

Constitutional Design: Proposals Versus Processes

Donald L. Horowitz

Constitution-making has become an international and comparative exercise in a way that it rarely was in the century before 1989. 'International' in the sense that the involvement of experts and practitioners across state boundaries has been welcomed, indeed encouraged, to the point at which a new democracy that excluded foreigners entirely from its constitutional process might stamp itself as decidedly insular, even somewhat suspect. 'Comparative' in the sense that there have been attempts to learn from the experience of states and societies that are similarly situated. In 1978, during the extended session of an elected Nigerian Constituent Assembly that reviewed and rewrote the product of an expert Constitution Drafting Committee, there was great demand for information about the United States constitution (see Horowitz 1979). The US embassy was only too happy to supply copies of the *Federalist Papers*, for which there was then a great thirst. But Nigerian comparative curiosity did not extend much beyond the United States. The situation is changed now. The experience of what are seen as the world's most successful democracies is still sought, but so, to some extent, is the experience of states that have faced what are viewed as comparable problems. If the answers remain elusive, the questions have become far more sophisticated.

I do not want to exaggerate the increase in the diffusion of constitutional innovation across international boundaries. This is, after all, a process that began more than two centuries ago. The framers of the United States constitution were, of course, students of ancient republics. In the nineteenth century, Latin American states were

I am pleased to record my gratitude to the United States Institute of Peace and the Harry Frank Guggenheim Foundation, both of which have supported my ongoing research project on constitutional design for divided societies.

much influenced by constitutional models deriving from the United States. In Europe, proportional representation spread across state boundaries. There are many other examples of borrowed political institutions, including the diffusion of judicial review, mainly in the post-World War II period. Much, though not all, institutional borrowing before 1989, however, was confined to borrower and lender states within the same cultural zone. The heyday of European nationalism, from roughly the mid-nineteenth to the mid-twentieth century, was a period in which state boundaries were, to a considerable degree, impervious to international institutional learning. The making of constitutions was regarded as an intimate act, for which sovereign shades should be drawn.

By contrast, the post-1989 period has been a time of constitutional liberation. In this period, democracy has been marketed aggressively as a product that ought to be available to everyone. Even if purchases of off-the-shelf varieties are a bit dangerous and tailor-made versions are preferred, the implication is that those with less experience can profit from consulting those with more. Western governments have been forthcoming with assistance—although some, fearing being held responsible for the results, were slow off the mark; a spate of non-governmental organizations has sprung up to meet the demand and to create it where it was slow to arise; the United Nations and other international organizations have responded; and professional bodies such as the American Bar Association have assembled cadres of provision merchants, lawyers, and judges eager to dispense ready-made constitutional clauses on request. If the nineteenth was the century of Christian missionaries, the twenty-first may become the century of constitutional missionaries.

In spite of all this cross-boundary involvement and in some ways because of it, constitutions that have been *designed*, as opposed to merely constructed, are difficult to find. The sheer proliferation of participants makes it less, rather than more, likely that a design, with its consistent and interlocking parts, will be produced at the outset and adopted at the conclusion. I shall return to a fuller discussion of impediments to realizing designed constitutions soon enough. Suffice it to say here that the results since 1989 do not suggest the triumph of constitutional design or even of comparative learning, however great the efforts have been. A study of new east European electoral systems, for example, concludes that their framers consulted foreign models and then proceeded to adopt an array of idiosyncratic hybrids (Elster, Offe, and Preuss 1998: 80). A similar study of sub-Saharan African electoral-system change finds

a good deal of change, often, surprisingly enough, change involving borrowing across colonial traditions but, again, no particular pattern, just a variety of purely local adaptations (Albaugh 1999). If constitutional design were thought, reasonably enough, to produce some standard solutions, locally modified, to recurrent problems, more discernible patterns than these would be visible. New democracies, like older democracies, seem inclined toward adopting hybridized, sometimes inconsistent, institutions. In the electoral field, a more general tendency toward hybrid systems is visible from Italy to Israel to Japan. This is a tendency that reflects a desire to graft one institution on to another rather than to design an ensemble of institutions.¹ Perhaps counter-intuitively, homogeneity of outcome is not the hallmark of the more intense international contact of the current period.

Despite international consultations, many countries produce constitutions that are more or less impervious to whatever international wisdom has been purveyed or, for that matter, to what a careful examination of comparative experience might reveal. In spite of abundant experience, in Africa and elsewhere, showing the futility of prohibiting the formation of ethnically-based political parties, Bulgaria; a state with large Turkish and Pomak minorities, adopted such a prohibition. (When the lawfulness of the Movement for Rights and Freedoms, universally known as a Turkish party, was litigated, Bulgaria was saved from the counterproductive consequences of its action by a judicial determination that what everyone knew to be true was nonetheless false [Ganev 1997].) The majority of states, urged to adopt constitutional designs of one kind or another, have proved to be most conservative. I shall explore the sources of some of this conservatism shortly.

None of this should be surprising. Even that most theoretically informed, deliberate group of men who assembled in Philadelphia in 1787 to reform the Articles of Confederation and who are credited with having produced a brilliant constitutional design actually improvised at every step. They abandoned reform for reconstruction. They composed their bicameral legislature to resolve an impasse between small states and large. The supremacy

¹ Although I shall speak here of 'constitutional' design, I mean to include fundamental political institutions, such as electoral systems, the regulation of political parties, and devolution, whether or not these matters are embraced formally in the constitution, as sometimes they are and sometimes they are not. In Indonesia, for instance, new laws on all these subjects were adopted in 1999, while the 1945 constitution, sacrosanct as it was, was left unchanged for the time being. The adoption of these laws was meant to be, and certainly was, a constitutional act.

of federal authority over the states was the unintended consequence of a dispute over a different issue (Farrand 1913: 120). The institution of judicial review was omitted from the document, was assumed to be inherent in it by some (Farrand 1913: 156-7), and was probably not contemplated by others. The presidency, truly an original contribution to government, was the result of a *coup* against the majority of the constitutional convention by partisans of a strong executive operating in two committees of the convention; most delegates were wary of executive power, believing that parliament was the palladium of liberty (see Horowitz 1987: 10-11; Thach 1969: 118). The framers of 1787 could justify the design that emerged, but they could hardly claim to have planned the result.

If it is true that designs are not generally adopted, that does not render constitutional design an unimportant subject. It is a naive view of the relation of ideas to institutions that concludes that ideas are unimportant merely because institutions do not reflect them fully or quickly. The difficult path of democracy itself, from 1680 to 1789 to 1989, makes this clear enough. Ideas are contested by other ideas, ideas are met with a variety of non-ideational barriers, and even ideas that survive these tests must go further: they must be put in adoptable forms, they must be legitimized by opinion leaders and opinion-leading states, and they must be seen to be in the interests of those who must approve their adoption before they find their way into institutions. In the case of constitutional design, the battle of ideas is not over, non-ideational obstacles are strong, it is still early days in terms of constitutional iterations, the interests affected by adoption are not uniform, and retrogression is possible after adoption. In the remainder of this paper, I shall expand on some of these themes, with particular reference to constitutional design for societies severely divided by ascriptive groups, whether the lines of division are said to be national, ethnic, racial, or religious.²

² By 'severely divided societies' I mean those in which ethnic-group identities have a high degree of salience, exceeding that accorded to alternative identities—including supra-ethnic, territorial, ideological, and class-based alternatives—and in which levels of antipathy between ethnic groups are high. This definition leaves open the institutional manifestations of severe divisions and so allows us to evaluate the effects of constitutional designs on institutions exacerbating or mitigating conflict. Compare the broadly similar definition of Nordlinger (1972: 9).

The Contest of Ideas

If there is a subject called constitutional design, then there must be alternative constitutional *designs*. Assuredly there are, but even now most constitutional drafters and reformers are, at best, only vaguely informed by anything resembling an articulate theory of their enterprise. Most act on the basis of inchoate and partially worked-out ideas, such as the notion that assuring legislative representation for minorities is the crucial step in inter-group accommodation: a notion that has animated many judicial and legislative determinations under the Voting Rights Act in the United States. Politicians have their own ideas, and these are not so easily dislodged, even with the growth of constitutional design and various sub-fields, such as electoral-system design, as matters for experts. Individual politicians can still make their influence felt, even in very large countries.³ Before we even reach the contest of explicitly stated theories, we need to recognize the more significant, albeit often subliminal, contest between explicit theories and the more influential, implicit theories espoused by practitioners. The inarticulate theories call out for study. As of now, we lack a theory of their theories.

We also lack a consensus emerging from the articulate theories, whether these relate to electoral systems, presidential or parliamentary structure, or the costs and benefits of centralized or devolved power. Lack of consensus is the first obstacle.

No treatment of the contest of ideas can avoid an encounter with consociational democracy. There is much to admire in the efforts of Arend Lijphart in behalf of managing inter-group conflict, most notably his realism about group divisions (they are not to be wished away) and his optimism (they do not need to produce civil war). Yet Lijphart, in his contribution to this volume, is right to identify me as a dissenter from the consociational approach, although, as I shall point out, completely wrong to identify me as an opponent of either power-sharing or territorial devolution. I want to move on to a brief statement of a more promising approach and to a fuller treatment of the gap between constitutional design and the constitutions that actually emerge from processes of constitutional innovation, but I need first to state why I think consociational theory is not a fruitful path for constitutional designers.

³ I am thinking here of the singular part played by Viktor Shaynis, a parliamentarian, in designing the Russian electoral system.

To avoid restating objections to consociationalism that I have advanced in several previous publications (Horowitz 1985: 568–76; 1991: 137–45, 167–71; 1997: 439–40; 2000: 256–9), I shall resort to a list of the main objections.

1. The consociational approach is motivationally inadequate. Lijphart (1977: 53, 165) identifies statesmanship as the reason elites will form a cartel across group lines to resolve inter-ethnic differences. In his view, leaders are motivated by a desire to avert the danger of mutual destruction. But why should majority-group leaders, with 60 per cent support, and the ability to gain all of political power in a majoritarian democracy, be so self-abnegating as to give some of it away to minority-group leaders? There may be instances of this sort of generosity, in the face of the attractiveness of a less-than-maximal coalition (see Riker 1962: 32–3), but the motive of avoiding ultimate mutual destruction is based on a time horizon longer than that employed by most political leaders, who, in any case, are apt to think that retaining control for themselves is the best way to avoid disaster. On this point, Lijphart (chapter 3) now contends that the motive is not statesmanship but the desire to enter into a coalition. This, of course, does not account for the motives of leaders of majorities, who do not need coalitions, much less the all-inclusive or grand coalitions that Lijphart (1977) specifies as a central element of the consociational prescription.⁴ The failure to make the elementary distinction between the different incentives of majorities and minorities, to which I shall return, is crucial. Even states that start out multipolar, with several ethnic groups, can become bipolar and bifurcated—witness the growth of northern versus southern groups in many African states—thus obviating the need for a coalition across group lines for the group that is slightly larger. In general, bipolar states, with a majority and a minority, are the more seriously conflicted. A theory of conflict reduction that cannot cope with hard cases is of limited utility.⁵

⁴ Lijphart sometimes includes and sometimes omits the grand-coalition requirement. The tendency to shift ground about the indispensable requisites of the theory is one of the main reasons why consociationalism attracts such strong criticism (see, for example, Dixon 1997; Halpern 1986).

In the actual experience of constitutional innovators, there are some examples of motivation to accept consociational arrangements, but these are idiosyncratic and cannot be assumed to be widely distributed. Motivation always needs to be treated as an issue, not a given.

⁵ The claim that the bipolar (60–40) problem is rare (which Lijphart made in an earlier version of the paper published in this volume) cannot be sustained. In many developing countries, bipolar alignments emerge as a result of the amalgamation of group identities.

2. To the extent that the imputed motive is still statesmanship rather than self-interest, the assumption that elites in divided societies are likely to be more tolerant of other ethnic groups or less inclined to pursue advantage for their own group is extremely dubious. Studies of ethnocentrism show educated elites in some countries to be less ethnocentric than their followers, in others more, in some others neither less nor more, and in still others more with respect to some groups and less or the same with respect to other groups (see Horowitz 1997: 457 n.31; 1991: 140–1 nn. 44–50). It is very risky to count on statesmanship (see Reilly and Reynolds 1999: 13).

3. When leaders compromise across ethnic lines in the face of severe divisions, there is usually a high price to pay. Counter-elites arise who make an issue of the compromise, referring to it as a sell-out. Consociational theory assumes the existence of 'group leaders', but, even when groups begin with a single set of leaders, compromise across group lines is likely to show those leaders to be merely party leaders opposed by leaders of other parties seeking the support of the same group. The centrifugal competition for group allegiance is an enormous constraint on compromise across group lines, and it renders the grand coalition, under conditions of free elections, a contradiction in terms. Not one of the four developing countries cited by Lijphart (1977) as consociational—Lebanon, Malaysia, Surinam, and the Netherlands Antilles—had a grand coalition. Each had an inter-ethnic coalition of some parties, opposed by other parties representing the same groups. Some of the four also violated other core conditions of consociational theory, such as proportionality in allocations, proportionality in executive participation, and cultural autonomy, but were claimed for the theory nonetheless. For reasons I shall enumerate later, it is not amiss to refer to consociational *elements* or consociational *practices*, but consociational regimes in the developing world are, to be generous about it, few and far between.⁶

⁶ The tendency to shift the goal posts and to claim countries for the theory is palpable. Whenever a divided society seems to be more or less democratic and more or less lacking in the most severe forms of conflict, the reason must be that it is consociational. India, the leading example of adversary democracy in Asia—and adversary democracy is the form of democracy to which consociationalism is juxtaposed as an alternative—is said to be consociational (Lijphart 1996). If South Africa settles its differences peacefully and electorally, even if it lacks central elements of consociationalism, such as minority vetoes, then South Africa must be consociational (Lijphart 1994b).

To be perfectly clear at the outset, it is not possible to identify states that have adopted an incentives approach—or any other coherent, conflict-reducing approach—across the board either. The difficulty of adopting constitutional designs *in toto* is precisely the point of this chapter.

Consociational theory exaggerates the latitude enjoyed by leaders in ethnically divided societies where free elections prevail.

4. If the grand coalition, proportional resource allocations and shares of executive power, and the minority veto all encounter the motivational problem mentioned earlier, cultural autonomy encounters a different problem. Presumably, groups are to find satisfaction—and power—in the ability to manage their own affairs, and that will contribute to stable democracy (Lijphart 1977: 42; this volume, chapter 3). But those who work on the sources of conflict in ethnically-divided societies know there is more to it than that. Cultural matters, such as the designation of official languages and official religions, and educational issues, such as languages of instruction, the content of curricula, and the official recognition of degrees from various educational streams associated with various ethnic groups, are habitually divisive issues in severely divided societies. These issues go straight to the heart of the conflict in three of its most important respects. To accord equal recognition to all cultures, religions, and languages is to concede equal ownership of the state, contrary to what groups are very often willing to concede (see Wimmer 1997). To accord equal recognition is also to concede another core issue: the issue of group superiority, which is contested by reference to disputes over cultural superiority and primacy. To accord equal recognition is, finally, to concede the issue of the identity of who will get ahead, which otherwise would be regulated by limitations on languages and educational streams associated with competitors. In short, cultural autonomy, with its implication of equality, is the product of the reduction of inter-ethnic conflict, not an ingredient of a conflict-regulating prescription at the threshold.

5. Lijphart fails to make a critical distinction between pre-electoral and post-electoral coalitions. The coalitions recommended by consociational theory are post-electoral coalitions, which no doubt entail compromise over the division of cabinet portfolios, but typically not compromise over divisive inter-ethnic issues. A better analysis of Lebanon and Malaysia during their most accommodative periods would have put the emphasis on the need of candidates, parties, and coalitions to attract votes across group lines, rather than on post-electoral compromise. In those cases and others, pre-electoral coalitions across group lines required compromise on ethnic issues. The combination of list-system proportional representation and political parties based on ethnic-group support does nothing to foster compromise on ethnic issues. The zero-sum relation of party lists to each other translates into a zero-sum electoral competition between ethnic groups (see Horowitz 1991: 167–76).

These criticisms suggest that when consociational arrangements are adopted a conflict is probably already on the wane, and they also point the way towards alternative power-sharing prescriptions. Certainly, to conflate consociation with all of power-sharing is completely unwarranted.⁷ Again, in setting out the outlines of an alternative perspective, I shall not be comprehensive, because I am as much concerned with the under-explored fate of constitutional designs as I am with the designs themselves.

Several points follow from what has already been said: If it is true that inter-group conflict involves a conflict for control and ownership of the state, for group superiority, and for group success, all measured in relative terms, then compromise will be difficult to achieve. The divisive issues are not easy to compromise. No single formula will assure the reduction of conflict. Progress will be, in most cases, incremental and, in many of these, reversible. When electorates are alert to ethnic issues, as they typically are, exhortations to leaders to compromise are likely to be futile in the absence of rewards for compromise. Attention needs to be devoted, therefore, to maximizing incentives for accommodative behaviour. For elected politicians, those incentives are likely to be found in the electoral system. Electoral systems that reward inter-ethnic accommodation can be identified and can be made to work more or less as intended (see Reilly 1997; see also International Crisis Group 1998; 1999). Where electoral rewards are present, they can provide the motivation ethnic leaders otherwise lack, they can operate even in the presence of ethnocentrism, and they can offset electoral losses that leaders anticipate as a result of making concessions to other groups. Where these rewards are present, they typically operate by means of vote-pooling arrangements: the exchange of votes by ethnically-based parties that, because of the electoral system, are marginally dependent for victory on the votes of groups other than their own and that, to secure those votes, must behave moderately on the issues in conflict. The electoral rewards provided to a moderate middle compensate for the threat posed by opposition from those who can benefit from the aversion of some group members to inter-ethnic compromise.

Where vote pooling takes place, as it did in Lebanon and Malaysia, it promotes pre-electoral coalitions, coalitions that need to compromise in order to attract voters across group lines but that may be

⁷ Others have also pointed out that the appropriation of the term 'power-sharing' to refer exclusively to the consociational approach is confusing and conceptually constricting (see, for example, Dixon 1997: 23, 32).

opposed by ethnic parties on the flanks. A recent instance in which a vote-pooling electoral system was used successfully to induce the formation of a multi-ethnic coalition that won the election was the alternative vote (AV), adopted in the 1997 Fijian constitution. The electoral incentives in Fiji were weak, but they had a powerful effect.⁸ A severely divided society, Fiji elected a thoroughly multi-ethnic government, led by its first-ever Indian prime minister (see Lal 1999). A year later, that government was overthrown, but not because the incentives did not work.

Incentives, then, are the key to accommodation in difficult conditions, but the difficult conditions imply that the incentives approach will not be attractive to everyone or attractive at all times. Some times are more propitious than others, and the problem of motives does not disappear by invoking the incentives approach. The incentives approach has had no more success in securing full-blown acceptance than has any other. Now the question becomes who will opt for this approach, when, and why. This is a problem I shall turn to shortly. First, however, I need to flesh out a few more implications.

If political leaders are likely to be more willing to compromise under some electoral systems than under others, it follows that the electoral system is the central feature of the incentives approach to accommodation. Indeed, differing electoral logics can create differing ethnic outcomes, reversing even favourable and unfavourable starting points, an argument I have made in a comparison of Sri Lanka, which began with a relatively easy ethnic problem, and Malaysia, which began with a very difficult one (Horowitz 1989a).

Vote pooling is the major, but not the only, goal of the incentives approach. As the difficulty of reconciling majorities to non-majoritarian institutions suggests; multipolar fluidity makes inter-ethnic accommodation easier; since, by definition, it lacks a majority. The presence of many groups, no one of which can lay claim to majority status, in Tanzania and India is conducive to the mitigation of conflict. But group identities can change: as I mentioned earlier, a large number of groups can consolidate into a smaller number, and the formal institutional structure can facilitate the change from multipolar fluidity to bipolar opposition. Where multipolarity prevails, another purpose of the electoral system is to preserve it against consolidating tendencies. Among others, the Lebanese system did this for a long time. By acknowledging

⁸ By way of disclosure, I should report that I served as a consultant to the Fijian Constitution Review Commission that recommended the AV system (see FCRC 1996). Arend Lijphart was also consulted by the Commission.

the plasticity of group identities, which consociational theory completely neglects, the incentives approach can prevent the crystallization of identities and the emergence of more severe conflict.

It is not usually recognized, however, that territory can act in aid of or in lieu of electoral mechanisms for such purposes. Territory can partition groups off from each other and direct their political ambitions at one level of government rather than another. Federalism, and especially the proliferation of federal units, or regional autonomy can act in effect as an electoral reform and can preserve multipolar fluidity. There is very good evidence of this in the case of the proliferation of Nigerian federal units.

Federalism and regional autonomy have other conflict-reducing functions as well. If the units are homogeneous, they may foster intra-group competition, at the expense of an exclusive focus on inter-group competition. If the units are heterogeneous, they may provide an experience in political socialization for politicians of different groups who become habituated to dealing with each other at lower levels before they need to do so at the centre.

Does devolution lead to secession, as central-level politicians so often fear? The intervening variables here are timing and the ties woven with the centre. Early, generous devolution, coupled with carefully crafted connections of the regional population with the centre, is likely to avert rather than produce separatism. Late, grudging devolution, coupled with a view at the centre that members of a group residing in the autonomous territory should henceforth look exclusively to the regional unit for their satisfaction, is far more likely to encourage departure from the state. Hesitation about devolution creates a self-fulfilling prophecy. Because of hesitation, devolution often comes too late.

The incentives approach is as difficult as, or more difficult than, the consociational to adopt, but, once adopted, it has an important advantage. Consociation is certainly easier to understand: one size fits all. But, even if adopted, consociation is far from self-executing, because compromise is not likely to be rewarded by the electorate. The matter will not be left in elite hands. By contrast, politicians who benefit from electoral incentives to moderation have continuing reason to try to reap those rewards, whatever their beliefs and whatever their inclination to toleration and statesmanship. Politicians who are merely exhorted to behave moderately may be left with mere exhortations.

Structural Sources of Constitutional Conservatism

Once we move past arguments about the best constitutional course for divided societies, hubris should subside and humility should return quickly. There is ample reason, after all, to be humble. Why is it so easy to point out how few, if any, states have adopted completely one prescription or another? Because adoptions are likely to be partial at best. The processes of constitution-making are uncongenial to the creation of a set of institutions that derive from any single theory. Beyond that, there are systematic biases of constitutional actors that favour and disfavour particular approaches. And there are variations in the positions and interests of ethnic groups participating in and affected by constitutional processes. For all of these reasons, the result is far more likely to be the adoption of a mix containing elements drawn from several approaches than of a document embodying a consistent perspective and method.

This is inadequately mapped terrain, so the best I can do is to sketch some of the constraints.⁹ Perhaps I can begin by illustrating hybrid outcomes, using an example I referred to earlier: Fiji.

Fiji is a severely divided society with a population that is, very roughly, half Fijians, two-fifths Indians, and one-tenth other minorities. After a military regime promulgated a quite exclusionary, pro-Fijian constitution in 1990, the regime promised a review of that constitution, to take place several years later. A Constitution Review Commission was duly appointed. In 1996, the commission reported (FCRC 1996). Based on its view of the benefits of the vote-pooling approach, it recommended an AV electoral system and the creation of as many heterogeneous constituencies as possible, so that ethnic parties would have incentives to make arrangements with other ethnic parties across group lines to secure the 50 per cent plus one that AV requires for victory.¹⁰ Fiji, however, has a history of ethnically reserved seats and communal rolls, that is, the electorate for each seat is limited to voters of the group for whose candidates the seat is reserved. The commission was unable to abolish these seats altogether, so it retained 25 of them in a proposed house of 70, leaving 45 open seats. The Fijian parliament more than

⁹ For an altogether different set of constraints, see Reilly and Reynolds (1999: 10–19).

¹⁰ For the powerful incentives AV creates for voters to cross party lines—and, by inference, in an ethnically divided society, to cross ethnic lines—see Sartori (1997: 5–6). Lijphart (this volume, chapter 3) mistakenly equates the incentives of AV to those of the majority, two-round runoff system.

reversed these numbers: it enacted a constitution specifying 46 reserved seats and only 25 open seats. It also adopted a proposal requiring that any party securing at least 10 per cent of the seats be invited to be represented proportionately in the cabinet, but without a veto. The British convention of majority confidence was explicitly retained.

Here, then, was a hybrid constitution, drawing inspiration from the incentives approach, the consociational approach, and the majoritarian approach (for a fuller treatment, see Horowitz 2000). What I want to argue here is that such mixed outcomes are more likely than not, and I want to enumerate some of the reasons.

The first is that there is an asymmetry of preferences. It should come as no surprise that representatives of the Indian minority, weary of leading the parliamentary opposition, proposed the provision for inclusion in the Fijian cabinet. (Ironically, however, one Indian party did so well that it became the largest party in the coalition that won the election and so did not need the provision, while the other Indian party did so poorly it could not take advantage of the provision.) The consociational approach involves guarantees, and minorities are more likely to favour minority guarantees. Majorities, however, favour majority rule. While, in this case, Fijians conceded a single consociational *feature*, they certainly did not concede a *consociational approach*. Nor did they concede the full thrust of the incentives approach so clearly preferred by the commission. Rather, they watered it down.

This asymmetry of preferences is systematic; it derives from the exigencies of minority and majority position. But position is not the only source of mixed outcomes.

Two other sources are a multiplicity of participants and a multiplicity of objectives. Theorists often think—correctly, in my view—that the dangers of ethnic conflict are so great that a nearly single-minded focus on its amelioration is warranted in the design of institutions. Others, however, have additional objectives. The more others there are, the greater is the chance that competing objectives will intrude and need to be accommodated. An example from Bosnia will make the point. While a three-member international committee worked for many months devising and testing an electoral system to mitigate Bosnia's ethnic conflicts, an internal drafting committee and some other members of the international community, although also concerned about ethnic conflict, were equally concerned about the responsiveness of legislative candidates to constituents—a classic concern of the electoral-system literature. This led to a quite different electoral proposal. This,

in Bosnia, a state in which there is serious apprehension of renewed ethnic warfare if the international community should depart.

Now there are undoubtedly ways to narrow the composition of participants playing a part in such deliberations, but some of the most likely ways may not be productive. It is tempting to think that some form of *diktat* would surely produce more consistency. The only problem then would be to convince the author of the *diktat* of the soundness of one theory or another. These days, however, any *diktat* that emerges is likely to emanate from international actors. While these often have a view of the benighted condition of the troubled territories needing their help, a jaundiced view that might be conducive to imposing some strong medicine on their wards, international actors are exceedingly unlikely to speak with a single voice or, if they can find any responsible voices in the target territories, to speak with any voice at all. The possibility of a *diktat* that comes with international involvement carries with it the proliferation, rather than the reduction, of participants. (Never mind whether a *diktat* can produce a legitimate constitutional design: it certainly did in some ex-colonies.)

What I have already said about Fiji and Bosnia also implies that the invocation of expertise or the detachment of outsiders, such as the distinguished chair of the Fijian commission (a Maori who had served as governor-general and previously as archbishop of New Zealand), will yield a consistent product in the end. The recommendations of experts and outsiders can be rejected and modified as inconsistent with local conditions or simply as inconsistent with the preferences of local actors.

If there are many actors, constitutional processes are likely to entail bargaining. By definition, bargaining involves the exchange of preferences, and that exchange is inimical to the realization of a single constitutional design.

There are times when there is a discernibly different process at work, when a sober contemplation of unpleasant experience produces a determination to depart from the institutions producing that experience. Those propitious times needs to be specified more precisely than they have been thus far. As I said earlier, the very problems that make constitutional innovation necessary generally impede acceptance of constitutional departures. And so a focus on exceptional times, hospitable to innovations, is well warranted.

At some such times, the past has been so unpleasant and the future is so uncertain that the ethnic groups' sense of their own future interests becomes elusive. In Nigeria in 1978, groups found it impossible to foresee the pattern of ethnic political advantage and

disadvantage. Faced with the veil of ignorance, they set out to choose institutions they could live with regardless of future position. Among these were a separately elected president, so that control of parliament by a single ethnic group would not be sufficient to exclude the rest. The president was to be chosen by a vote-pooling formula involving plurality plus geographic distribution—as territory was a rough proxy for ethnicity. Unfortunately, the Nigerian framers did not opt for conciliatory electoral systems for legislative office, and so one set of institutions worked against others. Propitious moments may produce a suspension of interest asymmetry, but they do not necessarily produce adequate innovations. Epiphanies do not compensate for all the defects of the human condition, such as failures of information, foresight, and thoroughness.

To a considerable degree, the list of obstacles to constitutional innovation recapitulates the standard impediments to policy change. This, I want to suggest, is a useful function, since tidy constitutional designs have generally been propounded without regard to untidy processes of adoption. In the terms familiar to the literature on agenda setting (for example, Kingdon 1984; cf. Horowitz 1989b), constitutional prescriptions are solutions awaiting problems, but in this case the problem whose serendipitous occurrence produces a new receptivity to pre-existing solutions is likely to be a human catastrophe, such as a civil war or a hurting stalemate (see Zartman 1991). Neither of these will necessarily assure the adoption of any prescription in its totality. In many such dire cases, there is likely to be a sense that any compromise is better than no agreement. This is an outcome that is highly likely to be encouraged by outside mediators. In short, the existence of a design does not repeal the laws of policy-making or negotiation.

One structural condition is certainly conducive to constitutional innovation in the service of conflict reduction: monopoly position within one's own ethnic group. Lijphart (1977: 25) refers to 'a grand coalition of the political leaders of all significant segments of the plural society'. Most of the time, however, it is difficult to identify a single set that can be called the political leaders of each group. Groups usually have more than one set contesting for leadership, and this, as I have argued, is a major constraint on inter-group compromise. Where, however, a single set of leaders is as yet unchallenged, it has, for the moment, leeway to compromise that it would not otherwise enjoy. The Malaysian compromises of the 1950s go back to this fortuitous structural condition. Once the compromises were made, however, counter-elites arose within each group to challenge them. These alternative, ethnically more exclusionary leaders

hemmed in the compromising coalition partners, limiting their latitude, and also drove the coalition partners together, since their majority increasingly depended on their ability to pool votes with each other. Without monopoly position at the outset, it is unlikely that the initial compromises could have been made.

In spite of all these obstacles, including lack of monopoly, one recent agreement stands out by its exceptional character: the largely consociational agreement reached in Northern Ireland on Good Friday, 1998. The agreement is not perfectly consociational, and its early implementation involved some deviations from strict proportionality. Yet, on the whole, the consociational coherence of the document stands out. Even more remarkable are the maximal commitments to inter-group accommodation made by the signatories. In a separate paper, based on interviews in Belfast and London (Horowitz 2002), I show that the Northern Ireland agreement was made possible by a concatenation of exceptional circumstances that suspended nearly all the obstacles I have identified here.

The one obstacle not overcome at Belfast—intra-group competition—particularly on the unionist side, threatened to preclude agreement in the first instance and then delayed implementation of the agreement for a year. The principal constraint on David Trimble, leader of the Ulster Unionist Party, was opposition not only from outside the UUP, from Ian Paisley's Democratic Unionist Party, but also from inside his own caucus. The two are related. The existence of the DUP, criticizing compromise from the Protestant flank, leads members of the UUP to depart from the compromises, lest the exclusive appeal of the DUP draw support away. If the agreement does not collapse completely, the same risk may materialize on the Catholic side. Should there be a shortfall of delivery on the maximal commitments of the agreement, the main beneficiaries of which are on the Catholic side, Catholic moderates of the Social Democratic and Labour Party stand to suffer at the hands of Sinn Féin, which is likely to outflank them on such issues.

The actual workings of a regime of this sort are, therefore, made quite precarious by intra-ethnic divisions. In particular, when parties of the middle cannot count on electoral support from their partners in compromise, in order to offset losses incurred within their group as a result of the compromises, they will proceed haltingly at best, and they may be caught in centrifugal processes initiated by their intra-group competitors. That is a strong reason why intra-group monopoly is best at the outset (though it will not last); it is also a reason why vote-pooling mechanisms are exceedingly helpful. And it is also a

reason why there can be no guarantees of success for any prescription or mix of prescriptions: compare Reynolds (1999b: 5).

Which Models, Which Histories? Sources of Bias

The process of constitutional choice is fraught with the prospect of bias and distortion. Two of the more prominent sources of skewed choice concern the relative attractiveness of alternative constitutional models across states and the interpretation of constitutional experience within states. The pitfalls, therefore, are inappropriate comparison and misinterpreted history.

In cross-state comparisons, there are, in turn, at least four sources of difficulty. The first is a preference for the best or most successful cases. The second is a preference for source countries of colonial, cultural, or regional affinity. The third is a preference for single outstanding examples, at the expense of a run of dissonant examples. The fourth is a preference of international actors for home-country institutions.

As Nigerians looked to the United States in 1978, so, too, have many countries aimed to resemble Switzerland rather than Nigeria, even though their problems may have resembled Nigeria's more than Switzerland's. Success attracts admirers, although success may imply an easier problem that may have made possible the adoption of institutions that are held, in retrospect, to be responsible for the success. Severely divided societies need to look to other severely divided societies that have made some progress in reducing conflict, rather than to societies that are less severely divided, especially if the reduction of divisions in the less divided countries can causally be attributed to political institutions that antedate the onset of democracy.

Anglophone countries in Africa and elsewhere generally express an affinity for British institutions; Francophone countries, for French institutions, such as the presidency with two-round elections. Post-colonial conditions can and do change, but powerful networks, habits, and pressures can retard the change. The same goes for the English-speaking world's general, albeit imperfect, allergy to list-system proportional representation and comparable aversions to other systems in other cultural zones. Inter-regional boundaries also constitute powerful impediments to constitutional borrowing. Bosnia's and Northern Ireland's cleavages may be similar in structure and in severity to those of some Asian and African countries, but in neither have constitutional designers

been inclined to look east or south for models. There is not yet completely free trade in constitutional innovation.

A more subtle source of difficulty derives from a different selection bias. Those with an interest in a specific innovation may focus on a single attractive case, to the neglect of the range of relevant outcomes. Take the case of Tatarstan, which in the early 1990s aimed to secure a specially favourable, asymmetric federal arrangement with Moscow. Policy-makers in Kazan focused on a model far from home: the relationship between Puerto Rico and the United States, which, not surprisingly, seemed remarkably favourable to the peripheral territory. They neglected the relevance of several other cases in which asymmetrical federal arrangements, conceded when necessary for the centre to forge the association, were diminished or revoked when the centre was in a position to do so: Cameroon, Ethiopia-Eritrea, Peninsular Malaysia-Borneo Malaysia. This is, of course, an instance of the bias toward success and perhaps also of a geographical-cultural bias. It is also, however, something more subtle: a bias toward the more visible and against the less visible, the same bias that has made South Africa conspicuous in debates in Northern Ireland (Guelke 1999).

Finally, there is a nearly imperceptible but, in some cases, palpably important source of skewing among international actors: the bias of international bureaucrats toward home-country institutions. To the extent that so-called failed states become wards of international actors, those states may find themselves subject to the democratic forms and processes of the leading custodian states. Hence, for example, reports of American military authorities who conduct ad hoc judicial proceedings along home-country lines in Kosovo. The same is undoubtedly true in constitutional design. There is also a subset of home-country bias: a preference for the institutions of a state in which decision-makers have studied. Indonesian decision-makers, educated in the United States, had a preference for plurality elections in single-member constituencies and for electoral commissions that included representatives of the contesting political parties. The latter innovation made for great delay and doubt about the count in the 1999 general elections, as an unwieldy commission sought to cope with objections from officials of literally scores of parties.¹¹

People bring with them what they know and what they are habituated to. How all this plays out is unclear in a multinational occupation or in the increasingly common situation in which advice is

¹¹ I am grateful to Ben Reilly for calling the source of this difficulty to me.

taken from several sources, but competing home-country biases are unlikely simply to cancel each other out. The biases may, however, interact in peculiar ways with adoptions based on other biases. In the early 1990s, Nepal opted for first-past-the-post elections, because it wished to emulate the experience of its powerful neighbour, India. It also wished to discourage party fragmentation. Consequently, on the recommendation of a German adviser, Nepal adopted a 3 per cent threshold; but, of course, such a threshold sits uneasily with single-member constituencies in which the threshold for victory is already determined to be a plurality virtually certain to exceed 3 per cent. Nepalese decision-makers, therefore, decided that a party securing less than 3 per cent of the vote would be ineligible to run candidates in the *next* election—a rule that also proved attractive for the same reasons, but without the German adviser, in Indonesia in 1999.¹²

Examples of this sort raise the more general question of interaction effects. If hybrid institutions are produced by asymmetrical preferences, processes of exchange, and multiple-source biases, it becomes more difficult to predict the incentives they create (see Shvetsova 1999).

Model biases are an instance of reference-group behaviour (Turner 1956). Those who search for models, personal or institutional, do not cast a net indiscriminately. They emulate or borrow selectively from donors thought to be appropriate sources of values or ways of conducting business. This is an old, but under-appreciated, story in the transference of legal systems across boundaries (see, for example, Watson 1985: 23). In the quest for the best institutions, students of the subject have neglected the subterranean screening that takes place in processes of constitutional adoption.

The study of the subject does not end with model bias. There is also historical bias to contend with. Although state decision-makers may learn something from the experience of other states, they inevitably have already learned something from their own historical experience. This they will bring to the table, whether or not they are conscious of it. Again, the American presidency is a good example. The nature of this office was uncertain until the end of the 1787 convention, because there was differential experience among the delegates. Many delegates, recalling the imperiousness of the British Crown, wanted a weak executive. Many others, who had recently witnessed what they saw as unbridled legislative domination and popular

¹² I am indebted to Jørgen Elklit for the Nepalese example, but the interpretation is my responsibility.

revolt, culminating in Shays' Rebellion, feared populist legislative supremacy. A third group, ultimately decisive, came from the few states that had had strong executives during the Articles of Confederation period. Their experience proved decisive, as they captured the crucial committees that resolved the issues (Thach 1969). One set of delegates was focused on Britain, a second on developments in some states, a third on developments in others. Each thought its slice of history definitive.

It is, however, not experience alone that is decisive, but how experience is filtered and interpreted, how some events are remembered and others are forgotten, and how transcendent moments in the past are invoked to make them relevant to present problems (Fentress and Wickham 1992: 127-37). As Nigerians associated their catastrophic conflicts with the easy capture of parliament and so looked favourably on a separation of powers, others may associate past problems with dictatorial presidents, and that may lead them in a parliamentary direction (see Horowitz 1990). There is an emerging literature on the role of historical memory in fostering conflict (see, for example, Posen 1993), but none yet on its impact in discriminating among institutional designs.

Yet memory weighs on policy-makers, and memory is subject to bias. Those who adopted the institutions agreed for Northern Ireland on Good Friday 1998 believed that everything else had been tried; in the process, they arguably misinterpreted Northern Ireland's previous failures, especially the failure of the so-called power-sharing government of 1973-4 (see Horowitz 2002). In Indonesia, drafters of the electoral and political parties laws enacted in 1999 were much concerned to avoid the danger of a fragmented parliament, and they drafted strong provisions to prevent regional or ethnic parties from securing a parliamentary foothold. In doing so, they were moved by what they saw as the deadlock of the 1955 parliament, the only freely-elected parliament in Indonesia's history. It is natural, perhaps, that the drafters should have looked for lessons to the only pertinent previous elections. Nevertheless, the degree of fragmentation in the 1955 parliament was not unmanageable. The admittedly non-electoral experience of 1965, when bifurcation and polarization overtook the Indonesian state, with truly disastrous consequences, was at least equally relevant but utterly neglected by the drafters (Horowitz 1999). In the short run, the drafters were right, as fragmentation has outweighed polarization as a problem, both in and out of parliament, but the cleavage between secular nationalists and Muslims can hardly be said to have been bridged permanently, any more than the cleavage

between the armed forces and the communists was in 1965. The prevention of polarization may yet be an important purpose of constitutional design in Indonesia.

Lessons that policy-makers draw are almost always partial, and the sources of skewing in one case will certainly not be identical to those in another (cf. Jervis 1976: 218–20, 274–5; John Anderson 1990: 239–42). If there is, for the moment, peace but none the less pessimism, as in Bosnia, there will be great risk aversion, and experience will be interpreted to make only small changes possible. But the full repertoire of recipes for hospitality to innovation in one direction or another has yet to be uncovered. The combination of model bias and historical bias in individual countries opens the way to a great many permutations of institutions rather than anything resembling homogeneity. Designers who propound one-size-fits-all prescriptions will be especially disappointed.

Constitutional Spillage

It is one thing to prescribe and quite another to take the medicine. I have been emphasizing here the slip between the constitutional cup and the adoptive lip: the spillage rates are great, but our knowledge of them is thus far so primitive that we can only regard spillage as being close to random in its incidence and configuration.

There is the further problem of retrogression. Designs have effects on the distribution of power, and those who gain power as a result may wish to alter the design to favour themselves. Of course, it is possible to build in safeguards or tripwires that make alterations difficult or set off alarms when attempts are made. But the looser the design and the easier the adoption, the easier the alteration as well. Slippage is not complete at the moment of adoption.

Certain electoral systems, for example, depend for their continued efficacy on constituency boundaries. Electoral results can be changed without changing the electoral system itself, by altering those boundaries. The integrity of the design, therefore, will depend on the integrity of the boundary delimitation process. In Malaysia, where vote pooling was the fortuitous product of an unusual pattern of intra-ethnic party monopoly, inter-ethnic party competition, and demographic imbalances (see Horowitz 1985: 398–404), rather than constitutional design, the emergence of a strong Malay party in the ruling coalition produced changes in electoral boundaries that made Chinese voters less important (Lim 1997). As Chinese votes became less important to the coalition, Chinese political influence

declined. Yet, in spite of the new boundaries, when Malays became more divided, marginal Chinese votes for Malay candidates became more valuable again, and this was reflected in ethnic policy and electoral appeals, most recently in the 1999 elections: The revival of Chinese influence, I cannot resist emphasizing, points to the utility of vote-pooling incentives as a source of accommodation, even in the face of retrogression.

Everything I have said thus far is intended to highlight the unlikelihood that constitutional designs can or will be adopted or, if adopted, retained in anything resembling their original form. I have assumed that this shortfall is as dangerous to divided societies as shortfalls in construction are to buildings designed by architects. But, of course, this assumption is really a conceit. Although some constitutional designers see the adoption of designs as an elite matter, this cannot really be the case (see Tsebelis 1990: 12). There are attentive voters, and most constitutional reformers contemplate facing election. If designs were really adopted in unmodified form, their democratic legitimacy might be at risk. The hash that is made of designs in the process of adoption may make conflict reduction much more difficult than it might be, but there may be some compensating advantages. A messy process of adoption, replete with design-destroying reciprocity, may give rise at least to a sense of local ownership of the product,¹³ even if the institutions fall short of what is required to mitigate conflict.

Many states will inevitably make do with what they have or what they acquire in fits and starts: inherited institutions, patched-together institutions, partial adoptions, and strange hybrids. Their conflicts may continue, perhaps intermittently; they may change course, as they have in Nigeria (Suberu 1993: 42–4); or they may abate. In the most fortuitous cases—Thailand and Taiwan conspicuous among them—ethnic cleavages may decline greatly in salience as a by-product of other political changes. Political institutions, the sort embodied in constitutions, are very powerful determinants of the course of conflict, but fortunately they are not the only ones.

¹³ It is, of course, easy to exaggerate the lack of legitimacy enjoyed by imported or imposed institutions. Counter-evidence can be supplied by reference to the healthy status of the MacArthur Constitution in Japan or of a number of constitutions imposed by colonial powers. They are many ways to indigenize, and so claim ownership, of external models, short of rejecting or radically reconfiguring them.