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Social Yes; Contract No

Abstract:

Social contract theory is incoherent and it does not work as desired. Among the most obvious disanalogies is that contracts are enforced by a third party, commonly the state. There is no such external enforcer for a constitution. Contractarian theorists typically ignore all such issues and use the metaphor of contract very loosely to ground a claim that citizens are *morally* obligated to defer to government *by their consent*, as the parties to a standard legal contract would be *legally* obligated. David Hume's term is acquiescence. He compellingly argues that actual citizens do not believe their own legal or political obligations depend on their having agreed to their social order. More often than not our interests are simply better served by acquiescing in the rules of that constitution than by attempting to change it. The forms of commitment that are important for constitutional and even for much of conventional social choice are those that derive from the difficulties of collective action to re-coordinate on new rules. They are inherent in the social structure of the conventions themselves, a structure that often more or less automatically exacts costs from anyone who runs against the conventions without anyone or any institution having to take action against the rule breaker. Establishing a constitution is itself a massive act of coordination that, if it is stable for a while, spawns conventions that depend for their maintenance on their self-generating incentives and expectations and that block alternatives.

Keywords: Consent, political obligation, contractualism, dual-convention, David Hume, coordination, acquiescence, Thomas Hobbes, John Rawls.

The most important context for social contract theory is the creation of a government or of a constitution for a government. In this application the theory is incoherent and it does not work as desired. The metaphorical claim that government is established by contract is one of the mainstays of traditional political theory, although there are several objections to the claim that a constitution is analogous to an ordinary contract in any useful sense. These objections include the following.

1) Contracts are typically enforceable by a third party (usually the state); constitutions are not but are enforced by social conventions.

2) Contracts govern a fairly limited quid pro quo between the parties; it can be hard even to define who might be the parties engaged in such an exchange when a constitution is drawn up.

3) The exchanges governed by a contract typically get completed and the contract, if fulfilled, ceases to govern further; constitutions typically govern into the distant and unforeseeable future and they have no project for 'completion' in sight—as a rule they have no date for future fulfillment.

4) Contracts require genuine agreement to make them binding; constitutions require merely acquiescence to make them work.

5) Game theoretically, contracts govern exchanges, which have the strategic structure of a prisoner's dilemma; constitutions govern coordination of a population on a particular form of government and therefore have the strategic structure of coordination games.

Spell out one of these points a bit further. In a two-person prisoner's dilemma, there is an outcome that would be best for one player and worst for the other player. In a coordination game, the best outcome for each player is also the best or near best for the other player or players. It is implausible that the major groups involved in adopting the US or any other credible constitution could face an outcome that was best for one very important group and worst for another, as would invariably happen in a prisoner's dilemma.

The two most important groups in the US in 1787 were arguably the financial and shipping interests of the northeastern cities and the plantation interests of the southern states. Together, these two groups were a small fraction of the whole polity but they dominated constitutional politics.

Alexander Hamilton and other financiers could not have supposed they would be best off when Thomas Jefferson and other agrarians were worst off. Any regime that did not enable them to cooperate in managing the export of southern crops and the import of manufactured goods, especially farm implements, would have harmed both groups. Any regime that enabled them to cooperate more efficiently in doing these things benefited both groups. The central issue of the constitution was to eliminate trade barriers between the thirteen states and to regularize tariffs with other nations as stipulated in the commerce clause of the US constitution. That was the issue that brought these two groups into the design and adoption of the constitution as a mutually beneficial arrangement. They faced a relatively straightforward coordination problem. The first of the two recent Egyptian constitutions, in 2012, was clearly viewed as a victory by the Muslim Brotherhood, because the payoff structure was a zero sum game with Islamists as victors and secular liberals as losers. That outcome offered no hope to liberals and guaranteed the failure of the constitution.

Contractarian theorists typically ignore all of these issues and use the metaphor of contract very loosely to ground a claim that citizens are *morally* obligated to defer to government *by their consent*, as the parties to a standard legal contract would be *legally* obligated. Superficially, the social contract seems like a compelling, good device. Traditional contractarian theorists do acknowledge one deep problem for their theories. Contractual obligation without actual personal agreement seems like nonsense, especially given that it is prior agreement that is supposed to make a contractarian order morally binding. Yet, it is hard

to ground any claim that future generations agree to an extant contractarian order.

Moreover, David Hume compellingly dismisses even the claim that there could ever have been a genuine agreement on political order in any modern society (1985[1746]). He argues that actual citizens do not believe their own legal or political obligations depend on their having agreed to their social order even though many citizens apparently do believe they and all other citizens are obligated.

Hume's arguments and facts are so devastating to the idea of the social contract that one must wonder why that idea continues to be in discussion at all. John Rawls essentially agrees with Hume's central conclusion. He says that, because citizens have not genuinely contracted for or agreed to any political obligation, they cannot have such obligations (Rawls 1999[1971], 97f.). Yet, he still perversely classifies his theory as part of the contractarian tradition (1999[1971], 28–30). There seems to be a prevalent view that contractarianism is morally superior to utilitarianism, and Rawls poses his theory this way. This is a deeply odd view. A utilitarian acts primarily on behalf of others. Those who enter contracts typically are concerned with their own benefits and need not care about the benefits to their partners in trade. The former is other-regarding; the latter is self-seeking. Indeed, this is precisely Rawls's position: he assumes that we are all *mutually disinterested*, by which he means each of us is concerned only with our own benefits and burdens, not with those of others (1999[1971], 12). This condition blocks concern with envy. It is a saving grace of contemporary claims for contractarianism that they are not about contracts. Unfortunately, they are rather about *rationalist agreement* on what are the right principles to follow as though these could merely be deduced from first principles.

A huge part of the discussion of contractarian theories addresses how we are to understand the idea of contractual obligation when there cannot be an actual contract or agreement by the relevant parties (in this case, the citizens and perhaps the governors). The nearest thing we ever have to actual contracts in politics is votes on the adoption or amendment of a constitution. But these votes typically require only some kind of majority, ranging from simple to supermajority. Unanimity is an impossible condition for a working constitution or amendment in a real society, although it is typically required for a legal contract to be binding. Hence, in a sense that is contrary to any plausible vision of contractarianism, contractarian constitutions must be imposed on a significant fraction of the populace, indeed on the overwhelming majority of citizens. Note how radically different this is from standard economic contracts. In a large number contract, if you refuse to sign, you are not bound to it. An effort to establish a social contract generally must be binding on all.

Traditional, straight contractarianism might be on the wane. Few people argue for it in principle, although many scholars continue to present contractarian arguments from John Locke (1988[1690]), Thomas Hobbes (1994[1651]), and others from the distant past. Such contractarianism has simply been rejected, as by coordination theorists. And in part, it has been displaced by *contractualist*

argument. Despite the growing flood of work on it, the contractualist program is not yet well defined.[1] Traditional contractarianism is relatively well defined and therefore its deep flaws are clear. It is a peculiar but false advantage of the contractualist program that it is ill defined. Its vagueness means that debate over it will often thrive, even debate over what the program is.

Contractualism is supposed to resolve or sidestep the problem of fitting some degree of obligation to a regime to which one has not actually consented. Thomas Scanlon's original definition is: "An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behavior which no one could reasonably reject as a basis for informed, unforced general agreement." (Scanlon 1982, 110) A further statement is often taken as definitive, although it is peculiar: "On this view what is fundamental to morality is the desire for reasonable agreement, not the pursuit of mutual advantage." (115n) Why is it this desire that is fundamental rather than achieving moral action or outcomes? I will ignore the concern with this desire because it trivializes and debases our concern.

Scanlon (1998) himself has primarily been interested in applying the contractualist idea to individual-level moral theory. The most extensive and articulate defense of the idea of reasonable agreement in political theory is probably that of Brian Barry, who says, "I continue to believe in the possibility of putting forward a universally valid case in favor of liberal egalitarian principles" Barry (1995, 3).

Unfortunately, Scanlon's criterion of reasonableness is somewhat tortured and ill-defined. Its use has become unmoored from his original defense of it. As first presented, the term supposedly attested to the claim that moral theory is analogous to mathematics (Scanlon 1982, 104–105). Mathematicians know mathematical truths; moral theorists can similarly know moral truths. We do not know either of these by observation but only through some inner faculty of reasoning. That the analogy is not apt is suggested by the fact that there is no terminological analog of 'reasonableness' in mathematics. Every mathematician knows that the square root of 2 is not a rational number (that is, a number that can be expressed as a fraction in the form of whole integers in both the numerator and the denominator). No mathematician would say further that this claim is reasonable. It just is true mathematically. If you say this is false, mathematicians will say you are a crackpot or an ignoramus, not that you are unreasonable. One wonders what are the analogs of axioms and theorems in moral theory.

The claim that morality is analogous to mathematics, right down to basics, is a perverse variant of intuitionism in ethics.[2] Intuitionists believe they can intuit whether, say, a particular action is right or wrong, and they can say this without deducing it from any more general principal. Unfortunately, they do not agree with each other. If disagreement were similarly pervasive in mathematics, there would not be mathematics departments in great universities.

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[1] The most important items include Scanlon 1982 and 1998 and Barry 1995.
[2] Although Scanlon (1982, 109) defends it against a particular sense of intuitionism.

If all of us reject some principle, presumably no one would disagree with the conclusion that we should collectively reject applications of that principle in practice and, furthermore, that it is reasonable for us to do so, whatever 'reasonable' might mean in this vernacular claim. Scanlon's principle must, however, be stronger than this. If you think you are reasonable to reject some principle that the rest of us support, what can we say to you? We might be quasi-Kantian and suppose that we can deduce the true principle here: and we can therefore say to you that you are simply wrong. That would surely violate the element of agreement that Scanlon and other contractualists want. They do not suppose that agreement on certain principles is incumbent on any and every one as a matter of moral or transcendental logic. They mean for agreement to be genuine, which is to say they mean that there must be a possibility of disagreement.

Rawls, on the contrary, sometimes seems to intend a quasi Kantian principle of rationalist agreement. He assumes that *any single representative person* behind his veil of ignorance would reach the principles of his system of justice (1999[1971], 120). It is hard to imagine how that could be true unless those principles are somehow definitively correct in the sense that they are rationally deducible. If this is true, then one who does not agree with the deduction of Rawls's rules of justice has evidently failed to understand. There is rationally no possibility of disagreement. To my knowledge there is no major, serious constitutional theorist who has such a rationalist view of the design of constitutions. Because Rawls's purpose eventually is to design the institutions of justice for a society, one might suppose that he intends for his theory to produce a constitution. Although he grants that the design of institutions would have to deal with social constraints, thus making its content contingent, he nevertheless seems to think that the content of these institutions, and hence of his constitution, must be fully determinate once his theory and the relevant social contingencies are taken fully into account.[3] If so, he holds a very strange—rationalist—position in the world of constitutional theory. No working constitutional lawyer could take that position seriously. General determinacy in constitutional theory is an implausible goal (see Hardin 2002).

Note that in coordination theory, as discussed below, you could well disagree with some rule we have adopted, even think it an unreasonable rule, and yet you could still think it reasonable for yourself to abide by the rule. For example (a recent and painful example for many Americans), the US constitution establishes an indirect device for electing presidents. That device made some sense in the era of the creation of the constitution, but it would be dismissed as a bad idea if proposed anywhere today. In 1789, transportation and communication were grievous obstacles and no one had much experience with making democracy work.

The device is to count votes at the state level and then to count peculiarly weighted scores for the individual states at the level of the Electoral College, which finally chooses the president if a majority of its members agrees on a

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[3] For his views on determinacy, see Hardin 2002, chap. 7.

particular candidate. On three occasions (nearly six percent of all presidential elections), the Electoral College has elected the candidate who got the second largest number of citizens' votes, and the candidate with the highest number of such votes lost. Most recently, this was the result in the presidential election of 2000, in which Al Gore had a clear plurality of the national vote but lost the election to George Bush in the Electoral College—with a large dollop of help from Bush's ideologically tainted friends on the Supreme Court. That court, on a party-line 5 to 4 vote, arrogated to itself the power (not the right) to decide the election.

Many US citizens as well as many non-citizen observers think that the result of the election of 2000 was in some moral sense wrong or was a violation of democracy. But no citizen seems to have thought it right to oppose the result by taking action that would have made Gore the president or that would have impeded Bush's accession to the presidency. Indeed, one can imagine that a poll would show that Americans overwhelmingly agreed that the constitutional rule on election of the president should be followed even though they might also have agreed that the system was perverse and should be changed. It would take a relatively strained effort to argue that that rule could in some sense meet the contractualist criterion. But it is easy to show why the rule arose originally and why it continues to prevail despite the possibility of a constitutional amendment to block what many people think was a travesty of democracy on the two most recent occasions when the apparent loser in the national election became president.[4]

Hence, you might morally or even merely self-interestedly reject a constitutional rule or principle. And you might readily be able to think your rejection reasonable in any sense that the contractualist would want. But still you would most likely conclude that it would be unreasonable for anyone in the system to act against the application of the rule. That rule has the great force of a convention that can be altered only through the actions of large numbers in concert. The only defense of it in a specific application is that *it is the rule* and that the rule is a convention that is not readily changeable even though presumably no one drafting a constitution today would include such a perverse institution as the Electoral College.[5] This defense does not make the rule morally *right*, it only enables the rule to *govern*. In this instance, the argument from convention

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[4] The first election that gave the presidency to the loser of the popular vote in a two-party split was that of Rutherford B. Hayes in 1876. But in that instance, there was a corrupt deal to distort the process. Such corruption is, of course, a travesty of democracy, but that is not an issue in the judgment of the American constitutional rules for election of presidents. The availability of the Electoral College let the deal take the form it did, but one can imagine that the deal would have been made no matter what the system had been. The second case was the election of Benjamin Harrison in 1888. In that election, Grover Cleveland received more votes but Harrison nevertheless won in the Electoral College. The 1824 election left four candidates without a clear winner in the Electoral College, and selection passed to the House of Representatives. In 1800 an ambiguity in the system forced the final decision into the House.

[5] The College was designed to block pure democracy by using a forum of political elites to make the final choice of who would be president. But presumably, the architects of the College did not intend such undemocratic results as those of 1888 and 2000.

trumps any argument from simple rightness or agreement unless the argument from agreement simply takes over the argument from convention.

The chief difficulty with the contractualist program for those who are not its advocates is that there is no definition of reasonableness and no clear account of how others can judge reasonableness in general even if we might suppose that the vernacular term fits some obvious cases (for which we might have no need of constitutional or moral theory). The term reasonable has unfortunately been left as a residual notion that is not defined by the contractualists. Scanlon's definition is vacuously circular. We "desire to be able to justify [our] actions to others on grounds they could not reasonably reject". A footnote supposedly clarifies this: "Reasonably, that is, given the desire to find principles which others similarly motivated could not reasonably reject." (Scanlon 1982, 116; 116n) This is one of the least reasonable definitions in contemporary moral and political philosophy. It is unreasonable not least because it is circular The historical dodges of the fact that supposedly contractarian obligations that were never literally agreed to were somehow hypothetically or tacitly agreed seem much more compelling than this murky, circular move to ground normative claims in their "reasonableness".

Advocates of the contractualist program seem to think they can spot reasonableness when they see it. Hence, what they give us are examples of reasonableness or unreasonableness rather than elaborations of principles for assessing reasonableness. For example, Barry believes "that it would be widely acknowledged as a sign of an unjust arrangement that those who do badly under it could reasonably reject it" (Barry 1995, 7). But Rawls's difference principle might leave us with a society in which the worst off class do badly relative to many others. This would be true if great productivity were motivated by substantial rewards to the most productive members of the society, so that they are very well off in comparison to the worst off groups. In that case, the worst off might suffer far worse misery if they did not suffer such inequality. It would be hard to argue—at least to a Rawlsian—that making the worst off citizens substantially better off is unjust. If Rawls's theory of justice is reasonable, then even gross inequality might be seen as reasonable. We must look at the whole picture of the society if we are to understand and to judge its justice and reasonableness.

Part of the rationale of the difference principle is causal. There is, at least possibly, a causal trade-off between efficiency of production and equality of rewards. Rawls openly supposes that the causal chain is from greater equality to lesser production, so that some inequality is required if the worst off are not to be abjectly miserable. If this were not thought to be true, there would be no reason to have such a complicated theory as Rawls presents, because pure equality would be a credible theory. At some points, however, Barry very nearly equates reasonableness and equality.[6] Once this move is made, there is little more needed to establish a theory of distributive justice merely by definition,

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[6] For example, Barry (1995, 7) says, "The criterion of reasonable acceptability of principles gives some substance to the idea of fundamental equality while at the same time flowing from it".

but it might still be very difficult to design institutions that would achieve extensive equality.[7]

Coordination Theories

Before Hume there were three main theories of social order. These are based on theological views, contractarian agreement or consent, and draconian coercion by the state. Hume dismissively rejects all three. The theological views are simply false or at least beyond demonstration. Locke and others propose contractarian consent as an alternative justification for the state and an alternative ground for obligation to the state, but as noted above, Hume demolishes the claim for consent. Hobbes's argument from draconian force seems empirically wrong for many very orderly societies, and Hume rejects it almost entirely, although he shares many social scientific views with Hobbes. Having demolished all of the then acceptable accounts of obedience to the state, Hume therefore has to propose a dramatically different, fourth vision.

In essence his theory is a dual-coordination theory. Government derives its power (not its right) to rule from some specific coordination establishing a form of government or a constitution. Once in place, that constitution becomes a convention, that is, an iterated coordination; and the populace acquiesces in that rule by its own convention. Once empowered by these two conventions, the government has the capacity to do many things, including ancillary things unrelated to the purpose of maintaining social order. This dual-convention argument is compelling for most stable governments in our time. Moreover, for democratic governments *the dual-convention theory virtually demands constitutional limits on government's power to interfere in democratic processes*.[8] The earlier theories could make as good sense without constitutional provisions and the absolutist versions of theological and draconian power theories virtually deny any role for a limiting constitution.

For both of the conventions in the dual-convention theory of government, *acquiescence is the compelling fact*. Hume argues, by example, that ten million British citizens simply acquiesced in the succession of William and Mary to the English throne, all by act of "the majority of seven hundred" in the English and Scottish parliaments voting together (Hume 1985[1748], 472–3). Acquiescence is Hume's term (469). We acquiesce because it would be very difficult to organize what would de facto have to be a collective action to topple an ongoing convention or to organize a new one. While we can readily just happen into a convention, such as the driving conventions of driving left or right, we cannot so readily alter one once it is well established. You might detest the convention we have and you might even discover that most of us detest it. But you may not be able to

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[7] See Hume 1975[1751], sect. 3, part 2, 193–4.

[8] Such limits may fail to stop violations of the government's principles, as in the US presidential elections of 1876 and 2000.

mobilize the opposition that would be necessary to change it. The foolishness of the Electoral College has seemed perverse to many Americans ever since its first anomalous and potentially destabilizing results in 1800 (Larson 2007). Since then, a couple of elections came close to faltering in that system. And finally the flawed election of 2000 was very nearly a destabilizing event that could have been very harmful if a national crisis had arisen during the period in which the result could have been in limbo. Yet there has been no substantial effort to change this bad system for selecting presidents.[9]

The term convention is first used by Hume in a discussion of how property relations become stabilized (Hume 1978[1739–40], book III part II section II).[10] He applies the term very consistently thereafter, but he never specifically defines it. It is clear that the meaning he has in mind is that of David Lewis's analysis of convention (1969). Lewis supposes that our numbers are large and that we are essentially scattered in such a way that we cannot come together to decide on which of various possible coordination outcomes we should focus. Therefore, if we ever just do happen to coordinate on doing things in a particular way, that fact is a signal to us that we could expect to succeed in coordinating on doing things that way the next time we face the same or even a similar coordination problem. Since none of us has much if anything to gain from challenging our prior choice, we simplify life for ourselves by supposing that our prior choice is a strong signal that every one of us recognizes clearly enough to act on it.

On this account, a constitution does not commit us in the way that a contract does (this discussion is borrowed from Hardin 2007, 83). It merely raises the costs of doing things some other way through its creation of a coordination convention that then becomes an obstacle to coordination on some alternative rule or action.[11] More often than not our interests are better served by acquiescing in the rules of that constitution than by attempting to change it. This is true not because we will be coerced to abide by those rules if we attempt not to, but because it will be in our interest simply to acquiesce. The forms of commitment that are important for constitutional and even for much of conventional social choice are those that derive from the difficulties of collective action to re-coordinate on new rules. These are not simply problems of internal psychological motivation or moral commitments and they are not problems of sanctions that will be brought to bear. They are inherent in the social structure of the conventions themselves, a structure that often more or less automatically exacts costs from anyone who runs against the conventions without anyone or any institution having to take action against the rule breaker.

Establishing a constitution is itself a massive act of coordination that, if it is stable for a while, creates a convention that depends for its maintenance on its

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[9] It would be hard to change because the rule seemingly gives power to small states, which together could block any amendment.

[10] See, further, Rawls 2000, 59s–61.

[11] The costs of changing constitutions and conventions may outweigh any benefit from the change. But a great advantage of democratic constitutions is that they reduce the costs of switching leaders.

self-generating incentives and expectations. Given that it is a mystery how contracting could work to motivate us to abide by a constitution to which we or our forebears have contracted, we should be glad that the problem we face is such that we have no need of a contract or its troublesome lack of enforcement devices or commitments across generations. Moreover, *the acquiescence that a successful constitution produces cannot meaningfully be called agreement or consent*. Some citizens might prefer extant constitutional arrangements to any plausible alternative, but for those who do not, their obedience to the constitutional order has more the quality of surrender than of glad acceptance. Indeed, if our constitution and its institutions are solidly ensconced, surrender or acquiescence gives us the best we can get, given that almost everyone else is abiding by them—even if almost all of them are merely acquiescing or surrendering in abiding by them.

Hobbes is commonly invoked as one of the founders of the contractarian tradition in political thought. Ironically, he is even more clearly a founder of the coordination theory of government. We coordinate on obeying a single leader or following a constitution. The initial selection of a ruler also is a matter of coordinating all of us. Hobbes presents an argument from contract but finally dismisses it as having no likely historical precedent, a claim later seconded by Hume. Hobbes says, "There is scarce a commonwealth in the world whose beginnings can in conscience be justified", because they were generally established by conquest or usurpation, not by contract or agreement (Hobbes 1994[1651], 492). He then goes on to defend the powers of a ruler—or, we might prefer to say, a state or a government—on the grounds that not abiding by the rule of a state would wreak havoc in our lives. Hence, for our own good, which is to say for our mutual advantage, we should abide by the laws of our state. This is an argument that carries even for a government that usurps the powers of an extant government. Once the usurper government is well established and is able to maintain order, it should rationally, self-interestedly then be obeyed. Those whose interests or views were trampled by bad-faith arguments for installing George W. Bush in the presidency had little choice but to acquiesce in the government of Bush.

The difference between Hobbes the contract theorist and Hobbes the power theorist is the difference between a political philosopher and a social scientist. His arguments from contract are about an imaginary and maybe even an ideal or desirable world. That world is a cute story, not a basis for philosophical or scientific analysis. His arguments from power and coordination are somewhat abstract but still they are about the actual worlds that he inhabited and that we inhabit. Although there are many discussions in his works on politics that have normative overtones, his most coherent and extensive discussions are arguments from political sociology. As already noted, constitutional content must be contingent on the conditions of the society that the constitution is to govern (see further, Dahl 1996). This is in the nature of coordination and convention. If a particular rule does not coordinate our actions, it cannot become one of the conventions of our constitutional regime.

Caveats and Clarifications

It should be clear that the first issue here is, as in Hobbes, *establishing* government. It is the strategic structure of that choice or problem that we wish to understand. This is not the same as understanding the problems that government, once established, will resolve (as in Weingast 1997, 248). The latter can be coordination, exchange (prisoner's dilemma), collective action (n-prisoner's dilemma), and fundamental conflict problems, all of which might be handled by a relatively strong established government, unless, for example, the conflicts are too deep for resolution, as must be true in Egypt today. Contract theories suppose that *this problem*—establishing a constitution for a form of government—is one of exchange and bargaining between groups with varied interests. If a constitution is to work in its early years, it must, however, successfully coordinate its populace on acquiescence to the new government that it establishes.

The nature or content of debates over the design of a constitution may not fit the strategic structure of the problem of constitutional design. Much that is said at a constitutional convention is apt to be blather and the fraction of time given over to blather might far outweigh the time spent on central issues. Successful or failed coordination on a constitution and government is the core problem.

Some of the easiest resolutions for the new government under the US constitution of 1787–88 were among the hardest of the problems under the weak prior government of the Articles of Confederation. Coordinating on a central government with even modest powers implied a nearly instant resolution of such problems as certain common pool resource issues, tariff regulation, commerce between the states, and military conflict between the states. Before the new constitutional order these had been conflictual problems, with freeriding, cheating, and the threat of instability. Pennsylvania and Virginia succeeded in establishing a tariff-free joint trade policy, but other states went their own ways. Having a central government with sole jurisdiction over these issues turned them into, roughly, coordination problems, because on collective issues the central government must legislate for all one way or the other. No state could impose a tariff on trade with other states or with foreign countries. The possibility of freeriding on the resolution of a typical common pool resource issue was virtually eliminated because under central government the choices were reduced to the binary pair: provide the resource to all and tax all, or provide it to none and tax none.

The thesis of coordination is a causal thesis, not a definition of what a constitution is. A constitution can include anything people might want. But if it is filled with perversities, it is likely to fail to coordinate us. Even if it looks like a model constitution (suppose its text is adopted whole from another, long successful constitution), it may fail to coordinate *us*, the people it is to govern. For example, the people of Rwanda are arguably so deeply divided that no constitution could soon gain wide support from both Hutu and Tutsi ethnic groups (see Hardin 1999, chapter 7). Most constitutions have failed fairly soon after their adoption (France may have set the record for failures in the decade or more after the Revolution). If a particular constitution in a particular society fails to

coordinate, we would say that it is a failed constitution, not that it was not a constitution after all. It is wrong to say that a constitution is a coordination device as though by definition. But the reverse is true: A successful constitution must be a successful coordination device.

Suppose that a particular constitution is apparently the result of a bargain. If that constitution is to work in establishing social order, it must coordinate us on acquiescence to our new government. This is likely to be a critical problem in the early years before the government has acquired the power to enforce its mandate. Hence, what makes the constitution work is that it coordinates us on social order and is virtually self-enforcing. Hobbes supposes that most regimes in the world were established by acquisition or conquest, which is to say that someone usurped the power already in place or some outside body that already had substantial power in its own right came in and established a regime. Hobbes recognizes that there is a problem in creating initial power if we want to create a sovereign by contract. Even though we the citizens might entirely agree that our government must have requisite power to maintain order and to do various other things, we cannot turn our power over to a newly ensconced regime. Hobbes rightly says, "no man can transferre his power in a naturall manner".[12] Hence, the contractarian foundation crumbles before its state is empowered.

Hobbes's (1994[1651], chap. 20) account of government by acquisition or conquest suggests an important fact about a constitutionally created regime: once it is in place and working to maintain order it can then be seized by some group and its powers put to use in continuing an order that is far less beneficial to many who were well served by the prior regime. For example, the Hungarian government has recently been seized by the regime of Viktor Orban. This has been possible simply because social order at that point is the result of general acquiescence to the regime rather than of genuine approval or support of it. Recently, in Hungary's distorted election system, 53 percent of votes got 68 percent of seats in parliament, a super-majority that can amend the constitution at will and has done so (Scheppele 2014). Acquiescence might be readier once a government gains great power to block opposition, as in this case. To get initial coordination on a constitution and its regime, however, is likely to require a fairly broad degree of support. It does not require continuing support to maintain a regime that once has power and control of the mechanisms of office. The core issue in constitutionalism is how a government under a constitution is empowered (especially initially). Once it is, it can maintain social order and it can resolve prisoner's dilemma and other interactions, including other coordination problems. Trivially, for example, it can establish orderly traffic laws.

Constitutionalism is a two-stage problem. At the first stage temporally, we coordinate on a constitution and its form of government. At the second stage, that government then enables us to maintain order and to resolve various ordinary problems, many of which are between individuals or small groups of individuals rather than, like the constitution, at the level of the whole society.

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[12] Hobbes 1983[1642], 2.5.11, 90; see further, Hardin 1991, 168–71.

Concluding Remarks

To argue convincingly that a particular constitutional system is 'necessary' or 'right' is very hard, because there is commonly evidence that other possibilities are attractive, plausibly even superior in principle. The pseudonymous Caesar (1987[1787]), writing during the debates over the adoption of the US constitution, put the case clearly: "Ingenious men will give every plausible, and, it may be, pretty substantial reasons, for the adoption of two plans of Government, which shall be fundamentally different in their construction, and not less so in their operation; yet both, if honestly administered, might operate with safety and advantage." *Caesar's conclusion is a defining principle in the coordination theory of constitutionalism.* There may be no best constitution, although there may be many that are comparably good and far more others that would be bad.[13]

Conventions do not have a normative valence per se. Some are beneficial and some are harmful. Both beneficial and harmful conventions can be self-reinforcing even when their only backing is sensibly motivated individual actions. If we could easily redesign government, law, norms, practices, and so forth, we might immediately choose to do so in many cases. The very strong Chinese convention of foot-binding was horrendously harmful, and it was deliberately changed (Mackie 1996). The still surviving convention of female genital mutilation is similarly horrendously brutal, and it is being eradicated in some parts of Africa. In the light of such harmful norms, we must grant in general that it is possible to contest whether some pervasive convention costs us more than it harms us; but successful major constitutional change is rare in any given society.

We face the fundamental problem that we need government to enable us to accomplish many things and to protect us from each other, but that giving government the power to do all of this means giving it the power to do many other, often harmful, things as well. We depend on constitutional cleverness to design institutions that accomplish the former and block the latter. The cleverest person in this task historically was probably Madison. Americans, however, have long since lived past the institutions he helped design and the present government under his constitution might be unrecognizable to him. These changes have happened while a few hundred million Americans essentially acquiesced.

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[13] John Locke's 1669 "constitutions" for Carolina included, as its last substantive clause, the silly, naive proviso that it "shall be and remain the sacred and unalterable form and rule of government of Carolina forever" (Locke 1993[1669], 232).

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