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What Constitutional Efficacy Is Not

ANDREA POZAS-LOYO

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INTRODUCTION

Ours is arguably the era of codified constitutions.[1] Today about 200 countries, both democratic and authoritarian, have a constitution. Prolific constitution-making processes all around the globe marked the last two decades of the 20th Century, and the first years of the 21st.[2] But have constitutions lived up to the great political and social expectations vested in them? Have they worked?

Answering these apparently straightforward questions turns out to be extremely challenging. The road to their responses is studded with conceptual, theoretical and empirical difficulties (see Law 2010). The objective of this manuscript is to contribute to the first step by clarifying what we mean when we say that a constitution works. Without a clear conceptualization of constitutional efficacy, one that is useful for empirical research, that is theoretically sound and normatively sensible we cannot even start answering questions as fundamental as when and why constitutions work.

Prima facie, the question "what do we mean when we say that a constitution works?" may seem odd. "Constitution" and all its associated terms are recurrent elements of our public speech. It is hard to open a newspaper without finding some reference to them, and "constitutional efficacy" is not the exception. Nevertheless, a close analysis of academic and non-academic sources makes it clear that "constitutional efficacy" is used in very different ways, and that these meanings are often inconsistent.

In this paper I focus on provisions that create and regulate governmental offices (i.e. the organic part of the constitutions). I argue against three influential conceptualizations of constitutional efficacy. In particular, I claim that they all have serious theoretical and normative problems and, that using them for empirical research creates difficulties. The first conceptualization I discuss one is the account of constitutional efficacy as text-reality congruence that has been very influential in political science and empirical legal studies. The second one is the constitutionalist account of constitutional efficacy, which is paramount in normative legal and political thought. Lastly, I present the account of constitutional efficacy as satisfaction of the intended effect that pervades studies on constitutional design and is an important trend of judicial interpretation.

The content of this paper is part of a book manuscript on constitutional efficacy I am working on. In it I present and defend a conceptualization of constitutional efficacy that I argue is empirically useful, theoretically sound, and normatively sensitive.

I. CONSTITUTIONAL EFFICACY AS TEXT-REALITY CONGRUENCE

Consider the following news report published on March 22, 2007 that the BBC Monitoring Kiev Unit entitled "Ukrainian mayor says top presidential official controls home region":

[1] By codified constitution I mean a *written rigid* constitution; and by *rigid*, the legal fact that the majority of the elected representatives cannot modify constitutional provisions (i.e. that constitutional amendments require a decision-making process more complex than that of ordinary legislation). Approximately ninety six percent of all constitutions are rigid.

[2] Half of the world's constitutions were written or rewritten between 1978 and 2003 (Hart, 2003).

> The mayor of Uzhhorod, Serhiy Ratushnyak, made a resonant statement at a news conference in Kiev today. According to him, *the laws and constitution do not work* in the Transcarpathian Region. The region is actually controlled by the family of the head of the presidential secretariat, Viktor Baloha.

According to the mayor, the Ukrainian constitution does not work in the Transcarpathian region because the real rules of the game are *different* from those established in the constitution: the legal authority is impotent and the actual rules are those imposed by the powerful Baloha family. If the constitution is ineffective because the political reality differs from the constitutional text then, under the implied notion of constitutional efficacy, for a constitution to work what is legally prescribed by the constitutional text (*de jure*) must correspond with what is actually the case (*de facto*).

Text-reality congruence can be considered either a *requirement* for, or a *criterion* of, constitutional efficacy. In other words, it can be considered either a *necessary* condition for a constitution to work or a *necessary and sufficient* condition for constitutional efficacy. Note that only the latter implies that observing correspondence between a polity's constitutional text and its political reality is *sufficient* to claim that its constitution works, which is precisely the claim of the conceptualization of constitutional efficacy as text-reality congruence.

In this section I defend two theses:

1. An acceptable notion of constitutional efficacy –theoretically sound and empirically useful– must consider agreement between the constitutional text and the political reality as a *necessary* condition for a written constitution to work.
2. However, text-reality congruence is not a *sufficient* condition for constitutional efficacy, and therefore the text-reality congruence conceptualization is not satisfactory. The text-reality congruence criterion is not satisfactory for two reasons: a) it is too broad (i.e. under it constitutions that play no role in their polities are considered efficient), and b) this criterion is consistent with a conceptualization that ultimately renders constitutional efficacy unintelligible.

A Reductio ad Absurdum Argument for the Text-Reality Congruence Requirement

The first thesis, that *text-reality congruence* is a necessary element of any plausible conceptualization of constitutional efficacy, is hardly a controversial statement. The constitutional articles that are the center of this enquiry are those concerned with the faculties and behavior of public officials. Thus, if text-reality congruence is *not* a necessary condition of constitutional efficacy then it is possible for those articles to be fully ignored and yet to work. In other words, the negation of the first thesis implies that it is possible for norms regulating behavior to do so effectively and for such behavior to be inconsistent with them. This is a contradiction since the very meaning of "regulation" implies agreement between the regulated behavior and the norms that regulate it. Hence, by *reductio ad absurdum*, text-reality congruence is a necessary condition of any plausible conceptualization of constitutional efficacy.

Text-Reality Congruence not Sufficient for Constitutional Efficacy

Now, let me focus on the text-reality congruence criterion; that is the idea that agreement between the constitutional text and the political reality is not only necessary but also *sufficient* for constitutional efficacy. Unlike the previous thesis I defended, arguing that text-reality congruence is *not sufficient* for constitutional efficacy is highly controversial. Arguably, the text-reality congruence criterion is the most common conceptualization of constitutional efficacy in political science. In what follows, I argue that the text-reality congruence is not sufficient to assert constitutional efficacy because under it codified constitutions that have no motivational role on the behavior of public officials are considered effective. My aim is to show that it makes sense to open the possibility of constitutional *inefficacy* even if we observe that the relevant public officials behave in accordance with what the provision in question requires. I then turn to the prevalent notion of constitutional efficacy in political science (i.e. constitutional efficacy as an equilibrium) and argue that it implies the text-reality criterion. Finally, I argue that the text-reality criterion should also be rejected because under it there is at least one notion that ultimately renders constitutional efficacy unintelligible.

My first argument against the idea that text-reality congruence is sufficient to assert constitutional efficacy has the same form as the classic argument presented by Schumpeter against the claim that "government approved by the people" is a satisfactory definition of "democracy." (Schumpeter 1976). The text-reality congruence criterion is overbroad in exactly the way "government approved by the people" is too broad to define democracy. Schumpeter claims that "government approved by the people" is not a satisfactory definition of democracy because "by accepting this solution we should lose the phenomenon we wish to identify: democracies would be merged in a much wider class of political arrangement which contains individuals of clearly non-democratic complexion" (Schumpeter, 1976, 247). In the same way, I argue that *text-reality congruence* is not a satisfactory criterion for constitutional efficacy since if we accept it, constitutions that work would be merged in a wider political class: that of written constitutions whose content is consistent with the political equilibrium of its polities, which contains constitutions that do not matter. In other words, a satisfactory conceptualization of constitutional efficacy should not have as part of its extension constitutions that have no effect on their regulatory target.

Let me show the ways in which one can find text-reality congruence without efficacy. Congruence is a state of agreement. The text-reality criterion of constitutional efficacy is satisfied when the constitutional text and the behavior of public officials agree independently of what is behind such an agreement. Such an agreement can be attained 1) because the constitution has some effect on the behavior of public officials, 2) because the behavior (or intended behavior) of public officials has some effect on the constitutional text or 3) because of another independent cause. While in these three cases there is congruence between constitutional law and behavior, only in the first case it makes sense to claim that the constitution is effective. In what follows I discuss in detail scenarios where the criterion text-law is satisfied but the constitution has no effect on the behavior of constitutional role-holders.

Ex post ad hoc Enactment

An *ex post ad hoc* enactment occurs when the constitutional text is made to fit an already occurring behavior. The 1980 Chilean constitution is a particularly illuminating case in this respect. This constitution has two parts: the permanent articles that provided the basic framework for a transition to civil rule that did not come into effect until 1989, and the transitory part that dealt with the institutional framework that ruled Chile until the transition. What is important for our current purposes is that, to an important extent, these articles enacted an already established institutional framework, an institutional framework that had ruled Chile from the early years of the dictatorship (the military coup took place in 1973).

By 1980 "the Junta already had agreed to its own rules… The transitory articles enacted did not significantly depart from this prior organization (Barros, 2002, 177). Thus, the fact that the constitution entered into effect in March 11, 1981 was not very noticeable: "the organization of power during the transitory period remained largely identical to the period which the regime allegedly was stepping away from" (Barros, 2002, 179). Take for instance Pinochet's executive role and the legislative faculties of the Junta. These roles and faculties emerged in 1973-4 to respond to specific political challenges and from power struggles within the military Junta. As Barros' account clearly shows the constitution did not *constitute* the particular equilibrium linked to these institutional roles; actually the equilibrium *preceded* the constitution.

In sum, the transitory articles of the Chilean constitution of 1980 are a good case of *ad hoc ex post* enactment, and thus a case where text-reality congruence does not provide a sensible foundation to conceptualize constitutional efficacy. Even if there was a high degree of text-reality congruence relative to the Junta's legislative powers, it would be misleading to say that the constitutional provisions dealing with that power were effective since this role was originated and maintained by means independent of the constitution.

Ex ante ad hoc Enactment

Someone could argue that adding to the text-reality criterion Paine's famous dictum, i.e. that the constitutional provision in question *precedes* the constitutional role it habilitates (see Paine, 1751, 59), would be sufficient to claim that for a constitutional provision to work it is necessary and sufficient that there is text-reality congruence. Thus, *prima facie*, we could say that the text-reality congruence criterion could still survive by additionally requiring that the constitutional provisions *precede* the equilibrium. Let me call this addition the *precedence requirement*, and the text-reality criterion that incorporates it the *modified* text-reality criterion.

I believe the precedence requirement misses the mark. Even incorporating the precedence requirement, the modified text-reality criterion is not sufficient to ascertain constitutional efficacy. In particular, I argue that such a criterion is still too broad since it leads us to consider effective cases that are not such. As I have shown, correspondence between text and reality can be reached through different routes. In the previous section I showed that text can be made to fit behavior. In what follows, I show that the text can also be made to fit *intended* behavior and that this type of fit undermines the modified text-reality congruence criterion.

The constitutional text can be written to fit an individual intended behavior when the intention to behave in a certain way shapes the enactment of the constitutional provision that is

supposed to regulate the intended behavior. I call this *an ex ante ad hoc enactment*, since the enactment of the provision in question precedes the behavior but the content of the provision is made to fit the intention to behave in that way.

Consider the following example:

Imagine a President of a country who is about to finish his term with overwhelming public support, and who heads a party with the political capacity to amend the current codified constitution (e.g. a party with a supermajority in congress). Suppose that the constitution of that country has a provision (CP_1) that mandates a term limit that is about to expire and prohibits presidential reelection. Now, suppose that the president intends to seek re-election, and that he knows that given his overwhelming public support he could get the term limit nullified without any real opposition. Now suppose that the President has a legalistic preference that leads him to instruct the members of his party to amend CP_1 *ad hoc*. CP_1 is amended and a new constitutional provision, CP_2, enabling indefinite reelection is enacted. If the president stays in office until he finishes his term and then seeks reelection, there would be congruence between the relevant constitutional text (CP_2) and the president's behavior. However, it would be misleading to say that CP_2 was in any way causally linked to such behavior. Therefore, claiming that text-reality congruence is *sufficient* for a constitution to be effective implies that it is possible for a constitutional norm to work even if the behavior it prescribes has no causal relation to it.

The previous is a counterexample to the modified text-reality criterion showing that even if the precedence requirement is incorporated, text-reality congruence is too weak to ascertain constitutional efficacy. However, it may be argued that this counterexample does not pose a real problem to the modified criterion since in the real world *ex ante ad hoc* enactment does not occur. To refute this point consider the following example:

When the administration has the control of the organs required to amend the constitution it has the capacity to surpass the rigidity of codified constitutions without opposition. In such a context, *ex ante ad hoc* enactment is facilitated. This was the case during what Dominicans call "The Era of Trujillo", the time during which Rafael L. Trujillo ruled the Dominican Republic (1930-1961). During those times, *ex ante ad hoc* enactment was not an uncommon practice (Espinal Jacobo 1997).

Trujillo was president from 1930 to 1938 and from 1942 to 1952, but he remained "the Supreme Leader of the Dominican Party" and in fact he and his family controlled Dominican politics until his assassination in 1961. Trujillo's rule was a bloody and authoritarian period in Dominican History; it was also a time marked by personality cult. However, he had a notable respect for the legal forms and constitutional technicalities that lead him on several occasions to amend the constitution for it to fit his intended actions, (de Galindez 1973; Espinal Jacobo 1997). Thus, under this legalistic dictator the modified text-reality congruence criterion was satisfied, but one could hardly claim that the constitution governed Trujillo's behavior. In this case text-reality congruence was achieved through the adjustment of law to intended behavior.

Parallel Norms

I have argued that the central problem with the text-reality congruence criterion is that it is satisfied whenever the constitutional text and the political reality agree independently on what

is behind such an agreement. As already discussed, this agreement can be reached without any guarantee of constitutional efficacy when the constitution is made to fit behavior or intended behavior. There is a last logical possibility where the text-reality congruence is satisfied but constitutional efficacy is not assured: when there are parallel norms.

A codified constitution is a system of norms. It is a system because its constitutional provisions are interrelated, creating a more or less consistent whole. And that system is of norms because its provisions establish constitutional roles (e.g. that of Supreme Court Justice or President) and regulate the behavior of individuals occupying those roles.

But, codified constitutions are not the only normative systems of political life. Historically, in fact, they are latecomers: they have been present in the political scene only since the late eighteenth century. Moreover, even in countries with codified constitutions, the Constitution is only one among many political normative systems that can potentially regulate interactions of individuals in constitutional roles. Constitutional conventions (non-written norms regulating relations between political parties or governmental branches) (Jaconelli 1999; 2005) and intra-political parties' formal and informal norms are only two of the many normative systems in place in the political scene. Each of these normative systems establishes institutional roles and regulations linked to them. Furthermore, politics is not an isolated sphere, and normative systems are present in all areas of social life. In this way, a complex net of normative systems constitutes social and political life (Searle 2010).

Now, any given individual has a number of different roles. For instance, an individual with a constitutional role like that of "the President", can also be member of a party, a corporation's stoke holder, a friend of many, and a parent of two. And therefore, a given interaction between two individuals holding constitutional roles can be regulated by a number of different, potentially conflicting, normative systems (Merton 1949). For instance, an interaction between two individuals holding the constitutional roles of "Vice-president" and "member of Congress" correspondingly could be regulated by a constitutional provision linked to those roles, by an informal corporative norm if they both are board members of a corporation, by an interpersonal norm if they happen to be friends, among many others.

Here I am interested in what I call parallel norms. This is its definition: Two norms are parallel if an individual holds two roles linked to two independent normative systems, each role belongs to one of these systems and can be satisfied by the same individual physical movement. Note that in this case there is no behavioral conflict derived from the norms associated to two different roles.[3] In what follows, I present an example in which parallel norms present a systematic problem to the empirical assessment of constitutional efficacy.

The PRI (*Partido Revolucionario Institucional*) was the hegemonic party in Mexico from 1929 to 1989. During the PRI Era, this political party had control over the Administration, the Federal Congress, the states' governments and the Judiciary. The President was the head of a very well disciplined political system: he was the head of the government and the head of the PRI. He had the political capacity to violate some provisions of the 1917 Constitution without political opposition. For instance, the Constitution mandated life tenure for Supreme Court judges. However, every six years the incoming President used to appoint as much as 72% of the Court (Ruiz

[3] For more on this type of role conflicts and the relation between different normative systems see (Pozas-Loyo 2013).

Cortinez, 1952-58) and no less than 36% (Lopez Mateos, 1958-64). "The president could thus somehow create vacancies to be filled by justices he appointed or, put in other terms, he could either dismiss justices or induce early retirements" (Magaloni 2003, 228-289). Furthermore, the PRI's supermajoritarian control also gave him the legal capacity to alter the Constitution. Every incoming President amended the Constitution to make it fit his political agenda: as much as 66 constitutional provisions were altered in the presidential term of Miguel de la Madrid Hurtado, 1982-1988 (Valdés Ugalde 2010).

Nevertheless, surprisingly during this president-centered era (1929-1989), Article 83 of the constitution that establishes a six-year presidential term without re-election was neither altered nor violated. In 1927, Article 83 had been amended to enable non-consecutive re-election allowing former president Álvaro Obregón to run for a second term, but in 1928 (after the assassination of Obregón) the article was again amended back to its original form, and it was never again touched.

Why did presidents with extraordinary power accept to hand over political power and to retire from public life once their term was over? Arguably, the means by which Article 83 was enforced, at least during the first terms of the PRI era, were *independent* of constitutional prescriptions (see Magaloni 2003). During this period, Article 83 was enforced through the norms of the PRI that also enabled, and in some instances promoted, the violation of some constitutional provisions and the *ad hoc* amendment of others. In other words, there was a highly efficient alternative normative system to the constitution: that of the hegemonic political party, the PRI. If this normative system could totally account for the behavior of presidents facing the end of their term, then Article 83 was ineffective.

The prescriptions of the hegemonic party system sometimes contradicted the constitutional norms, as happened with the party norm that enabled the President to dismiss Supreme Court justices or induce their early retirement. At other times, the norms of the PRI were parallel to the constitutional ones, as was the case with the prohibition of re-election. In this case, text-reality congruence would not be sufficient to affirm constitutional efficacy since the President's behavior could be fully motivated by the party's norm, the constitutional norm could then have no motivational effect, and it could not work while the text-reality congruence would still hold.

Constitutional Efficacy as Equilibrium and the Text-Reality Criterion

I have been presenting the arguments against the text-reality criterion in a somehow isolated fashion. Let me now relate this discussion to the literature of political science. In what follows, I argue that this criterion is part of the leading contemporary notion of constitutional efficacy, the one that characterizes a constitution that works as an equilibrium.

Constitutional efficacy as equilibrium is arguably the most common criterion in the literature of political science. While several authors describe constitutions as equilibria, it is clear that the claim is not that all codified constitutions constitute equilibria, but that all codified constitutions *that work* are equilibria. Thus, for instance, I believe that Hardin's account of constitutions as

coordination devices is not that all codified constitutions can be considered as such, but that all constitutions that work do coordinate (Hardin 1999).[4]

A constitution depicts an equilibrium if and only if actors behave in accordance with the constitutional text and they individually have nothing to gain by changing his or her own strategy unilaterally. A constitution that depicts an equilibrium is often characterized as a self-enforcing constitution. This conceptualization of constitutional efficacy implies the text-reality criterion since under it text-reality congruence is necessary and sufficient to assert that a constitution works.

As the reader most probably can see by now, the problem with constitutional efficacy as equilibrium is that it tells us nothing of what maintains such an equilibrium. In particular, it can perfectly well be the case that what maintains the correspondence between the constitutional text and the actor's behavior bears no relation to the constitution itself. If this were the case, a constitutional norm that has no effect on the relevant behavior would be considered effective. Hence, the conceptualization of constitutional efficacy as equilibrium is overbroad: for constitutional efficacy to make sense endogenous motivations must play a role in the maintenance of the equilibrium.

Consider an account of constitutional efficacy as equilibrium that assumes the criterion of text-reality congruence with only exogenous controls maintaining the equilibrium: the one presented in Barry Weingast's influential article "The Political Foundations of Democracy and the Rule of Law". Weingast's central question is: "How are democracy's limits enforced?". His aim is to give "a unified approach to the political foundations of limited government, democracy and the rule of law- phenomena requiring that political officials respect limits on their own behavior" (Weingast 1997, 245). Political officials respect the limits of their behavior if and only if they have incentives to do so (i.e. if those limits are self-enforcing). His approach is modeled by a game of the stability of limited government that focuses on the relation between a single political official, called the sovereign, and the citizenry.

To stay in power the sovereign requires sufficient support from the citizens, and each individual supports the sovereign as long as he does not transgress what the citizen believes are her rights (Weingast 1997, 246). Different citizens have different "preferences and values" and therefore, different conceptions of what her rights are (Weingast 1997, 245-6). So accordingly constitutions are devices that *coordinate* the citizens on what constitutes a violation of rights so that they can collectively react to transgressions by withdrawing their support from the sovereign. If the constitution is effective, that is if citizens are coordinated on its content, the sovereign will avoid any behavior that violates the constitution because by doing so he risks losing power. Notice that in this model the converse relation also holds: if the sovereign acts in accordance with the consti-

[4] In this connection, some criticisms to this theory would be somewhat off the mark. For instance, showing that for most Latin American constitutions the probability of replacement increases as time goes by would not falsify Hardin's theory for the Latin-American region (Negretto 2010) since we would expect re-coordination costs to decrease the probability of replacement only for constitutions that in fact coordinate. In other words, assuming the interpretation I propose, if it is the case that most Latin American constitutions have a very low degree of efficacy, the empirical implications of the theory would not be in conflict with such empirical findings. Hardin acknowledges that: "Many actual constitutions do have the character of contracts at their core. They cover the agreed resolution of a bargaining process in which interests are compromised. Unfortunately, constitutions that include contracts at their core are typically unstable…If a constitution is to be stable, it must be self-enforcing" (Hardin 1998, 98).

tution, the constitution is effective. Therefore, clearly this model falls under the conceptualization of constitutional efficacy as text-reality congruence: text-reality congruence is necessary and sufficient for constitutional efficacy.

Furthermore, in the model the controls are exogenous to the constitution. Weingast claims that whether or not a constitution coordinates individuals on its content is a function of the social consensus of the rights of citizens and the limits of the state.

> In terms of the model, limits become self-enforcing when citizens hold these limits in high enough esteem that they are willing to defend them by withdrawing support from the sovereign when he attempts to violate these limits. To survive a constitution must have more than philosophical or logical appeal; citizens must be willing to defend it (Weingast 1997, 251)
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> Because citizens have different views about ideal limits, a unique set of ideal limits is unlikely. Coordination requires that citizens compromise their ideal limit…When the difference between each citizen's ideal and the compromise is small relative to the cost of transgression, the compromise makes the citizens better off (Weingast 1997, 252).

Thus according to this account whether or not a constitution works, whether or not there is congruence between the constitutional text and the political actor's behavior, depends on the presence of a common set of citizen attitudes that are totally exogenous to the constitution and its incentives. What maintains the equilibrium of efficacy has therefore nothing to do with the constitution and its design. We are then in the odd situation of asserting the efficacy of a norm that has no effect on the behavior that is its object. This point is made clear in Weingast's account of why Latin American constitutions "have not worked" while the American has:

> [Latin American constitutions "have not worked" because] "Latin American states are not characterized by a common set of citizen attitudes about the appropriate role of government…[While] citizen reaction implies that US constitutional restrictions on officials are self-enforcing …Latin America states exhibit a complementary set of phenomena: citizens unwilling to defend the constitution, unstable democracy and episodic support for coups (Weingast 1997, 54).

I believe that Weingast's account of constitutional efficacy is theoretically problematic because it contains a fallacy of equivocation at its core. In particular, the way in which he uses "constitution as a coordination device" conflates two different claims. As Hardin argues

> In claiming that a particular constitution is a device for coordination we could be making two quite different claims: that the choice of the content of the constitution was itself a matter of coordination or that the constitution works by successfully coordinating actions under it (Hardin 1998, 103).

Claiming that the content of a particular constitution coordinated the most important sectors of a society may be given as an account of a successful constitution-making process and as an explanation of why the content of a particular constitution is such. So following Hardin's account, we can claim that the American-constitution making processes coordinated the most important economic interests and, we may add, following Weingast, also the most important attitudes about the appropriate role of government (i.e. that those interests and attitudes were coordinated *on* the content of the constitution).

Now when we claim that a constitution that *works* is a coordination device, we are claiming that actions are successfully coordinated *under* it; i.e. that the behavior that is its regulative target is attained thanks to the incentives the constitution gives to the relevant individuals. That

public actors act according to the constitution as a result of their pursuit of individual benefits *under* constitutional laws.

The need of separating these two senses in which a constitution is a coordination device follows from the recognition that an account of modern constitutional government requires a two-stage theory (see Hardin 1998, 83). Success in coordinating on a particular constitutional content does not guarantee that the individuals who populate the institutions created by the constitution will coordinate under it. In other words, a successful constitution-making process is not sufficient for constitutional efficacy. This is the case because constitutions create and distribute power in ways that are not predictable *ex ante*. Moreover, constitutions are complex systems that often have unintended effects. Therefore, what enables coordination *on* a particular constitutional content and what enables coordination *under* that constitution require separate accounts. In particular, while the former necessarily deals only with interests and other motivations *exogenous* to the constitution, the latter requires the incorporation of motivations *endogenous* to it.

If I am right, the source of Weingast's problematic account of constitutional efficacy lies in his conflation of the two stages required by a satisfactory theory of modern constitutional government. He conflates the determinants of coordination *on* constitutional content with the determinants of coordination *under* a modern constitutional order, assuming that the former is sufficient for the latter and in doing so presents a notion of constitutional efficacy where a norm that has no effect on its regulative target is considered effective.

Weingast's account is then an instance in which I claim we can have text-reality congruence without efficacy. It also exemplifies why I claim constitutional efficacy as equilibrium is too broad, thus why it is not a satisfactory conceptualization of constitutional efficacy.

Empirical Problems of the Text-Reality Congruence Conceptualization

In sum, adopting text-reality congruence as a sufficient and necessary condition for constitutional efficacy is problematic from an empirical perspective. Empirical research aims at understanding phenomena and their relations. Arguably, in order to be able to establish causal relations any conceptualization of constitutional efficacy needs to capture a core idea: an effective constitutional provision needs to have an effect on the behavior that is *de jure* identified as its regulatory target. The text-reality congruence criterion is empirically problematic since under it constitutional provisions that have no significant effect on the behavior that is *de jure* identified as its regulatory target are considered effective (e.g. constitutional provisions that are the result of *ad hoc ex post* enactment, *ad hoc ex ante* enactment or cases where the behavior is fully induced by other normative systems).

This points to the central role that codified constitutions play according to modern constitutionalism. Madison articulated this tenet of modern constitutionalism in a very clear way in Federalist #51.[5] Following his thinking we could say that a constitution that works gives public officials "the personal motives and the constitutional means" for its enforcement. Thus, following Madison, we could rephrase our previous discussion and claim that the central problem of the text-reality congruence criterion is that under it constitutions whose enforcement mechanisms are

[5] The third part of this manuscript discusses modern constitutionalism and the central differences it has vis-à-vis ancient constitutionalism in detail.

exogenous to the constitution are considered efficacious. In other words, this criterion incorporates in its extension cases where all the motivations that maintain the equilibrium are exogenous to the constitution. In sum, we could conclude using Madison's words and say that for a constitution to be effective "the interest of the man must be connected with the constitution…."

This discussion was exemplified in terms of equilibria that require endogenous controls versus equilibria that only have exogenous ones. As argued, the text-reality congruence criterion is behind most political science accounts of constitutional efficacy that define constitutional efficacy as self-enforcement. The point of this section is that whereas all constitutions that are effective depict an equilibrium, not all constitutions that depict an equilibrium are effective.

I am not claiming that exogenous controls play no role in the maintenance of efficacious codified constitutions. What I am claiming is that for constitutional efficacy to make sense, internal controls must play a role, otherwise we would be in the ancient constitutionalism paradigm where all controls were external and where constitutional efficacy was unintelligible as in fact Burke, Hegel and de Maistre claimed.[6] In sum, while empirical research concerned with constitutional efficacy should incorporate text-reality congruence as a first and necessary step, it ought to be clear that it is not sufficient to affirm that a constitutional provision works.

Normative Problems of the Text-Reality Congruence Conceptualization

Adopting a text-reality congruence criterion also has problematic normative consequences. "Constitutional efficacy" has an important normative weight. The very idea of constitutional efficacy is intrinsically linked to the emergence of modern constitutionalism and to the codified constitutions that were to embody the principles of that constitutionalism. The thought that constitutions are things susceptible of working is linked to the idea that they can constitute a government that is capable of guaranteeing order (positive constitutionalism) and incapable of abusing its power against its people (negative constitutionalism). Thus, any solid conceptualization of constitutional efficacy needs to capture the relation of constitutional efficacy and modern constitutionalism.

Now, as I have shown, under the conceptualization of constitutional efficacy as text-reality congruence cases of *ad hoc* enactment are considered cases where the constitution works. However, these are cases where the fundamental distinction between the constituted power of the government and constituent power of the people disappear and the principles of positive and negative constitutionalism are violated.

By definition codified constitutions are rigid constitutions, constitutions whose provisions cannot be modified by the majority of the elected representatives at a given time (Bryce, 1905). Thus, codified constitutions establish an amendment procedure that is harder to meet than the procedure to pass ordinary laws. The difference between those who can make and transform the constitution and those who can make and transform ordinary law, i.e. the difference between the constituent and legislative power, is central to the idea of a codified constitution. In Madison's and Sieyes' words:

[6] The third part of this manuscript presents an account of ancient constitutionalism as an equilibrium in which all controls were exogenous to the constitution.

> The important distinction so well understood in America, between a Constitution established by the people and *unalterable by the government*, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country (Hamilton, Madison, and Jay 2000, Fed. 53, 327 emphasis added).
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> [Constitutional laws] "are said to be *fundamental* …because bodies that can exist and can act only by way of these laws *cannot touch them*" (Sieyès, 1963, 136 emphasis added).

Therefore, constitutional law is *fundamental* according to modern constitutionalism because it empowers and limits governmental officials, and to effectively do so those officials must be incapable of transforming the constitution at will. Thus, constitutional rigidity is a legal characteristic directed precisely against the possibility of *ad hoc* enactment; it is a mechanism that aims at maintaining the hierarchy of laws. As Sieyes puts it "in each of its parts a constitution is not the work of a constituted power but [of] a constituent power" (Sieyes, 1963, 136).

Now under certain political conditions constitutional rigidity becomes totally ineffectual making *ad hoc* enactment trouble-free. This occurs when a coordinated political group has control over all the political agencies required by the constitution to pass an amendment. As Schmitt claims:

> The requisite of a more-difficult-to-meet reform implies certain guarantee of duration and stability. Clearly such guarantee and stability disappear when a party or coalition of parties decides and has the capacity of satisfying the supposed more-difficult to meet [requisite] (Schmitt, 1982, 43).[7]

Now, a conceptualization of constitutional efficacy that characterizes as effective cases where the constitution may be and is modified by the government, cases where the distinction between constituent and the constituted powers is erased, is normatively problematic because those cases violate both positive and negative constitutionalism. A government that is capable of modifying the constitution can hardly be limited or habilitated by it. Thus, this criterion is problematic for a conceptualization that aims at being normatively appealing.

II. The Constitutionalist Conceptualization of Efficacy

The Specific-Content Requirement

Consider the following quote from a November 24th 2006 news report that the *Inter Press Service* entitled "Morocco: Reformists Want Government, not Monarchy, to Rule."

> Morocco is considering curbing the constitutional powers of the king after a collective of non-governmental organizations issued an appeal titled *For a New Constitution That Works*. "The demands of reforming action call, on one hand, for a more autonomous government and for strengthened prerogatives in the determination and the conduct of general politics," states the appeal. It also speaks of the need for parliament to be able to investigate and control the executive, and for an independent judiciary.

[7] This translation is mine, the original in Spanish is: "En el requisito de reforma dificultada hay un cierta garantía de duración y estabilidad. Claro es que garantía y estabilidad desaparecen cuando un partido o coalición de partidos decide y está en situación de proveer a los supuestos de mayor dificultad."

What conception of constitutional efficacy is implied in this news report? To elucidate this question it is helpful to raise the question: What makes the Moroccan constitution ineffective from the non-governmental organizations' perspective? The first thing to note is that the proposed solution to achieve constitutional efficacy, to get "a new constitution that works", is a constitution-making process, in particular an amendment process. Given that the proposed way to tackle constitutional inefficacy is to modify the codified constitution through an amendment, the NGOs must consider that the source of the problem has a legal nature. This is clear in the following excerpts of the previously quoted news report:

> According to Mohamed Sebbar, president of the Truth and Justice Forum… "there exists in the present constitution a concentration of powers in the hands of the monarch." …Under article 19 of the constitution, Sebbar told IPS, the king can exercise executive power, be at the head of the Council of the Magistrature, legislate between the two parliamentary sessions, name high officials, ambassadors and the like - and also declare a state of emergency.
>
> …"The main thing required is a better articulation of the constitutional powers of the king, government and parliament -for a more democratic, stronger and more effective state" said Khalid Naciri, a senior member of the Party for Progress and Socialism.

If the content of a codified constitution can be the source of constitutional inefficacy then, under this conceptualization, the constitutional text must satisfy certain requirements for a constitution to work. In particular, under this conceptualization having a *specific content* (i.e. incorporating certain elements) is considered a *necessary* condition for a codified constitution to be effective. For this reason I call the requirement implied in the constitutionalist conceptualization *the specific-content requirement*.

The central thesis of this section is that we should not incorporate the specific content requirement into the conceptualization of constitutional efficacy because it is theoretically, empirically, and normatively problematic.

First, it is important to distinguish the specific-content conceptualization of constitutional efficacy from one that would sponsor a much stronger and arguably implausible position: a conceptualization that would consider the inclusion of a specific content to be a *necessary and sufficient* condition for a constitution to be effective. This latter view would establish a criterion of constitutional efficacy while the former only establishes a requirement. This point is important because the specific content requirement leaves open the possibility of other sources of inefficiency (e.g. text-reality divergence). Thus, as I discuss later, the *specific-content requirement* can be supplemented with other requirement(s), so that their conjunction is considered a criterion of constitutional efficacy (i.e. combined they are considered necessary and sufficient for constitutions to work).

What precisely is the *specific content* that the constitutionalist conception considers necessary? According to the news report about the Moroccan constitution that opens this chapter, the NGOs claim that the source of constitutional inefficacy is Article 19, which concentrates legislative and executive functions on the king, and the lack of provisions enabling an independent judiciary. This arrangement, which the Moroccan reformists identify as a source of constitutional inefficacy, is pretty much a paradigmatic example of what constitutionalism considers the institutional arrangement of a despotic government. Let us briefly go over the classic articulation of this thesis: the one advanced by Montesquieu.

Montesquieu distinguishes between organs and functions of government (Manin, 1989, 730; Vile, 1967, 88). In *every* government there are three functions: to make law, to execute or

administer law, and to adjudicate those controversial cases where the law has to be applied. One or more organs of government (e.g. the king, the courts of law, or the houses of parliament) can perform these three functions. Now, a government is despotic if the fundamental laws that regulate relations among organs of government are such that the resulting government is not moderate. For a government to be moderate the three functions of government need to be exercised by at least two organs of government and given that "every man invested with power is apt to abuse it", power must be a check to power (Montesquieu, 1977, XI. 4).[8]

We can now clearly see how the Moroccan reformists' notion of constitutional efficacy follows the normative heritage of negative constitutionalism that establishes some requirements over the fundamental laws that regulate relations among governmental organs in order to preclude the arbitrary use of power.[9] Using Montesquieu's terminology, the specific content requirement makes governmental moderation a necessary condition for constitutional efficacy. Only constitutions that preclude increasing returns to power by establishing institutional constraints can be considered effective under conceptualizations that incorporate this requirement.

Influential Examples of the Constitutionalist Conception of Efficacy

A clear example of the specific content requirement is found in Karl Loewenstein's classification of written constitutions. The main concern of his classical article "Reflections on the Value of Constitutions in Our Revolutionary Age" is constitutional efficacy, even though he somewhat misleadingly refers to it as "the ontology of constitutions." He defines "ontology of constitutions" as "the investigation of what a written constitution really means within a specific nation environment; in particular, how real it is for the common people" (Loewenstein 1951, 193). Loewenstein distinguishes three types of constitutions: nominal, semantic, and normative constitutions. Among them only the last one is effective or, using his terminology, "real".

While nominal constitutions are "cases where a constitution, though legally valid, is actually not lived up to", semantic constitutions are constitutions that concentrate power being the mere "formalization of the existing location of exercise of political power" (Loewenstein, 1951, 204). Only normative constitutions are truly effective.

A normative constitution is a constitution that satisfies two requirements: First, in opposition to semantic constitutions, normative constitutions satisfy the specific content requirement. In Loewenstein's words, a normative constitution is a "well balanced constitution", one that satisfies the liberal normative requirements. Particularly important for our purposes, a normative constitution incorporates provisions that establish a system of checks and balances (Loewenstein, 1951, 203).[10] Second, unlike nominal constitutions, a constitution is normative only if there is text-reality congruence, that is, as I discussed in the previous section, only if what is written in the constitutional text corresponds to the political reality of the polity. Thus, Loewenstein's criterion of constitutional efficacy, captured in his concept of normative constitution, is a good example of a constitutionalist conceptualization of efficacy.

[8] Montesquieu's constitutional theory is discussed with more detail later in the manuscript.

[9] For an account of the distinction between positive and negative constitutionalism see: (Holmes 1995).

[10] In "Theory of the Constitution" Loewenstein gives a detailed list of formal requirements that an "authentic constitution" needs to cover. This list includes a system of checks and balances and a bill of rights.

The most immediate consequence of this concept of constitution is that under it not all the written constitutions can properly be called "constitutions." So, the 1789 *Declaration of the Rights of Man*, the most important instance of this concept of constitution states: "every society where rights are not assured and where there is no separation of powers does not have a Constitution".

Jeremy Waldron endorses a contemporary version of this normative definition. He considers that for a system of law to be such, it must satisfy the normative requirements of the rule of law. He considers that "we should not describe a system of governance as a system of law unless it does the sort of thing that the Rule of Law celebrates" (Waldron, 2006, 12). This definition of a system of law would imply a specific content requirement because practically all the criteria of the Rule of Law include certain de jure requirements (e.g. clauses establishing an independent judiciary or certain rights; see Raz 1979).

Notice that including the specific content requirement into the conceptualization of constitutional efficacy is less exclusionary than including it into the concept of constitution or system of law. Whereas in the latter case written constitutions that do not satisfy this requirement are not even considered constitutions or part of a system of law, in the former case they are only considered ineffective.

Notwithstanding this difference, the concern behind such a requirement is in all cases the same: a normative opposition to the opportunistic use of law by governments. Arguably, the source of this requirement for constitutional efficacy is the historically sound idea that codified constitutions emerged in the 18th Century as a means to preclude the arbitrary use of law and to promote the ideals of constitutionalism. From this fact those favoring the specific content requirement seem to conclude that constitutions that betray this original function do not really work.

Empirical and Normative Problems of the Constitutionalist Conceptualization

While I share the normative concern behind the specific content requirement, I believe that incorporating it into the conceptualization of constitutional efficacy is not advisable. Think about the consequences that such incorporation would have in the case of a constitution introduced by a king to improve the public administration's efficiency or as part of a modernization program. Consider for instance the constitution that the Sultan Abdul Majeed (1945–1952), 'father of modern Maldives', introduced on April 23· 1942 to liberalize and modernize the country. Had this constitution created a group of public officials who systematically behaved according to their constitutional role would it be sensible to say that it did not work at all? Would we want to *a priori* assert that this constitution was totally ineffective because it did not satisfy all the normative requirements of constitutionalism?[11]

One can certainly make a critique of such a regime on normative grounds using liberal principles. Furthermore, "under what conditions can constitutions satisfying the specific content requirement work?" is a fundamental question. However, I believe that such a question should be in principle differentiable from the broader question "when do constitutions work?" This dis-

[11] The classical example of this type of written constitutions is the Prussian Constitution of 1805, given by the King to improve the bureaucracy. Many of the so-called " instruments of government" had these characteristics.

tinction is important not only for the sake of theoretical clarity, but because it has important consequences for empirical research.

A conceptualization of constitutional efficacy that incorporates the specific content requirement makes the questions "when and why constitutions work?" unintelligible for all codified constitutions that do not have separation of powers, a system of checks and balances, and a first-generation bill of rights. Thus, incorporating it into our conceptualization would lead us to *a priori* exclude from empirical research on constitutional efficacy the consequences of all the constitutions that do not satisfy these normative criteria, which constitute a very important part of the world's constitutional history.[12]

Moreover, this move may not even be desirable on purely normative grounds since understanding the conditions under which non-liberal constitutions have behavioral consequences may help us understand the conditions under which constitutions in general, and liberal constitutions in particular, are more than "pieces of paper". Thus, incorporating the specific content requirement may do a poor service to the normative ideals that inspired it by *a priori* foreclosing research that could be conducive to their promotion.

There is a further problem produced by the incorporation of the specific content requirement: it *a priori* precludes degrees of efficacy for non-liberal constitutions. As we have said, the specific content requirement considers the formal requirements of negative constitutionalism *necessary* for a constitution to work. Thus, the violation of those requirements is sufficient to consider a constitution ineffective. As a consequence constitutions as dissimilar, and with such different effects and degrees of enforcement, as the Afghan constitution of 1923 enacted by King Amanullah and the Chilean Constitution of 1980 (before the transition to democracy in 1989) would be considered equally ineffective. To clearly appreciate the epistemic costs of such equation let us consider these two constitutions in more detail.

The Afghan constitution of 1923 was a long way from meeting the liberal requirements (e.g. it concentrated great power on the King and prohibited political parties) but it was part of an important attempt to liberalize the country. The reforms included: discouraging the seclusion of women, abolishing slavery and forced labor, and introducing secular education (for girls as well as boys). Unfortunately, those reforms met harsh opposition leading to the abdication of the King in 1929. From its enactment the constitution was widely ignored (see Federal Research Division Library of Congress http://lcweb2.loc.gov/frd/cs/aftoc.html).

In contrast, as I discussed in the previous section, the Chilean constitution of 1980 in its transitory articles formalized to an important extent the location of power produced by the coup d'état of Allende's democratic government (Barros 2002, 177-1779). Nevertheless, it incorporated the constitutional role of member of the Constitutional Tribunal, which was fundamental to the transition to democracy. In this case, unlike in the Afghan one, there was great agreement between the wording of the constitution and Chilean political reality.

Independent of the specific conceptualization of constitutional efficacy one may want to adopt, I believe it is safe to say that these two constitutions differed in many respects that are relevant to the efficacy question. By *a priori* declaring them equally ineffective, the constitutionalist conceptualization obstructs the empirical research of those differences. In conclusion, an explanatory fruitful conceptualization of constitutional efficacy should avoid incorporating the specific

[12] For an interesting account on some of these kinds of constitutions see Brown 2001.

content requirement in order to enable the quest for different sources of constitutional inefficacy in non-liberal constitutions.

III. Constitutional Efficacy as the Satisfaction of the Intended Effect

The Intended Effect Requirement

Consider the following extract from the news article "Charter's Ideals Fine, but System of Senate Election Must Change" published on April 23, 2006 in the Tai news paper *The Nation*:

> After the experiences of his six-year term in Thailand's first elected Senate, Chirmsak concluded that the concept of "non-partisan" senators enshrined in the Constitution *does not work*. According to the 1997 charter, which mandates that the Senate should be an elected body, the 200-member upper house is supposed to be impartial …Consequently the election law bars senatorial candidates from being members of political parties. Candidates are also barred from campaign activities such as holding rallies and making public speeches
>
> …The Constitution tries to make the senators as non-political as possible, which is essentially impractical in the real world of politics. Given this constitutional flaw, it's not surprising that the majority of successful candidates in Wednesday's Senate election are merely extensions of the existing power base of political parties. The ruling Thai Rak Thai party is reportedly behind nearly 100 senators elect, while the Democrat, Chat Thai, Mahachon and Pracharaj parties have unofficially supported 22, six, four and two respectively.

The first thing to note is that the source of constitutional inefficacy the Tai Senator identifies is not *exogenous* to the constitution but it is derived from it: it is the result of a constitutional flaw. This can be further appreciated by noting that, as in the Moroccan example discussed above, the proposed solution is a constitutional reform. However, unlike the Moroccan case where the proposed reform aimed at tackling the mismatch between the constitutional content and the ideals of constitutionalism, the problem behind this notion is the mismatch between the *intended effect* of the provision (i.e. having non-partisan senators) and its resulting effect (i.e. having senators dependent on the political parties). Therefore, the *intended effect* is here linked to constitutional efficacy.

We can link constitutional efficacy to the production of the intended effect in two ways. On the one hand, we can consider such production a necessary and sufficient condition for a constitutional provision to work; by doing so we would assume what I call the *intended effect criterion* of constitutional efficacy. On the other hand, we can consider it only a necessary condition, merely adopting an *intended effect requirement*. The central thesis of this section is that incorporating an *intended effect requirement* into our conceptualization of constitutional efficacy is not advisable since it produces empirical, theoretical and normative problems. Clearly, if successful, this argument will imply the exclusion of the *intended effect criterion*.

Distinctiveness of the Intended Effect Conceptualization

The first step in the argument is to make clear the analytic distinctiveness of this conceptualization vis-à-vis the ones I have already discussed. To do so let me analyze the following two

cases that show how a constitution can be considered effective under the intended effect conceptualization while being considered ineffective under the other two conceptualizations.

In 1991 Lao People's Party (LPRP) unilaterally made a constitution that arguably aimed at improving the international legitimacy of the regime, and at attracting foreign investment. Laos had been without a constitution since 1975 when the LPRP came to power. But in 1991 Laos was buffeted by the crisis of the Communist Bloc. With a per capita GDP of $180 the country faced the prospect of losing the economic assistance of the USSR, which had been very important. Foreign investment was of crucial importance and the lack of a constitution was "something of an embarrassment as well as a hindrance to attracting foreign investors who were put off by Laos's weak legal structure" (Johnson, 1992, 83-84). In such a context, the LPRP decided to make a constitution and new business legislation.

Using this example, let us contrast the constitutionalist and the intended effect conceptualizations. Under the former, the Laos constitution of 1991would have been considered effective only if its content satisfied the normative requirements of constitutionalism. This was not the case of the Laos constitution of 1991; it did not contain a system of separation of powers and of checks and balances, and while it had a bill of rights that included freedom of speech, press, and assembly, it lacked "provisions guaranteeing the inalienability of fundamental rights, prohibiting torture, safeguarding against arbitrary arrest and detention, protecting people deprived of their liberty, and providing for a fair trial" (Country Studies: http:/countrystudies.us/laos/).

In contrast, the Laos constitution of 1991 would be considered effective under the intended effect conceptualization (i.e. that which makes the satisfaction of intended effect necessary) only if it had help to attract foreign investors and potential sources of economic assistance and/or to improve the regime's legitimacy vis-à-vis the international community. Arguably in this account the constitution was somewhat effective; internationally the constitution was perceived as a positive step (Johnson, 1992).[13] Hence, a constitution that is considered effective under the intended effect conceptualization is not necessarily so under the constitutionalist one. An important fact is thus illuminated: codified constitutions are political artifacts that can serve many different aims, not all consistent with the principles of constitutionalism.

In the same way, there is no necessary relation between the text-reality convergence and the intended effect conceptualizations: in principle the Laos constitution of 1991could have been successful in attracting investment or in increasing (at least temporarily) the regime's international legitimacy, while not being fully implemented. The following case shows this point in a clearer way.

After the Spaniards captured and assassinated Miguel Hidalgo, José María Morelos y Pavón assumed the leadership of the Mexican War of Independence. In June 1813, he convoked a National Congress that met in Chilpancingo. The Congress agreed to write a constitution containing the main political and moral principles the movement stood for: Mexico was declared independent, slavery, forced labor, government monopolies, and corporal punishment were declared illegal, and universal male suffrage was prescribed (Tena Ramírez 1999). Arguably one of

[13] In 1992 the US and Laos resumed ambassadorial relations. Another illustrative example is the following:

[Some] constitutions are written in order to delude the public; the "great" Stalinist Constitution of 1936 was created to beguile the world. The world or parts of it wanted to be deceived, and it was for a while, deceived indeed (Sajo 1999, 16).

the central aims of the Apatzingán constitution was to reinforce the distinctive identity of the movement for independence and to invite support.

Under the intended effect conceptualization the Apatzingán Constitution worked very well: it became an emblem of the fight for Mexican independence, and even today the document is considered to contain the principles for which the war for independence was fought. However, this constitution never went into effect. Thus, under the text-reality conceptualization the Apatzingán constitution was fully ineffective.[14] This case shows that there is no necessary relation between these two conceptualizations of constitutional efficacy. This illuminates the fact that constitutions can be enacted for reasons other than their enforcement.

Examples of Constitutional Accounts that Assume the Intended Effect Requirement

It is noteworthy that intuitively it is easier to grasp the lack of a necessary relation between the intended effect and the constitutionalist conceptualizations than to grasp the lack of such a relation between the former and text-reality convergence conception. Arguably this is the case for two reasons. First, the same adjective "effectual" can be used to designate the phenomena that satisfy two different requirements grounding these conceptualizations. "Effectual" can mean "that produces its intended effect, or adequately answers its purpose" and "actual, existing; being in effect" (Oxford English Dictionary, 2008).[15] As we have noted before, "effective" and other related terms as "effectual" are polysemous. Precisely for this reason, inquiring which conceptualization of constitutional efficacy is empirically, theoretically and normatively more satisfactory is not trivial.

Second and more interestingly, we often implicitly assume that in all cases constitution-makers aim to produce a document that would cause compliance. This assumption is very common both in academic and non-academic texts. For instance, constitution-making is often defined as a process in which political actors engage in the production of a written document that is intended to regulate the machinery of government, the relation between private and public actors, and amendment procedure (see e.g. Elster 1991, 7). So under such an assumption, it is always the case that a constitution fulfills its authors' *intent* by producing text-reality congruence, and that a constitution works if and only if it does so.

This way of defining what the constitution-making processes entail, and what constitutional efficacy is, implies both a necessary relation between the intended effect requirement and the de text-reality requirement and the adoption of the conjunction of both as the criterion of constitutional efficacy (i.e. as necessary and sufficient for a constitution to work). Most of the authors who implicitly incorporate the intended effect requirement do so by adopting the above assumption. For instance, this assumption is present in the contractarian account of institutional creation. Under this account institutions are the result of a "purposeful design through social contract" such that agreement in a particular institutional framework automatically implies enforcement.

[14] It is noteworthy however, that several of the core principles of this constitution have been central to the constitutional history of Mexico.

[15] The same term when qualifying a legal document can mean "valid, binding" (Oxford English Dictionary, 2008).

> We might thus portray the process of creating an institution as a bargaining problem, in which participants anticipate the effects on them as individuals of each possible (equilibrium) institution arrangement. Any agreement reached is then automatically enforced (since it is self-enforcing), as required for a bargaining problem. All of the potential problems of bargaining, such as incomplete information about other players' preferences, could then intervene to forestall the reaching of any agreement" (Calvert 1994, 81; see also Buchanan and Tullock 1962).

Hence, under this account constitution-making is the resolution of a bargaining process aimed at the establishment of an institutional framework that automatically creates text-reality congruence. Thus, under this account a successful constitution-making process (i.e. one on which the parts agree) necessarily implies an effective constitution, and the criterion of constitutional efficacy consists in the conjunction of the text-reality congruence and the intended effect requirements.[16]

This account has several problems. The first and clearest one is that, as Przeworski puts it, the "contractarian theorem – "if parties agree to some rules, they will obey them" or "if they do not intend to obey them, parties will not agree to the rules"– is false" (Przeworski 2006, 267). It is false because ex-ante agreement on rules does not necessarily imply ex post enforcement. This contractarian account shares with other self-enforcement accounts (such as Weingast's) the theoretical flaw of blurring the two stages required by a satisfactory theory of modern constitutional government. I have already discussed this theoretical problem.[17]

Note that another problematic implication of this contractarian account is that it *a priori* precludes the possibility of changes in the degree of constitutional efficacy in the absence of a new constitution-making process. A satisfactory conceptualization of constitutional efficacy must be capable of capturing efficacy variations with the constitutional text constant.

A particular version of the contractarian theorem is implicit in Beau Breslin's account of the different kinds of codified constitutions (Breslin 2009).

> Constitutions therefore actually operate along two intersecting axes: constitutionalist versus nonconstitutionalist, and "sham" versus "fully operative" A constitutional text can purport to be constitutionalist insofar as it includes all the traditional mechanisms that limit the power of the sovereign. But that constitution can still be considered a sham…
>
> [One of the four quadrants formed by the intersection of these axes] includes those texts that are neither authoritative nor constitutionalist; they are non-constitutionalist shams. It is reasonable to assume that …[this quadrant] cannot logically host any examples. Recognizing that in the post-Enlightenment era, a regime that shuns the principal features of a constitutional text will in some sense be condemned for its lack of commitment to individual rights, equality and/or due process, few countries (if any) would go through the trouble of constructing a constitutional text that rejects constitutionalists maxims (and thereby empowers political leaders rather than limiting their authority) and would then decide that the best course of action is to ignore its own already unpopular constitutional text. That is, it seems doubtful that there are constitutional framers who believe it is wise to design a non-constitutionalist political order, only to then see their design disregarded by political officials in favor of the opposite: justice and limited government. As far as I know there have not been benevolent dictators for quite some time. (Breslin 2009, 27-28)

[16] It is interesting to note, that the importance of "the intended effect" is also emphasized by some judges' interpretative strategy like the "originalism" of Justices Scalia and Thomas. Several authors have argued against the relevance of the original intent. Lon Fuller claimed that the intentions of the law-makers is of no interest once the law has been in effect for a while, Madison himself noted that the debates and incidental decisions of the Convention could have no authoritative character (referred in Hardin 1989, 112).

[17] In addition, cooperation based accounts of constitution-making and enforcement face other important theoretical problems (see Hardin 1998).

The particular version of the contractualist theorem I referred to, is illuminated by the reason Breslin offers to back his claim that the quadrant of "non-constitutionalist shams" (i.e. constitutions that *de jure* violate the normative principles of constitutionalism and are not enforced) is empty. The reason is that it would be irrational for the founders of those constitutions to pay the costs of violating constitutionalism only to "decide that the best course of action is to ignore it". It follows that under this account their agreement on the constitutional text is logically sufficient for its enforcement. Here the assumption is that the only possible reason for the non-enforcement of an authoritarian constitution is the lack of will of its authors. This assumption is not grounded. There are other logical explanations for the non-enforcement of a constitution that violates constitutionalism. For instance, the lack of enforcement can be an unintended consequence. Recall the example that opens this section. Despite the fact that Thailand's 1997 constitution hardly fulfills the requirements of constitutionalism, the constitutional provision that mandated an impartial, a-political Senate was violated: Senators were in fact fully dependent on political parties. The reason behind it was a flaw in constitutional design and therefore subservient Senators were an unintended effect.

There is another assumption in the above quote that is worth calling into question: that lack of enforcement of authoritarian constitutions (or some of their provisions), implies the enforcement of "… the opposite: justice and limited government" (Breslin 2009, 28). That this assumption is false follows from the fact that there are many alternative organizations an authoritarian government can have, and some of them may not converge with the authoritarian constitution in place. For instance, an authoritarian constitution may prescribe that the judiciary be dependent on the King, and actually it may be dependent on some small group of nobles. In this case the constitution would not be enforced but the political reality would be far from limited government.

Empirical and Theoretical Problems of the Intended Effect Conceptualization

Let me now focus on the problems specific to the conceptualization that incorporates the intended effect requirement. To understand why adopting an intended effect requirement (and by implication, an intended effect criterion) is problematic it is useful to note that constitutional provisions have a large set of potential effects, many of which are unintended. This fact creates a problem for anyone adopting the intent requirement: in order to assess the constitutional efficacy of a constitutional provision she would need to determine what the founders particular intent was with regard to that provision. How can we identify the intended effect among all the *potential* effects of a given provision?

This question can be addressed either *a priori* by assuming that the original intent is always the establishment of the content of the provision, or we can answer it *a posteriori* by engaging in empirical research on the constitution-makers' aims when enacting the constitution. As I have argued, the former is theoretically problematic since constitutions are artifacts that can be enacted with different intents that do not necessarily include the implementation of their content. Moreover, constitution-makers are not unitary agents, and thus they can have different purposes in mind when enacting a constitution. Therefore, *a priori* assuming all constitution-makers necessarily intend to enforce the constitution they have enacted is an ungrounded generalization.

Thus, the only theoretically sound approach for determining the framers' intent is through empirical research.

One could argue that an empirical study aimed at determining the framers' intent is likely to face important difficulties; in particular when studying old constitutions and closed and secretive constitution-making processes. This is arguably true, but I think it is hardly reason enough to exclude the intended effect requirement from our conceptualization of constitutional efficacy. As the failure of the behavioral paradigm showed us, behavioral reductionism is hardly capable of giving a full account of social and political phenomena.[18] Thus, dealing with the beliefs, the desires and other mental states of individual actors is arguably both, difficult and inescapable.

Nevertheless, I believe that the empirical difficulty involved in determining the intended effect of constitutions has a problematic implication: it makes comparative empirical research extraordinarily difficult. To understand why this is so note that, as already argued, framers can enact constitutions and constitutional provisions within them with many different and even incompatible intentions. Hence, under the intended effect requirement the conditions under which a constitution works varies depending on what its framers intended. For instance, using the previous examples, the Stalinist constitution of 1936 would have worked if it had deceived part of the international community (Sajo 1999, 16), while the Mexican constitution of Apatzingán would have worked if the independence movement had gained support thanks to it, and so on. Hence a comparative study on constitutional efficacy would require first research on what each specific group of framers intended, and then research on whether they were successful in attaining it. These requirements would make large comparative research on constitutional efficacy almost impossible.

Moreover, I believe that incorporating the intended effect into our conceptualization of constitutional efficacy is *per se* problematic. In particular, I believe there are good reasons to want to assert constitutional efficacy even if the intended effect is not reached; consider the following example: Think of a military junta or a single party that controls the government and the constituent power of a given country, and which in order to appease international pressure and/or internal conflict enacts a constitution containing a constitutional tribunal with a certain degree of *de jure* independence. Now suppose that in order to minimize the costs of introducing such a court, to the tribunal the framers appoint judges considered not only ideologically close to them but also belonging to common social and political status function systems. Now suppose that in the period following the enactment of this constitution the strategy works well, the internal tension and/or the international pressure diminishes, and the actual judicial independence is very scarce. If so, in this period the constitutional provision establishing judicial independence would not satisfy the text-reality congruence requirement, but would satisfy the intended effect requirement.

Now suppose that as time goes by the internal tension and/or the international pressure increase again, and the social and political controls over the judges dwindle as the regime looses power. Suppose that in this context the constitutional tribunal, enabled by the constitutional structure starts playing an important role actually binding the party or members of the junta through some key decisions, and perhaps even playing an important role in the transition to a democratic regime. If so, in this second period, the constitutional provisions' effects would oppose

[18] For instance, see Hardin 2002 for a nice account of the important shortcomings of a purely behavioral account of trust and trustworthiness.

the original intent of the framers, and the text-reality congruence would be an unintended consequence of the establishment of a constitution.[19]

Now, if we decide to incorporate the intended effect requirement, we would need to conclude that in the second period the constitution did not work. I believe that such a conclusion is highly problematic given that the judges were enabled by the constitution and fulfilled their constitutional role. To accept this and still claim that the constitution did not work seems to empty the concept of constitutional efficacy. Therefore, this is a case where there seem to be good reasons to assert constitutional efficacy even if we know that the intended effect requirement was not satisfied. In sum, there are good reasons to analytically separate the fulfillment of the intended effect of a constitutional provision and its efficacy, thus adopting the requirement of intended effect is not advisable.

IV. Conclusion

In this paper I argued against three influential conceptualizations of constitutional efficacy: the account of constitutional efficacy as text-reality congruence, the constitutionalist account, and the conceptualization of constitutional efficacy as satisfaction of the intended effect. I claimed that neither is a satisfactory conceptualization of constitutional efficacy since they all have serious theoretical, normative empirical problems.

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[19] This example is a stylized version of some accounts of the creation of Constitutional Courts in Latin America (see e.g. Magaloni 2003).

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