

Critical Dialogue

Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives. Edited by Gabriel L. Negretto. New York: Cambridge University Press, 2020. 247p. \$110.00 cloth. doi:10.1017/S1537592721002784

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Because of its editor and lead contributor Gabriel L. Negretto, *Redrafting Constitutions in Democratic Regimes* has the twin virtues of being more focused and more ambitious than most edited volumes. Deploying an international array of legal scholars and political scientists and blending normative theory, quantitative analyses, and qualitative case studies, Negretto's volume illuminates many empirical dimensions of a little-studied phenomenon and makes important prescriptive arguments. The phenomenon is the full redrafting (not simply amending) of constitutions in regimes that have been defensibly democratic for at least five years. Negretto finds 25 examples from 1900 to 2015. The book's most provocative argument is that, even in democracies, constitution making requires the forging of extensive agreement among plural, competing political elites, along with a meaningful degree of mass participation—or else the new constitution probably will not serve democratic constitutionalism well.

Here “serving democratic constitutionalism well” has a chiefly procedural meaning, centered on maintaining the rule of law and civil liberties against authoritarianism. The contributors do not discuss in detail the substance of the new constitutions they examine, referring only briefly to how, for example, many “transformative” democratic constitutions have added numerous positive rights to traditional negative rights. This focus is less a flaw than a feature, however, because it contributes to the volume's coherence.

Negretto's opening chapter frames the book clearly. After noting circumstances that have led to new constitutions in democratic regimes, Negretto observes that in 20 of the 25 (80%) of the cases the book considers, democracies adopted new constitutions in ways that at least putatively conformed to established legal processes for doing so. In an identical number of cases, they did so through “constituent legislatures,” not special “constituent

conventions” charged with constitution writing. In 12 of the 25 cases (48%), direct citizen participation occurred before or during the drafting of the constitution, and 16 cases (64%) included popular referendums to authorize or ratify a new constitution. When assessed by the Liberal Democracy Index of the Varieties of Democracy Project (V-DEM) or the Polity index of democratization of the Polity IV Project, however, the results of these democratic legal processes are decidedly mixed.

Data on one case (Nepal) were not available, but for the 24 others, 9 improved in their “liberal democracy” scores, 9 declined, and 6 remained even. The Polity IV “democratization” scores improved in 7 cases but declined in 8, and in 9 remained unchanged. From these astonishingly 50–50 outcomes, Negretto draws five conclusions that most other chapters in the volume (including one authored and one coauthored by Negretto) reinforce. First, legal frameworks for constitution making in democratic regimes are important. Second, those frameworks must prevent domination by powerful minorities or by a factious majority. Third, judicial interventions on accompanying legal issues are often consequential, but again, they are sometimes beneficial from the standpoint of liberal democratic values and sometimes not. Fourth, “inclusive agreements among a plurality of representative elites” (p. 26) are essential for good outcomes. Fifth and as a result, the redrafting of constitutions in democratic regimes has the potential to contribute to further democratization but may end up abetting new authoritarianism.

The most controversial of these conclusions is the contention that, even in democratic regimes, constitution making will likely not turn out well if it only involves direct popular decision making, without accompanying deal making and consensus building among rival elites. This argument may suggest that the volume is a brief for elitist liberal theories of democracy. Critics, however, will find they must confront potent reasoning and evidence if they wish to oppose the book's claims. After Negretto's opening chapter, Part I of the book analyzes general issues of constitution redrafting in democracies. Part II's chapters present case studies in Colombia and Venezuela, Poland and Hungary, Thailand, Kenya, and Iceland. Most chapters rely on Negretto's framing of the volume's issues and themes.

In Part I, Joel I. Colón-Ríos considers the normative criticism that exercises of a people's constituent power to make constitutions cannot be confined to established legal channels. He responds that, even so, it is not illegitimate for a people to choose to act through such channels. William Partlett argues that constitutions should include directive principles for constitution-making procedures. He calls for representative participation in drafting and for final approval by binding popular referendums, with supermajorities required at both stages to combat factious majorities and minorities. David Landau reviews judicial interventions in legally established constitution-making processes and finds that courts may be as much barriers to needed changes as they are guardians of the rule of law. Finally, Negretto himself uses large-N global quantitative analyses, as well as qualitative evidence from Kenya and Bolivia, to bolster his key contention that "it is elite cooperation and not citizen participation in constitution writing that contributes to improving democracy in its liberal dimension" (p. 102). Negretto makes clear that he means elite "cooperation among a plurality of elected political representatives," so that these elites can claim some real democratic authority. He also makes clear that he thinks this process preferable to the kinds of mass democratic action that radical democrats often espouse.

Opening Part II, Ana María Berejano and Renata Segura explicitly support Negretto's argument. They compare constitution drafting in Colombia and Venezuela, arguing that both included high levels of direct citizen involvement. In Colombia, however, the constitution "was designed and approved by a consensual agreement among a plurality of political representatives," whereas in Venezuela "the incumbent executive and his party imposed the new text." They see the results as "deepening of democracy in Colombia" but its deterioration under Hugo Chávez in Venezuela (p. 132). Negretto then adds a coauthor, Solongo Wandan, to assess constitution making in Poland and Hungary. They depict the 1997 Polish constitution as "the result of a compromise among a plurality of political interests," whereas in Hungary, Viktor Orbán's Fidesz government "unilaterally imposed the constitution with negative consequences for the future of democracy" (p. 155). They acknowledge that the ensuing rise of the increasingly authoritarian Law and Justice Party in Poland weakens this contrast. Conceding that there are no long-term guarantees, they conclude, "Features of constitutional origins ... matter in the short term to keep a country within a democratic path or derail it" (p. 172).

Tom Ginsburg's chapter on Thailand cannot so squarely address the volume's "elite cooperation and citizen participation" theme, because Thailand's story is one of instability. Since it became a constitutional monarchy in 1932, Thailand has had "twenty constitutions ... somewhere between seventeen and twenty-four coups and coup

attempts, and nearly sixty governments" (p. 175). Ginsburg does maintain, however, that even though Thailand's 1997 constitution, adopted after a restoration of democracy in 1992, has since given way to a 2017 constitution "produced under strict military dominance," Thailand does retain some "independent watchdog institutions" and other democratic features established in 1997 (p. 188). He also credits the 1997 constitution with raising baseline expectations for public participation, even if meaningful democracy in Thailand remains remote.

Christina Murray's analysis of the decade-long constitution-making process in Kenya again stresses the importance of agreements among plural elites during drafting stages. Kenya experienced a failed first attempt to adopt a new constitution before a happier second try. Murray holds that "insisting on a 'people-driven' process and failing to secure elite buy-in was fatal for the first process; requiring consensus among the elite, along with a degree of public involvement, was key to bringing the second process to a successful conclusion" (p. 190). However, Murray recognizes that, despite a celebrated handshake between President Uhuru Kenyatta and his rival Raila Odinga in 2018, abuses of power have since arisen. She fears that "politics is back on its old track of deal-making among elites with little attention to the underlying problems that hold back development" (pp. 212–13).


In the final chapter, Thorvaldur Gylafason explores the shocking fact that Iceland's democratic constitution, "although drafted and ratified by citizens according to a procedure established in advance," with nearly two-thirds of Iceland's electorate voting for approval in 2012, "is still not in force" (p. 217). Iceland's Supreme Court tried to invalidate the election of the Constitutional Council that crafted the new constitution, and then its parliament, whose members were ineligible for the council, repeatedly refused to add its ratification. We are surely expected to conclude that the case of Iceland dramatizes the need to involve existing elected political elites in constitution making, because even adhering to legal processes with great citizen participation has left the country with its democratic standing "thrown into doubt" (p. 238).

Perhaps we should so conclude. Negretto and his colleagues have made a strong case for this need, while clarifying many other aspects of constitution recrafting in democracies. To be sure, when we consider the three "success" stories in the case studies—Colombia, Poland, and Kenya—it is clear that the constitution-making processes that most of these contributors recommend cannot guarantee effective, responsive, law-abiding governance. All three nations are deeply troubled today. Many will surely debate whether their difficulties suggest that changes dependent on elite deals are more susceptible to declines into illiberalism than Negretto and his colleagues believe. Those debates are appropriate. Still, in politics as in life, nothing is guaranteed but death and taxes—and

certainly not constitutional success. This volume will aid reflection on how to increase the odds that efforts at democratic constitution making will do more good than harm.

Response to Rogers M. Smith's Review of *Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives*

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— Gabriel L. Negretto 

I thank Professor Smith for his thoughtful and generous review of *Redrafting Constitutions in Democratic Regimes*. As he rightly observes, the essays in this book set out to discuss the nature and impact of constitutional replacements within democratic regimes, with a focus restricted to the political and procedural origins of these constitutions. With this limited goal in mind, all contributors in the volume deliberately avoided discussing in depth other factors that potentially affect democratization, such as long-term institutional legacies, socioeconomic structures, or even the content of new constitutions. An expansion of this research agenda should, of course, incorporate these features into the analysis, as I myself am now doing in related works.

The reviewer notices that the most controversial argument of the book is that, even in democratic regimes, constitution making will likely not turn out well if it only involves direct popular decision making, without rival elites engaging in deal making and building consensus. We sought to back up this claim both normatively and empirically. On normative grounds, various contributors to the volume highlighted the importance of enabling transformations through constitutional change while preventing partisan majorities from engaging in self-dealing. On empirical grounds, several chapters—including my own contribution in Chapter 5—show the democratizing effects of compromise and accommodation at the level of representative elites. However, neither the general framing of the book in its introduction nor the specific chapters examined in detail the assumptions underlying the emphasis on elite compromise or the various possible interactions between political elites and citizens across different episodes of constitution making.

Political elites, by which the book generally means party representatives with the capacity to make binding collective decisions, obviously matter because they are the ones who decide whether a constitution will be replaced, what rules should be followed to write the new text, and its content. Yet they also matter in a more fundamental way because in making these decisions they are supposed to channel and aggregate the interests and views of important social groups. In this sense, the democratizing effect of inclusive constitutional agreements depends less on the

fact that they are forged by elites than on the distinct bases of social support that these elites presumably have.

The main proposal made in the book about direct popular involvement in constitution making is that, although it builds democratic legitimacy, it cannot contribute to democratization independently of plural deliberations and negotiations among political representatives. Popular participation is, however, obviously crucial when the assumption about the social bases of representation is untenable. Even if it can never replace plural representation, direct citizen participation in constitution drafting is essential to provide social support for a constitutional bargain when the linkage between citizens and political representatives has been eroded.

Professor Smith astutely notes that the fact that some of the success stories in our book, such as Poland or Kenya, are today deeply troubled democracies may cast doubt on the presumed democratizing effects of elite deals in constitution making. This, however, may be true of any aspect relating to the origins (or the content) of constitutions as the time elapsed since constitution writing increases. Despite the importance of the phenomenon, neither legal nor social science research has been able to establish with certainty the link between constitutions and democracy in the long run. We have tried to take a small step toward understanding that link on normative grounds and assessing the political impact of democratic constitution making in the short term.

Modern Constitutions. Edited by Rogers M. Smith and Richard R. Beeman. Philadelphia: University of Pennsylvania Press, 2020. 360p. \$69.95 cloth.

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This book examines how the meaning, content, and practice of constitutionalism have evolved from 1787 to the present. Rogers Smith and Richard Beeman have gathered a superb group of legal scholars and political scientists to address these topics. The first part of the book discusses the declining international influence of the US Constitution, its democratic deficit, and the contrasting legacies of American constitutionalism at the federal and the state level. The second part covers international human rights, the role of constitutions in authoritarian regimes, constitution making as a strategy of democratic erosion, institutional design and constituent power in multinational polities, and the impact of constitutions as instruments of state building and democratization in Africa. I highlight here the contributions of this project and discuss some of its limits with the aim of promoting a debate about how to study constitutionalism and constitution making in comparative perspective.

Part I starts with David Law and Mila Versteeg's chapter, which documents how the US Constitution has become increasingly atypical in terms of rights and structure compared to the rest of the world's constitutions. They suggest that one of the main reasons for this phenomenon is the difficulty in adapting the Constitution to changing environments because of its highly stringent amendment procedure. This approach to constitutional adaptation also implies that formal change in the federal Constitution is usually out of reach for citizens and elected representatives, a characteristic that Sanford Levinson decries as an integral part of a less-than-democratic design. As Emily Zackin shows in her chapter, the situation is different at the state level, where citizens and legislative majorities have more influence on ordinary legislation and constitutional change. Yet this brand of democratic constitutionalism, although important for US citizens, has generally remained out of sight for foreign observers.

Part II is more diverse in its coverage. Christopher McCrudden proposes that domestic constitutional rights have become intertwined with an increasingly internationalized understanding and practice of human rights. Tom Ginsburg and Valerie Bunce highlight the importance of authoritarian constitutions in modern constitutionalism. Ginsburg discusses how these constitutions matter not only for the working and duration of authoritarian regimes but also for the constraints and legacies they often create for democratic regimes. Bunce analyzes the design and experience with "ethno-federalism" in communist regimes and whether this approach to the accommodation of cultural diversity is advisable in democratic plurinational states. Jaime Lluch somewhat recapitulates this topic by analyzing the importance of accommodating the demands of substate nationalism in multinational democracies. In her thought-provoking chapter, Kim Lane Scheppele addresses the use of constitution making as a strategy of democratic erosion. Focusing on the case of Hungary under Fidesz, she argues that constituent power cannot be invoked as a self-legitimizing force. To be legitimate, it must be constrained by the general will of the community expressed through inclusive representative agreements and genuine citizen participation, which were absent from the unilateral, partisan imposition of the 2011 constitution. In the last chapter, Heinz Klug discusses the experience of constitution making in postcolonial Africa, proposing that the source of divergence between formal democratic constitutions and authoritarian practices in the region is found in the weak administrations and patrimonial states that emerged after the process of decolonization.

Given the broad scope of the book, readers would have benefited from a more developed analytic framework to assess the changing tasks of constitution making over time. The introduction mentions six organizing questions to analyze the evolution of constitutionalism: who has the authority to write or amend constitutions, what makes a

constitution legitimate, whether the constitution should be difficult to amend, whether it should be fully written, what sort of governing institutions should a constitution include, and what should be the purposes of a constitution. This is a list of important questions, but one that is not organized on clear theoretical grounds and is not systematically covered by the different essays in the volume. More importantly, the organizing questions omit some key issues in the contemporary study of comparative constitutionalism and constitution making.

A comparative analysis of who has the authority to write constitutions and what makes constitutions legitimate requires a theoretical examination of the conditions, logic, and limits of constituent power in different political contexts. Constitution writing has widely diverse meanings and implications in a revolution, a transition to democracy, or a preexisting democratic regime. Scheppele's essay attempts to fill this analytical gap but lacks an explicit comparative framework. Discussing the stringency of amendment procedures calls for a systematic examination of the role of unwritten conventions and judicial interpretation vis-à-vis amendments as alternative means of constitutional adaptation. Sanford Levinson addresses this topic but only partially and indirectly. The basic political institutions that constitutions should include, as well as the purposes of constitutions, are mentioned in several chapters but without a specific organization or structure. Law and Versteeg include a comparative survey of some central institutions such as federalism, presidential government, and judicial review, but this analysis is not taken up in other chapters, and the book includes no similar study of bicameralism, electoral formulas, malapportionment, or minority vetoes. Ginsburg's chapter surveys the purposes of authoritarian constitutions, some of which also apply to democratic constitutions, yet there is no comprehensive introduction to the topic.

One also misses from *Modern Constitutions* some conceptual issues that are relevant for a historical and comparative discussion of constitutionalism. Two such issues are the role of majority rule and popular participation in democratic constitutions. Although the specific content of the US Constitution may be declining as a source of inspiration for contemporary constitution makers, the general model of checks and balances with its emphasis on minority vetoes and representative government still exerts an enormous influence on definitions of a liberal-democratic order. This is visible in constitutional change. The idea that supermajorities are necessary to amend constitutions is an important legacy of American constitutionalism. So is the idea that after enacting the original constitution, the constituent power of the people should remain as an extra-institutional force. The Swiss constitution and some new constitutions in Latin America regulate their own replacement to allow citizens to adopt a new constitution. But most national constitutions follow

Madison's advice in Federalist No. 49 to avoid frequent appeals to the people to alter or replace constitutions.

The US Constitution has also been very influential in the use of counter-majoritarian institutions in ordinary lawmaking. Over time, most democratic constitutions in the world have incorporated power-sharing features that limit pure majority rule. Their impact on democracy is, however, highly contested. Although many political scientists believe that majority-restraining institutions such as separation of powers, bicameralism, or supermajority thresholds for special legislation are essential for the protection of minorities and opposition forces, others regard these institutions as instruments to protect privileged elites against the interests of popular majorities. The evidence in support of these positions is mixed because one can find minority vetoes in constitutions of democratic and authoritarian origins alike. The deleterious effects of minoritarian institutions on democracy are currently being debated in the United States. Yet similar discussions can be found in many new democracies that struggle to deepen popular rule by getting rid of inherited counter-majoritarian institutions created in nondemocratic periods or imposed by autocratic rulers.

Another important topic that is missing in this volume is whether and how the origins and content of constitutions matter for democracy. It is apparent that both politicians and citizens, particularly in new democracies, invest a lot of time and energy in constitution making. In the past, successful democracies have emerged from carefully crafted compromises among contending political elites, as was the case of Spain after the 1977–78 constitution-making process. More recent episodes, such as the making of South Africa's 1996 constitution, show that citizen participation can also promote democratization by providing legitimacy to elite compromises. In fact, mounting comparative evidence indicates that the democratizing effects of constitution making depend on both inclusion at the representative level and participation at the citizen level. Yet there are examples of successful democracies, such as France after 1958, which followed a highly exclusionary and nonparticipative constitution-making process. Similar uncertainties can be observed in the analysis of the content of constitutions. Many scholars claim that specific institutions are key for the consolidation or deepening of democracy. Yet democracies have flourished and failed under widely varying designs, so the relationship between the content and efficacy of constitutions is still uncertain.

These critical comments notwithstanding, *Modern Constitutions* is an excellent contribution to the rapidly growing field of comparative constitutional politics. It is a timely and ambitious reflection on the origins and content of constitutions since the then-unique experiment with constitution making at the national level in the United States between 1787 and 1789. It should be placed at the

top of the reading list of anyone interested in the role that constitutions play in politics.

Response to Gabriel L. Negretto's Review of *Modern Constitutions*

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— Rogers M. Smith 

Gabriel Negretto offers a generous overall assessment of *Modern Constitutions*. He also usefully calls for discussion of “how to study constitutionalism and constitution making in comparative perspective,” and he offers cogent observations about what *Modern Constitutions* might do that it does not. Professor Negretto does not dispute the arguments that the book's contributors advance, although he stresses that the US Constitution's checks on majoritarian abuses have wider relevance today than some acknowledge. He does suggest that the book would benefit from a more developed analytical framework with more systematic comparisons and discussion of more constitutional issues, particularly questions of mass and elite roles in originating and maintaining constitutions.

In reply, let me note that there are different types of edited volumes that make different sorts of contributions. Professor Negretto's volume represents one type. He provided its contributors with a well-developed theoretical framework of issues involved in creating new constitutions in existing democratic regimes, and they all relied on it to some degree. It fostered a focus in most chapters on the roles of existing legal processes, democratic majorities, and elites in crafting constitutions, as well as constitutional protections against, especially, majoritarian authoritarianism. As my review indicated, I see this endeavor as altogether commendable.

Inevitably, however, costs accompany the benefits of having such a specific, shared focus. Among other things, Negretto and his collaborators give limited attention to the substantive rights provided for in various constitutions, nor do they consider constitutions forged in regimes that are not defensibly democratic. As I observed, these are features, not flaws, of this sort of edited volume—but they also confirm that no one type of volume can do everything.

Modern Constitutions is a different beast. It brings together an array of contributors that Professor Negretto rightly calls “stellar.” They were invited to share their views on a broadly defined topic—modern constitution making—without seeking to impose on them any particular framework or focus. The volume's introduction does identify core concerns of modern constitutions that the ensuing chapters collectively address, but contributors were not tasked with discussing all of them nor confined to discussing only them.

As a result, the volume addresses a great variety of topics. They include the differences between the rights

and institutions in the US Constitution and those of many American states and other nations; the partial convergence globally on human dignity as a constitutional value; the challenges of recognizing or denying ethnonational identities; the values of constitutionalism for authoritarian regimes; and the authoritarian potential of even apparently democratic constitution-making processes, among other subjects. A brief conclusion draws some shared lessons from these diverse contributions. However, the volume

does not cover every important topic, and its discussions are indeed more diffuse than those arising from a shared theoretical framework.

Still, both types of edited volumes can make significant, if distinct, contributions to studies of constitutionalism and to other topics as well. In fact, I venture to say that both the examples of these different types considered here have done so.