caudillismo*, authoritarianism, top-down centralization, and

government of men rather than law) and constitutionalism under rule of law. The Philippines, which was a Spanish colony until the end of the 20<sup>th</sup> century, thus started at a disadvantage, as it had no organic tradition of rule of law. After Spanish colonialism, instead of having the opportunity to develop its own traditions, the country remained a US colony for another 35 years, after which a US-inspired constitution was adopted, out of the blue. Beyond the general traits of former Spanish colonies, several particular Filipino traits were inimical to a US-style constitution of limited government and enshrined rights.

First, the *caudillo* tradition was particularly strong in the Philippines (see Smith 1945).

Second, there existed deep contradictions between the constitutional text and the culture – so while the constitution (on paper) emphasized individual rights, President Quezon could simultaneously claim that "it is the good of the State, not the good of the individual which must prevail" (Vinacke 1947).

Third, the Filipino constitutional culture was all too willing to place political expediency over constitutional principle; as long as the economy was growing, the constitution was respected. But when democracy was seen to have failed, Filipinos were eager to support Marcos' constitutional suspension, in the hopes of greater growth and order (see Vinacke 1947).

Fourth, the Filipino founding evinced a certain schizophrenia on the subject of rights. Smith (1945) states bluntly that "the adoption of [a Bill of Rights] in the Philippines was not as easy as might be supposed. There were traditional modes of thought influencing the Filipino in other directions. The concept in the beginning was alien, and political experience and education had to be added to the characteristic Filipino outlook before the Bill of Rights concept could become second nature to the Filipino" – and it is debatable whether it ever really did.

In sum, the Philippines was doomed, *ab initio*, by the wrong choice of a constitution. Although the Constitution of 1946 was not a verbatim copy of the US constitution, the document was still too strongly influenced by Anglo-Saxon political philosophy to be acceptable to Filipino constitutional culture. The seeds of liberty, limited government and rule of law, were cast on ground too thin – by dint of history and an atavism of Spanish colonialism – to allow such seeds to blossom. The Philippines might have done better with a rights tradition that was less idealistic but more matched to the situation (as in, perhaps, the case of Mexico). Either way, the Filipino experience shows the importance of matching formal parchment to informal constitutional culture – or reaping the harvest of dictatorship and constitutional failure down the road.

## 2. Japan after World War Two: Planting Western Roses in Japanese Soil?

At the conclusion of World War Two, one of the principal goals of the US occupying forces was to render Japan incapable of repeating its international aggressions of the 1930s – not just via military occupation, but through stronger constitutional constraints (see Kades 1989).

Thus would the US insist on certain principles (separation of powers, judicial review, popular sovereignty, entrenched rights) – but not the details or the language, which were left to Japanese drafters. In the end, a mutually acceptable constitution was adopted. That constitution has stuck for 60 years now, forming the institutional backbone of a successful democracy, operating under rule of law and constitutional order. The Japanese constitution of 1946 established a parliamentary system with executive powers vested in a cabinet responsible to parliament, in the Westminster tradition. However, the constitution adopted US-style judicialism (*i.e.* independent judicial review, rather than an integrated Kelsen-style institution of constitutional review, as is more commonly associated with parliamentary systems; see Kelsen 1942). This latter institution was associated with the adoption of a Bill of Rights, explicitly defined.

The constitution was not adopted *ex nihilo*. Japan, in spite of its lapse into stratocracy in the 1930s, had already experienced constitutionalism, dating back to the 1889 Meiji constitution (McHugh 2002, 119). That constitution, designed to modernize Japan, was a blend of many traditions; it largely paralleled the Westminster model, in establishing a parliamentary monarchy, but also incorporated Japanese traditions, especially in adopting indigenous legal practices, norms and values (Blaustein 1992, 50; see also McHugh 2002 and Haley 1995).

The Meiji constitution, an existing Japanese institution, thus formed the basis of the new constitution – with several other sources of inspiration. Such a background leads Kades (1989) to conclude that:

Drawing on [many] sources as well as [US] state constitutions, the paradigm for a new constitution of Japan did not follow in the footsteps of the Founding Fathers of the U.S. Constitution. Rather it beat a new path in the direction of a Japanese constitutional structure consistent with Japanese liberal traditions.

McHugh (2002, 118) echoes this conclusion, stating that:

[the post World War Two Japanese] political system was based, in many respects, upon the American model, although a parliamentary structure was adopted, since it was already familiar to the Japanese people and political elites and would prove to be more practical than the admittedly more complex American presidential system. It imitated much of the constitutional structure established during the Meiji restoration, so it was not an entirely alien document to Japanese society.

Haley (1995, 101) corroborates this: "Except for the military establishment, Japan's postwar constitutional reforms displaced few of the basic institutions of the Meiji constitutional order... Albeit imposed by an occupying army, Japan's post-war constitutional regime was as much a product of Japan's reformist views as of American ideals." See also Blaustein (1992, 66).

In sum, Japanese drafters and their US advisors were cautious to avoid a foreign transplant that would be rejected by Japan's constitutional culture. In the wise words of the lead Japanese constitution-drafter, the "arbitrary transplantation of a constitutional system unadapted to the condition and circumstance of the nation concerned" was bound to fail, just as some "roses of the West, when cultivated in Japan, lose their fragrance totally." (Kades 1989).

Japan's constitutional drafting was propitious for success, as it was not a constitutional imposition, but a consultative process with parameters that respected, Japanese traditions. But what of the match between Japanese constitutional culture and constitutional parchment? Two themes in Japanese culture bear mentioning.

First, Haley (1995, 98-99) writes that

No simple statement of Japan's political culture seems adequate. Nevertheless, certain orientations of habit, attitude and value should be apparent in the political and legal life of any nation. For a country with the ethnic homogeneity of Japan, certain orientations can be identified, several of which seem especially important to Japanese constitutionalism. The first is the remarkable stability of Japan's institutional structure and processes. Another is an acceptance of hierarchical authority and law with, however, an expectation of benevolence by those who receive the benefits of such deference. A third is more paradoxical, a communitarian emphasis in Japanese social, economic, and political life with a corollary concern for community and individual freedom from state control.

As discussed in earlier sections, such orientations are conducive to successful constitutionalism. Stability, a willingness to follow rules, and a willingness to compromise with others, within an ethic of respect for individual rights; all of these are a good foundation for constitutional order.

Second, McHugh (2002, 118 and 127-128) explains how the Shinto-Taoist ethic of "reconciliation of opposites" has facilitated Japan's adoption of Western values and institutions – not as a wholesale adoption, but as a harmonious blend of ideas that would otherwise seem contradictory: individual rights and community rights; deference to government with an expectation of government benevolence; Western civil law with Japanese legal practices; popular sovereignty with a symbolic emperor, etc.

The constitution stuck initially because it "accurately caught the spirit and aspirations of the Japanese people" (Kades 1989). Mayo (1987) concludes that "the Constitution's continuing popularity and staying power" can be traced primarily to the fact that "it owes much to lessons learned during Japan's prior experience, both good and bad, under the Meiji Constitution of 1889."

Japan's constitutional success can thus be attributed to the formal parchment's congruence with the underlying constitutional culture. The constitution drew on a sufficient number of endogenous legal, political, institutional and cultural sources that the two were able to adapt, in a successful compromise that has facilitated a half century of democratic, political and constitutional stability, and the ensuing blessings of economic growth.

### 3. Mexico in 1917: Western Influences... Cautiously

Mexico is known for corruption rather than rule of law; for chronic economic instability and underdevelopment caused by unsound institutions; and for its contrast between Ivy League-educated élites and impoverished masses. In addition, Mexico has only recently emerged from almost a century of one-party rule, in what Vargas Llosa (1991) dubbed "the perfect dictatorship," able to maintain power with an international veneer of democracy and constitutionalism, and minimal resort to traditional dictatorial methods.

But, for all its shortcomings, Mexico has been remarkably stable in the 20th century, especially by Latin American standards. Since the conclusion of the 1910-1920s revolution, Mexico has enjoyed stability, constitutional maintenance and constitutional transitions, and high levels of democratic participation – if "Mexico-style." Contrary to its Latin American neighbors, Mexico has not suffered a military coup since its early 20<sup>th</sup> century revolution, nor has it fallen into periodic civil war. McHugh (2002, 175) opines that Mexico's constitutionalism "has been a testament to a legal and political persistence that has not always been entirely successful but...has, nonetheless, provided a basis for the continuing democratic evolution of this country."

The stability and success of the 1917 revolutionary constitution are especially remarkable if one considers Mexico's early post-colonial turmoil. In fact, pre-revolutionary Mexican history can be roughly broken down into three periods: (i) 1821-1875, a period of political and institutional fumbling after independence, with no less than 800 (!) armed revolts and more than 50 presidents; (ii) the *porfiriato* dictatorship between 1875 and 1910; and (iii) a protracted revolution *cum* civil war from 1910 through the 1920s (Wiarda 1995, 121; for a general history, see Skidmore and Smith 2001). Hardly an auspicious foundation for constitutional government. In addition to this waltz of post-independence regimes, Mexico also underwent an unstable succession of constitutions. Mexico saw an 1824 federalist constitution designed to abolish the absolutism of the Spanish colonial legacy (Gutierrez Gonzalez 2005, 27), rooted in European and Spanish traditions, but

also influenced by the US (Kolesar 1990, 52). That constitution was replaced by the 1836 centralist constitution, a conservative plan to impose order on competing regional *caudillos*. That constitution lasted until 1854, with the beginning of the liberal reform, leading to an 1857 federalist/liberal constitution designed to stem the centralization of power (McHugh 2005, 27). The liberal order lasted until 1876, when strongman Porfirio Diaz revolted and occupied Mexico City. Diaz was to dominate Mexico for the next 34 years, in a period known as the *porfiriato*. Overturning liberal reforms (but without ever formally amending the 1857 federalist/liberal constitution), Diaz suspended civil liberties and constitutional rights, strengthened landowner power over the impoverished peons, and encouraged foreign investment, leading to a period of economic growth. That growth, however, was unstable, as it involved increasing inequality between the rich cronies and the poor marginalized masses; Wiarda (1995, 126) estimates that 80% of the Mexican population was economically or politically unintegrated at the beginning of the 20<sup>th</sup> century.

A powder keg of impoverished masses, regional *caudillos* vying for power against the *porfiriato* centralization, a marginalized indigenous population, and general dissatisfaction with the lack of civil liberties and rule of law, led to the Mexican revolution of 1910-1920.

Mexico's post-revolutionary stability falls into three periods: (i) an initial period of post-revolutionary consolidation that lasted until the late 1920s establishment of the PRI (the party of the institutionalized revolution) as the central force in Mexican politics, a corporatist umbrella of regional and socioeconomic interests; (ii) stability from the 1920s through the 1990s, under the PRI's domination; and (iii) the opening of political power from the 1990s through the present, as the PRI eventually lost its monopolistic grip on Mexican politics, and Mexico ushered in a new era, the history of which is still being written.

What was different about the Mexican constitution of 1917? Why did it stick, and how was Mexico able to enjoy a century of constitutional maintenance after so many civil wars, dictatorships, military coups, and constitutional instability? In simple summary, after a century of constitutions that did not match the country's underlying constitutional culture, the formal Mexican constitution of 1917 finally matched the country's informal constitutional culture. Wiarda (1995, 123) explains that the

earlier, nineteenth-century Mexican constitutions had been largely imitations of the U.S. Constitution, with the French Declaration of the Rights of Man appended. Many articles of these Mexican Constitutions were simply translations of the U.S. Constitution. They set forth such principles as separation of powers, independent courts and legislatures, long lists of civil and political rights, subservience of the armed forces to civilian authority, separation of church and state, federalism, and equal rights for indigenous peoples... But these principles usually bore little resemblance to the way Mexico was actually governed. It is not

that these constitutional principles were complete myths or "laughable," as some have claimed. Rather, they represented idealistic principles and future goals, for which most thinking Mexicans recognized the social, economic, and organizational foundations had not yet been firmly laid...

The problem was not just that the nineteenth-century Constitutions represented future aspirations, however, but that in many areas they had no bases in Mexican realities. Separation of powers was a noble principle, but Mexico had always been governed – under the Aztecs as under the Spanish – in a unified, integralist, top-down manner. Federalism worked in the United States, but Mexico had always been a centralized system. Democracy and egalitarianism were magnificent values, but Mexico was organized on a hierarchical basis, based on rank orders and the assumed inequality among persons, and with the social gradations reinforced by racial criteria...<sup>13</sup>

Thus did Mexico adopt, in 1917, a strong executive, single-party rule and a weak judiciary, which deferred to the executive, in what McHugh (2002, 187) calls a "certain deference to traditional institutions." Constitutional tensions abound, but they are a reflection of Mexico's mixed traditions: a strong executive is bound by strict term limits (Wiarda 1995, 124); constitutional rights are intertwined with constitutional duties (McHugh 2002, 187); negative, natural rights are intertwined with "positive rights" (McHugh 2002, 182 and Blaustein 1992, 56-57); individual rights figure side by side with a constitutional enshrinement of Mexico's indigenous communal land ownership (the *ejido*, McHugh 2002, 183 and Wiarda 1995, 124); federalism is tempered by a public finance and mercantilist structure that gives preponderance to the central government over the states and municipalities (Gutierrez Gonzalez 2005, 28, Wiarda 1995, 124 and McHugh 2002, 186); and democracy is dampened by *de facto* one-party rule (or was from the 1920s until the 1990s).

In sum we see a blend of indigenous and foreign constitutional influences (Wiarda 2005, 124; Blaustein 1992, 56-57); the Mexican constitution of 1917 was the "first to incorporate, at least partially, Mexican realities into the basic law of the land" (Wiarda 2005, 123).

To be sure, the Mexican constitutional system is not perfect. The country is still held back by endemic corruption. For most of the 20<sup>th</sup> century, power was monopolized by a corrupt, dirigiste, corporatist, "authoritarianism-light" political party. And Mexico still has great strides to make in human rights, economic freedom and development, and respect for rule of law. Still, the constitution has stuck for almost a century, in a country and

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<sup>13</sup> McHugh (2005, 26-27) echoes this tension between constitutional ideal and political reality, as does Kolesar (1990, 52)'s explanation that Mexican constitutions before 1917 had roots in foreign ideas, not Mexican traditions.

region not known for constitutional stability. The military is under firm civilian control and the country is remarkably stable, both exceptions in a region marred by instability, civil war and *caudillismo*. Much remains to be done, as Mexico continues its struggling (but successful) path towards democracy, rule of law, and economic growth.

Mexico certainly did not adopt the "best" ideas and institutions; communal ownership, the power of the presidency, and the state's role in the national economy are all thwarting Mexico's economic development. But Mexico has enjoyed constitutional maintenance, and the best is the enemy of the good – as exemplified by the next example, that of Argentina. The major difference is that Argentina's founders sought to adopt the best ideas and institutions, while neglecting the underlying constitutional culture – and paid the price for it in the form of constitutional failure.

#### 4. Argentina's Idealism and Failure: A Scottish Constitution for a Continental Culture

Argentina's constitution – almost a verbatim copy of the successful US constitution – offers a textbook study of constitutional failure. If the formal systems were the same, the differences in outcome must be traced to the informal, underlying constitutional culture.

The half-decade after Argentina's 1810 independence was marked by instability and bloodshed. Out of this chaos emerged a *caudillo*, Juan Manuel Rosas, who forced his way into control of the Province of Buenos Aires, a position he used for almost a quarter-century of authoritarian reign over the country (1829 to 1852). It was against the backdrop of Rosas's order-through-power that dissenting voices began to grow, leading eventually to the constitution of 1853/1860. In the next half century, Argentina grew into the eighth richest country in the world (see Ribas 2000 and Miller 1997). However, seeds of future discontent were already being sown under the rapid economic growth. "Major revolts occurred in 1874, 1880, 1890, 1891 and 1905" (Miller 1997). The ruling oligarchy maintained power through force and electoral fraud until the opposition, boosted by the universal suffrage law of 1912, broke its hold on power in 1916. There followed fourteen years of populist rule, until the military intervened in 1930, overthrowing the civilian president, in the first of 11 coups throughout the 20<sup>th</sup> century. In 1946, Juan Domingo Perón became president and established an Argentine version of national socialism. In 1955, the military stepped in to replace Perón, starting a 30-year waltz of unstable civilian regimes and military coups. Since 1983, democracy – if not rule of law – has been solidly entrenched, although Argentina, once in the world's top 10 economies, has struggled with debt default and economic crisis. For historical detail, see Shumway 1991, Ribas 2000, Sarmiento (2000[1874]), Miller 1997, and Skidmore and Smith 2001.

What happened? Why did the constitutional order lead from flourishing to dictatorship and stagnation? At first, the constitution appeared to stick. Power transfers, if based on fraudulent elections, were respected. Civil disorder kept to a minimum. Regional *caudillos* were checked by the national government. And, most importantly, after a half-century of

stagnation, Argentina's economy boomed, as the country attracted foreign capital and immigration. By the dawn of the 20<sup>th</sup> century, Argentina seemed solidly ensconced in the ranks of the world's rich countries and the world's constitutional democracies. What went wrong? In sum, the Argentine constitution failed because it never really stuck in the first place. I outline here four main reasons.<sup>14</sup>

First, philosophy. Argentine constitutional culture was (and is) predominantly Rousseauian. The 1810 independence from Spain was inspired by Rousseau, whose ideas had spread throughout Argentina in the early 19<sup>th</sup> century (Ribas 2000, 48). Argentina's main constitutional drafter, Juan Bautista Alberdi (2002[1852], 76) points to Rousseau as the inspiration for the Argentine revolution of 1810/1816 and asks rhetorically "what is our great revolution, in terms of ideas, if not a phase of the French revolution?" (ibid, 50). Although Argentina had a tradition of French thinking (Shumway 1991 and Sarmiento 2000[1874]), Alberdi was lured by the success of the US constitution, and thus proposed a document that was heavily influenced by the Scottish Enlightenment (see, e.g. Bailyn 1992, and Adair 1998[1951] and 1998[1958]). The clash was fundamental, and the constitution was ultimately an ideological aberration in Argentina's intellectual history. Argentina had a Rousseauian-majoritarian tradition, which clashed with Scottish constitutionalism.<sup>15</sup>

Second, a mercenary and instrumental vision of liberty. To be sure, liberty was prominently featured in Argentina's constitution, but (a) it was economic, rather than political or civic; and (b) the document reflected an emphasis on freedom as a means rather than freedom *qua* freedom. Alberdi (2002[1852], 18) complains that the early Argentine constitutions emphasized independence, rather than economic development. To him, rights were instrumental rather than a reflection of natural law (see, e.g. Alberdi (2002[1852]), 84). Alberdi (2002[1852]), 166) says it all when he concludes of the constitution that "its mission... is essentially economic;" after economics, "peace and interior order are the other great ends that the Argentine constitution must have" (90, translation my own). For an even more unabashedly instrumental approach, see Alberdi's (1954[1855]) economic analysis of the constitution. Economics first, then peace and order. But what of liberty and the pursuit of happiness? Alberdi's vision was one in which industry would lead to order, which would in turn lead to liberty (49); contrast this with the US founding vision, where respect for natural rights would lead to flourishing (see Bailyn 1992 and Adair 1998[1951] and 1988[1957]).

Third, institutional liberalism and political oligarchy. The political economic order of the post-constitutional era (the so-called "conservative order") was decidedly not liberal. Concessions to freedom were calculated and not principled, as the oligarchic order wisely

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<sup>14</sup> For dissenting views, see Miller 1997, Ribas 2000 and Garcia Hamilton 2006.

<sup>15</sup> For details on the two enlightenments, see Hampson 1991, Boettke 2000, Porter 2001, Himmelfarb 2004, and Wenzel 2008.

applied the personal guarantees necessary to attract immigration and capital, while using the state to foment economic growth. The freedoms not necessary or conducive to growth were not emphasized at the founding, and were quickly neglected. From 1853 to 1916, the constitution was driven and manipulated by the oligarchy. Economic growth for the country was really economic prosperity for the élite. The system was economically liberal, but not in a civil or political sense, *e.g.* no universal suffrage. There was economic liberty, but no respect for individual rights. As long as they could stay in power, and as long as the money kept rolling in, the oligarchs maintained the veneer of a liberal order. But as soon as they started to lose power through electoral reform and the subsequent middle class erosion of their power base and the economy faltered, the proverbial iron fist broke out of the velvet glove, and the military formally broke the constitutional order in 1930. Throughout Argentina's constitutional history, entrenched power meant change from within was impossible. Power was never shared, nor did national debates take place within the constitution's parameters. In sum, the constitutional culture did not accept power-sharing or the imposition of constitutional constraints on political disputes. This cultural proclivity was not helped by Argentina's institutional choices; until 1983 (with the restoration of democracy), force was used for change, because the institutional system was too inflexible to allow change from within.

Fourth, the Spanish colonial tradition clashed with rule of law and constitutionalism. Argentina lacked indigenous customs at the founding, having existed as a viceroyalty for only 34 years before independence, then having struggled, vision- and rudder-less for 19 years before succumbing to a 23-year dictatorship. Argentina lacked local legal customs, a local tradition of self-government, and a tradition of constitutionalism. Garcia Hamilton (2005) explains that Argentina's constitutional culture in the 19<sup>th</sup> century stemmed directly from Spanish colonial antecedents, none of which were propitious cultural soil for constitutional seeds – especially political absolutism, mercantilism, disregard for the law, and militarism. The country was thus already at a disadvantage, as it had not enjoyed the slow forging of institutional custom on the anvil of time. Argentina was burdened, in a diffuse sense, by the atavism of Spanish colonial, to which constitutionalism (generally) was foreign. In addition, the specific 1853 constitution of limited government was wholly alien to the legacy of Spanish colonialism. In a cultural parallel to the philosophical disconnect described above, the 1853/1860 constitution did not jibe with the constitutional culture. The parchment established a relatively limited government, with power balanced in the US tradition. This spelled disaster, as the constitutional culture would not abide by limited government; it rejected the formal parchment, which was too limiting. The two were so fundamentally disconnected that rupture ensued. The people wanted powerful, intrusive government – and that is what they got, constitutional parchment notwithstanding; we are left with Alexander Hamilton's warning that, in the wrong hands, a constitution is "frail and worthless fabric."

## **CONCLUSION**

The matching paradigm proposed in this paper can be used to understand many other constitutional situations. I outline three here (see Wenzel 2012 for a proposed research agenda and applications of constitutional culture).

First, constitutional review mechanisms and the tension between democracy and constitutionalism can be understood through the optic of constitutional culture. Thus does a Madisonian system reflect the American constitutional culture of suspicion of government and separation of powers to curb; a Westminster system of parliamentary sovereignty evinces a constitutional culture that is suspicious of aristocratic or royal fetters on the popular will; and the Kelsen compromise reflects a balance between the two (see Kelsen 1942, Gardbaum 2001 or North and Weingast 1994; generally see Epstein *et al.* 2001 or Gibson *et al.* 1998; see also Wenzel 2013).

Second, the matching paradigm can be used to understand constitutional change, from the disbanding of Russia's first post-Soviet constitutional court, whose aggressive independence was rejected in favor of a more moderate Kelsen-style council; to France's 1958 constitution, which finally got things right, as it matched the underlying constitutional culture, and brought stability to a country that has had 21 constitutions since 1789; or Britain's continued stability, absent a written constitution, where constitutional culture binds the state; and so on.

And third, the matching paradigm contains real hope, beyond academic curiosity, for the world's victims of unhealthy constitutional environments – the unfree, the repressed, and the hungry.

This paper is intentionally descriptive; its policy recommendations are intentionally limited at best. In sum, a good constitution can be designed, but it will not stick unless it matches the underlying constitutional culture. And any constitution is bound to fail if it assumes or attempts to create, a "new man" or a new culture, as constitutions often do – or if it attempts to impose an "ideal" constitution that does not take the underlying constitutional culture into account (see, *e.g.*, Siegan 1994).

As is so often the case, we find wisdom in the words of Adam Smith's *The Theory of Moral Sentiments* (1997[1759], VI.II.2, 59-60):

The man of system...is apt to be very wise in his own conceit, and is often so enamoured with the supposed beauty of his own ideal plan of government, that he cannot suffer the smallest deviation from any part of it. He goes on to establish it completely and in all its parts, without any regard either to the great interests, or to the strong opposition which may oppose it: he seems to imagine that he can arrange the different members of a great society, with as much ease as

the hand arranges the different pieces upon a chess board: he does not consider that the pieces upon the chess board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess board of human society, every single piece has as principle of motion of its own, altogether different from that which the legislature might choose to impress upon it. If those two principles coincide and act in the same direction, the game of human society will go on easily and harmoniously, and is very likely to be happy and successful. If they are opposite or different, the game will go on miserably, and the society must be, at all times, in the highest degree of disorder.

This paper is but a beginning. I look forward to further research, and further case studies to illustrate the theory.

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