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Tom Ginsburg

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**HOW TO STUDY CONSTITUTION-MAKING:  
HIRSCHL, ELSTER, AND THE SEVENTH INNING  
PROBLEM**

TOM GINSBURG\*

It is very difficult to comment on a book with which one fundamentally agrees. Ran Hirschl's magnificent *Comparative Matters* is not only a deep work of intellectual history, but it also makes a powerful methodological argument. Hirschl calls for integrating the study of comparative constitutional law into a broader field of comparative constitutional studies, in which rigorous but pluralistic social sciences are deployed to help us understand problems. Who could possibly object? Certainly not I.

Hirschl's clarion call is to expand our frameworks outward in three ways. First, he asks us to expand our focus geographically, away from the established democracies of Europe and North America; this is something that the field has belatedly begun to do in the last few years with superb results.<sup>1</sup> Second, Hirschl wants the field to expand methodologically, away from narrow lawyerly doctrinalism toward truly interdisciplinary inquiry, and he points out the many contributions of social scientists to the endeavor.<sup>2</sup> Third, he asks us to expand our temporal framework.<sup>3</sup> Hirschl's own methodology of returning to earlier exemplars of comparison, ancient and modern, is itself an example here. Hirschl also points out that, within any particular system, we ought not be limited in our focus on the moment courts decide cases but rather should take a broader frame. Instead we ought to look at moments of constitutionalization, constitution-making and constitutional politics beyond the judiciary. This is another way of expanding the temporal frame, away from the moment of judicial decision.

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\* Leo Spitz Professor of International Law and Deputy Dean, University of Chicago Law School; Research Associate, American Bar Foundation. Thanks to James Fleming for organizing the symposium, and to my co-panelists for thoughtful discussions.

<sup>1</sup> See RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 15-17 (2014).

<sup>2</sup> See *id.* at 15.

<sup>3</sup> See *id.* at 77 ("Contemporary discussions in comparative constitutional law often [ignore the fact that] [m]any of the purportedly new debates in comparative constitutional law have early equivalents, some of which date back over two millennia.").

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Let's begin with this last point. With apologies for the American parochialism, I have characterized the narrow focus on court decisions the "Seventh Inning Problem" in Comparative Constitutional Law.<sup>4</sup> The analogy is to a baseball fan who pays overly felicitous attention to a late inning. Imagine yourself as a fan going to watch the Toronto Blue Jays with a good friend; let's call him Shai. You arrive very late, at the top of the seventh inning. You see which team is batting, and so can deduce who is the home team, since the home team in baseball always bats in the bottom half of the inning. You look at the scoreboard and see the score, which allows you to ascertain who is winning and losing. But you do not know how the score came to be that way or why.

You proceed to watch the seventh inning. As baseball innings go, the seventh is fairly important—not just in the top ten but somewhat higher. Sometimes a team will score a decisive comeback run; other times a team will shut out the other side and close in on victory. (Indeed, this past October, the aforementioned Toronto Blue Jays played one of the most remarkable and important seventh innings in baseball history, winning the National League Championship Series with a three-run comeback.<sup>5</sup>) It is also the case that the seventh inning has some aesthetic or theatrical advantages over other innings. The inning is always accompanied by a rousing ritual of community, in which the whole stadium joins in the classic song "Take me out to the ballgame." You find this experience stirring and entertaining, as a rare opportunity to join with masses of others in a collective activity; you might also note to yourself that the overly formal civic hymn "God Bless America" is not sung in Canada.

Imagine that you as a fan watch the inning as it plays out with great excitement. One team scores some runs, perhaps taking the lead from the other. The fans cheer, the tension builds, perhaps the inning ends with a dramatic play in the field. Then . . . you leave. You walk out of the stadium. Maybe you hear the final score of the game on your car radio on the drive home. Maybe you don't. But either way, you do not observe the outcome first hand.

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<sup>4</sup> Portions of this section are adapted from Tom Ginsburg, *Comparative Constitutional Law: The Seventh Inning Problem*, MD. CONST. L. SCHMOOZE (2012), [http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1140&context=schmooze\\_papers](http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1140&context=schmooze_papers) [<https://perma.cc/A8XD-RVM9>]. I join a long line of distinguished and undistinguished work pursuing baseball analogies in law. For a critical review, see Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 33-39 (1994) (critiquing judges for using baseball analogies). *But see* Michael J. Yelnosky, *If You Write It, (S)He Will Come: Judicial Opinions, Metaphors, Baseball, and "The Sex Stuff,"* 28 CONN. L. REV. 813, 813-14 (1996) (rebutting Oldfather).

<sup>5</sup> Mike Axisa, *That Blue Jays-Rangers 7th Inning May Be the Craziest You'll Ever See*, CBSSPORTS.COM (Oct. 14, 2015, 8:08 PM), <http://www.cbssports.com/mlb/eye-on-baseball/25340061/that-blue-jays-rangers-7th-inning-may-be-the-craziest-youll-ever-see> [<https://perma.cc/AH2M-82GU>].

The absurdity of this example is not too far from where we started as a discipline in recent decades. Focusing too much on court cases in the constitutional “game” has precisely the same structure as the baseball fan who watches only one late inning. It means that we miss many of the most important questions—where does constitutional order come from? Who are the parties and what are they really fighting about? How does the court have the power it does? And what is the impact of the decision on real outcomes after the court decision? These questions can only be examined by broadening our temporal and conceptual frame. And they provide the real context for the judicial setting that we examine in the equivalent of slow motion.

The judicial setting presents us with players, one of whom is “losing” in the status quo and so brings a claim. There is a prior “score” in terms of distribution of resources between the litigants. The court case involves attempts to secure advantage, and requires litigants and their lawyers to engage in interesting strategic calculations, much as managers and players do. It is surely important for observers to understand the rules of the legal “game” in order to know how points are scored. But knowing who wins or loses the case is not the end of the game. In many constitutional settings, the politics of enforcement and implementation are at least as complex as those of the judicial settings. As generations of socio-legal scholars have debated, do the court decisions really matter much at all?<sup>6</sup> Even if they do, the final score is not known until well after the court decision.

To stretch the analogy further, a single game does not a season make. Cases unfold in sequence; baseball games stretch over a 162-game summer. To understand what is going on in the game—why the pitcher throws a slider or why the fielder is shading to the left—one might want to know the batter’s tendencies, what happened last time the two teams met, what the pitcher would like the batter to think for the *next* pitch, etc. Only by broadening out fully can we make sense of some of the individual moves in each game. Similarly, doctrine unfolds over time and across fields of law. We know that the most influential part of a judicial opinion is often not the holding, but the rationale.<sup>7</sup> Sometimes simply following a line of cited precedent—an “internal” move in the game—will not reveal the broader strategy and pattern.<sup>8</sup>

Why has the nascent field of comparative constitutional law not adopted a broader frame? There is a two-fold answer. First, in many countries, the study of constitutional law is embedded in broader academic cultures dominated by

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<sup>6</sup> See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 1-8 (1991).

<sup>7</sup> See MARTIN SHAPIRO, *LAW AND POLITICS ON THE SUPREME COURT* 40-41 (1964); see also Herbert M. Kritzer, *Martin Shapiro: Anticipating the New Institutionalism*, in *THE PIONEERS OF JUDICIAL BEHAVIOR* 387, 392 (Nancy Maveety ed., 2003).

<sup>8</sup> See WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 22, 30 (1964) (“A skilful legal craftsman can usually reach the result he wants without directly overruling established cases or obviously making new law.”).

formalism.<sup>9</sup> The seventh inning problem is really just the old critique associated with legal realism, political jurisprudence, and the law and society movement. One would think that we are all realists now, but that is not the case in much of the world, or at least not much of the world with which I am familiar.<sup>10</sup> Second, within the United States, part of the problem is that many of the early leaders of the field were Americanists who have become interested in comparative problems rather than comparativists interested in constitutional law.<sup>11</sup> This leads to what we might perhaps characterize as overemphasis on the role of courts.<sup>12</sup>

To be sure, as Hirschl's own work reminds us, judicialization has proceeded in many other milieus.<sup>13</sup> The seventh inning *is* genuinely more important than it used to be, in more parts of the world. It may be the case that the interdisciplinary literature that he celebrates has come to look at more parts of the game. The problem with the field of comparative constitutional law is not the focus on courts *per se*, but rather, as *Comparative Matters* so wisely reminds us, the possibility of selection bias in terms of what issues, and countries, are deemed important.<sup>14</sup> Cases in which judges have grappled with problems close to the hearts of Americans have received more attention than those that have not;<sup>15</sup> countries where courts are prominent have received more attention than those in which they are more marginal.<sup>16</sup> To be sure, there have

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<sup>9</sup> See Daniel Bonilla Maldonado, *Introduction: Toward a Constitutionalism of the Global South*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 1, 8-9 (Daniel Bonilla Maldonado ed., 2013) ("A significant part of Latin American, African, Asian, and Eastern Europe[an] legal academia is still dominated by various forms of legal formalism." (footnotes omitted)).

<sup>10</sup> Indeed, it is not the case in the United States either. See, e.g., RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 300 (2016).

<sup>11</sup> Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 410-11 n.8 (2003).

<sup>12</sup> See, e.g., Stéphanie Balme & Michael W. Dowdle, *Introduction: Exploring Constitutionalism in the 21st Century*, in BUILDING CONSTITUTIONALISM IN CHINA 1, 2-5 (Stéphanie Balme & Michael W. Dowdle eds., 2009).

<sup>13</sup> See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 169-210 (2004) (discussing the judicialization of politics, foundational nation-building questions, and fundamental restorative justice dilemmas).

<sup>14</sup> See, e.g., HIRSCHL, *supra* note 1, at 205-17.

<sup>15</sup> Compare *id.* at 218 (discussing the lack of U.S. media coverage of a monumental ruling by the Supreme Court of India on public health and poverty eradication), with *Botswana's Top Court Rejects Government Bid to Ban Gay Rights Group*, REUTERS (Mar. 16, 2016, 4:47 PM), <http://af.reuters.com/article/topNews/idAFKCN0WI2CQ> [<https://perma.cc/BU5V-ZT6F>] (illustrating the relatively robust U.S. media coverage of gay rights cases in Africa).

<sup>16</sup> See, e.g., HIRSCHL, *supra* note 13, at 8-9 (choosing to focus on constitutional changes in Canada, New Zealand, and Israel precisely because of the strong common law tradition and centrality of the courts).

been important correctives in recent years with the explosion of attention to courts in Africa, Latin America, and Asia, as well as the international level. But there is much more to be done, and more to be said.<sup>17</sup>

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Taking this line of thought seriously requires us to start at the beginning: the very formation of constitutional order. Anna di Robilant refers to this, in her comment in this symposium, as a “big question.”<sup>18</sup> How are constitutions made? And how should we study this question? We are fortunate that the leading figure in the study of constitution-making remains Jon Elster, certainly one of the modern “grandmasters” (to use Hirschl’s term) of social and political science.<sup>19</sup> Indeed, many of the central concepts in the field remain his, from a series of articles in the 1990s and 2000s, and a 2013 book, *Securities Against Misrule*.<sup>20</sup> Elster’s core contributions in the comparative constitutional field are several: wrestling with the importance of precommitment;<sup>21</sup> articulating the role of reasons, passions, and interests in constitutional design;<sup>22</sup> the importance of constituent assemblies;<sup>23</sup> and the hourglass metaphor of public participation, which holds that public involvement ought to be broad at the outset of the constitution-making process, then narrow during a phase of bargaining among interests, then broaden again at the end of the process with public ratification for legitimation.<sup>24</sup> Elster’s frameworks and concepts continue to guide our thinking on the making of constitutions, helping to understand the process in clear and bold terms, with concepts that are easy to deploy.

But it is also the case that Elster has strong views on methodology. He is not a fan of statistics or economic models. Indeed, in one recent pair of essays—

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<sup>17</sup> See, e.g., HIRSCHL, *supra* note 1, at 3, 212 (“[V]ery few of the leading ‘state of the discipline’ collections contain substantial analysis of the north/south gaps as such . . .”).

<sup>18</sup> Anna di Robilant, *Big Questions Comparative Law*, 96 B.U. L. REV. 1325, 1328 (2016).

<sup>19</sup> HIRSCHL, *supra* note 1, at 127 (identifying Montesquieu as “the first grandmaster of comparative public law” in addition to naming others who might also be worthy of the title of grandmaster).

<sup>20</sup> JON ELSTER, *SECURITIES AGAINST MISRULE: JURIES, ASSEMBLIES, ELECTIONS* (2013).

<sup>21</sup> Jon Elster, *Don’t Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751 (2003).

<sup>22</sup> Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995).

<sup>23</sup> Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 J. CONST. L. 345 (2000) (comparing the constitution-making processes of the 1787 Federal Convention in Philadelphia and the 1789-1791 Assemblée Constituante in Paris).

<sup>24</sup> See Jon Elster, *Legislatures as Constituent Assemblies*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 181, 197 (Richard W. Bauman & Tsvi Kahana eds., 2006).

perhaps reflecting deep post-financial-crisis pessimism—Elster seems to argue against the use of modern social science in constitutional or institutional design.<sup>25</sup> This puts him in apparent tension with Hirschl’s latest book.

Let us spend a moment on Elster’s argument. He first critiques the social sciences for “excessive ambitions.”<sup>26</sup> Decrying formal theory that is far divorced from reality, and the complex statistical models that are dominant in political science departments these days, Elster goes on to critique rational choice, behavioral economics, and empirical analysis. To quote: “[A] non-negligible part of empirical social science consists of half-understood statistical theory applied to half-assimilated empirical material.”<sup>27</sup> He thinks that the reason for this sorry state of affairs is that social science departments are stuck in suboptimal equilibria: career incentives have reinforced a turn toward technical complexity.<sup>28</sup> Technique and the search for causal relationships, with the aspiration of replicating predictive sciences, come at the expense of what can be called “retrodiction”—the ex post analysis and explanation of events after they occur. The latter is, in Elster’s view, an achievable goal—the focus on prediction impossible.<sup>29</sup> The failure of departments of social science means that they are hardly the kinds of places to which we might turn for our understanding of constitutions.

In the second essay, Elster focuses on institutional and constitutional design. He argues for an approach that we might call Hippocratic—given that we know little about the effects of institutions and their internal interactions, we ought to focus mainly on the prevention of bad results rather than optimal institutional design.<sup>30</sup> This is a kind maximin strategy.<sup>31</sup> Elster goes on to critique much normative political theory. He (correctly in my view) identifies that much political theory ultimately rests on empirical arguments about the effects of chosen institutions on outcomes, which (because of his skepticism

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<sup>25</sup> See Jon Elster, *Excessive Ambitions*, CAPITALISM & SOC’Y, Oct. 2009, at 1 [hereinafter Elster, *Excessive Ambitions I*] (critiquing these models generally); Jon Elster, *Excessive Ambitions (II)*, CAPITALISM & SOC’Y, Jan. 2013, at 1 [hereinafter Elster, *Excessive Ambitions II*] (building on his previous criticism of excessive reliance on statistical modeling, and arguing that the potential for constitutional and institutional designers to justify self-interested policy through the use of manipulated statistical models cautions against the use of such models).

<sup>26</sup> Elster, *Excessive Ambitions I*, *supra* note 25, at 1.

<sup>27</sup> *Id.* at 17 (emphasis omitted).

<sup>28</sup> See *id.* at 19-20.

<sup>29</sup> *Id.* at 23-24.

<sup>30</sup> Elster, *Excessive Ambitions II*, *supra* note 25, at 5; see also Aziz Z. Huq, *Hippocratic Constitutional Design*, in ASSESSING CONSTITUTIONAL PERFORMANCE (Aziz Z. Huq & Tom Ginsburg eds., forthcoming 2016) (manuscript at 49, 53) (on file with the author).

<sup>31</sup> See MARTIN J. OSBORNE, AN INTRODUCTION TO GAME THEORY 361 (2004) (explaining that maximinimization strategy requires one to assume the worst possible outcome for each action, and then select the action for which the worst outcome is the best).

about social science) cannot be verified.<sup>32</sup> Many claims about “ought” depend on assumptions about the “is”,<sup>33</sup> but our understanding of the world rests on causal theories that are underspecified and poorly worked out.<sup>34</sup>

These are harsh critiques of social science. If correct, do they undermine Hirschl’s prescriptions? Not necessarily, I will argue, though they do call into question some of Elster’s own work on constitutional design, which remains the gold standard in the field.

Let us begin with Elster v. Hirschl. Hirschl is not arguing, obviously, for poorly specified causal theories, or half-baked empirical approaches. He is sufficiently pluralistic that many methods fall into his big tent. Thankfully, he accepts that careful large-*n* work has a place as well as small-*n* work; Hirschl thus seems more catholic than Elster.<sup>35</sup> The key for Hirschl, I suspect, is rigor and attention to method. But it is important to recognize that method must be suited to the problems at hand. It seems to be a valid critique that many social scientists start with method and then move to problem. As practitioners of comparative constitutional studies, we should take the opposite approach: let the method fit the problem rather than the reverse. The two scholars would likely agree on this proposition.

Having made a case that Hirschl survives Elster’s critique, let us now ask whether Elster himself does so: late Elster v. early Elster. To do so requires some attention to his method. In his classic work on constitutional design, Elster’s approach was to focus on paradigmatic cases, using what looks like a most different cases design.<sup>36</sup> In *Forces and Mechanisms in Constitutional Design*, for example, he compared and contrasted the French and American constituent assemblies to examine the roles of secrecy, transparency, and deliberation; he also looked at the relative roles of interests, passion, and reasons in the production process.<sup>37</sup> He found, among other things, that the French structure of transparency was more conducive to arguing than to bargaining, as members of the public heckled and pressured representatives during deliberations. This setting was one in which passion was the dominant force. He contrasts this setting with the American closed-door sessions in

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<sup>32</sup> Elster, *Excessive Ambitions II*, *supra* note 25, at 5-6 (giving an example of determining the optimal fact-finder in a trial).

<sup>33</sup> See Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 66-67 (2006) (discussing Hume’s work on the relationship between ought and is).

<sup>34</sup> Elster, *Excessive Ambitions II*, *supra* note 25, at 27-28 (stating that certain attempts to develop policy in light of empirical studies “presuppose a knowledge of social causality . . . that, in most cases, we simply do not possess”).

<sup>35</sup> HIRSCHL, *supra* note 1, at 193-94 (explaining that the low use of both large-*n* and small-*n* studies is a deficiency in current comparative constitutional law and should be remedied).

<sup>36</sup> *Id.* at 253-56 (explaining this method).

<sup>37</sup> Elster, *supra* note 22, at 376-77 (reasons, passions, and interest); *id.* at 384-87 (secrecy and deliberation).

Philadelphia, which promoted bargaining over arguing, and the predominance of interest over passion.<sup>38</sup>

Elster's own normative view is that the task of constituent assemblies is to maximize the role of reason, and to minimize the roles of passion and interest, in constitution-making. While there may be a certain amount of passion and interest required to obtain and sustain constitutional bargains, these are not desirable qualities.<sup>39</sup>

Yet, as may be apparent to the reader, there is a serious tension between Elster's early and late normative diagnoses. If constitutional designers are to be guided by reason, as he wishes, they must be able to predict the effects of chosen institutions on outcomes. This requires designers—and national publics who will bless the decision—to utilize social science reasoning of a kind that sophisticated practitioners use in academic work. This seems like a heroic assumption, both for designers and especially for national publics.<sup>40</sup>

It is also the kind of reasoning that the late Elster says is impossible. If most social scientists cannot predict the effects of institutions, then how can designers—many of whom are chosen not for expertise but because of power or the need for representation—make reasoned choices? I submit that early Elster's normative theory thus fails an important test, that of being *possible*. For normative theory to be relevant, it ought to have a minimal relation to feasibly achievable outcomes. To return to the baseball analogy, non-feasible normative theory is like a manager designing a strategy for players that are not on his or her team and will never be. Think 2015 World Series champion Kansas City Royals' manager Ned Yost<sup>41</sup> planning out the lineup of the 1934 Yankees.

In an important corrective, Nathan Brown argued that real world constitution-making cannot and should not be limited to reason.<sup>42</sup> A certain amount of self-interest is required in order to facilitate political investment in the constitutional order, which in turn is a crucial feature of its survival.<sup>43</sup> Political and legal stability requires continuous investment in existing arrangements. Furthermore, extending public participation may undermine reason—in some contexts, scholars have argued that citizens, to a greater

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<sup>38</sup> *Id.* at 283-88.

<sup>39</sup> *Id.* at 394-95.

<sup>40</sup> Sidney Verba, *Would the Dream of Political Equality Turn Out to Be a Nightmare?*, 1 PERSP. ON POL. 663, 668 (2003).

<sup>41</sup> Jeffrey Flanagan, *Reigning Men: Royals Win First Series Since '85*, MLB.COM (Nov. 2, 2015), <http://m.mlb.com/news/article/156229646/2015-royals-are-world-series-champions> [https://perma.cc/9AWD-V25B].

<sup>42</sup> See Nathan J. Brown, *Reason, Interest, Rationality, and Passion in Constitution Drafting*, 6 PERSP. ON POL. 675, 675 (2008) ("The problem is not too much passion and interest but too little attempt to engage them.").

<sup>43</sup> See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 87-88 (2009).

degree than elites, are motivated by self-interest.<sup>44</sup> This might imply that participation should perhaps be limited until the final stage of constitutional adoption, when proposals have already been formulated and need only approval.

In addition, Brown points out, passion may be a valuable component of motivating interest in and support of the constitutional order, which in turn may be important for enforcement.<sup>45</sup> In the classic models of citizen coordination, constitutional enforcement is conceived of as a kind of collective action problem.<sup>46</sup> Each citizen would like to enforce the rules, but without knowing what other individuals will do, might be reticent to come out in the streets to enforce themselves. To overcome this mass coordination problem might require some individual to be sufficiently motivated by passions as to undertake the risky strategy of mobilizing others.<sup>47</sup>

In short, late Elster undermines early Elster's normative proposition for the priority of reason over passions and interests. The optimal amount of passion and interest are not zero, and so a Hippocratic approach cannot say that these motives are to be excluded or minimized entirely. Indeed, one might go further along the skeptical route and say that the "right" mix of reasons, passions, and interests to sustain constitutions is not only unknown, but unknowable. If so, we ought to ignore early Elster entirely.

Another example concerns Elster's proposition that constitutions ought to be written by specially designated constituent assemblies operating under a veil of ignorance, rather than sitting legislatures.<sup>48</sup> Elster's method in coming up with this proposition is, essentially, to use a technical term, "armchair reasoning." He reasons his way among ideal types of constitution-makers, attributing to them motives and mechanisms that seem logical. In particular, he fears that legislatures, if left to their own devices, will be too self-interested in terms of institutional and political interest, and so will produce constitutions more weighted to the legislative power. Note first that Elster's emphasis on legislative self-interest ignores the possibility that legislation can be highly

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<sup>44</sup> See, e.g., THOMAS R. CUSACK, A NATIONAL CHALLENGE AT THE LOCAL LEVEL: CITIZENS, ELITES AND INSTITUTIONS IN REUNIFIED GERMANY 82-85, 91-93, 103 (2003) (showing that East German citizens, compared to their elites, were more likely to favor socialist policies that benefited them relative to West Germans because of East Germany's lower wealth).

<sup>45</sup> Brown, *supra* note 42, at 683.

<sup>46</sup> See PETER C. ORDESHOOK, A POLITICAL THEORY PRIMER 32-37 (1992); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 246-51 (1997).

<sup>47</sup> See Weingast, *supra* note 46, at 261 (positing that in order to maintain or achieve a stable democracy, citizens must on occasion act not in their own self-interest, but according to their values).

<sup>48</sup> Elster, *supra* note 20, at 203.

emotional or might even result in the exercise of deliberative reason.<sup>49</sup> It also assumes that constituent assemblies are less self-interested than legislatures are; in other words, he follows Bruce Ackerman's idea that constitutional politics are systematically different from ordinary politics.<sup>50</sup>

These arguments of Elster's are, in principle, testable with empirical evidence. The question is, what evidence would convince the armchair reasoner? Co-authors and I tried to test one of Elster's propositions by examining whether legislatively produced constitutions had systematically more legislative power than those produced by constituent assemblies or executives.<sup>51</sup> Our measure of legislative power drew on Steven Fish's index of *de facto* legislative power.<sup>52</sup> We found that constitutions in which the executive was the dominant producer had less legislative power than those produced either by legislature or constituent assemblies. But the latter categories were indistinguishable.<sup>53</sup> In other words, we found no evidence for legislative self-dealing because there was no correlation between legislative involvement in drafting and legislative power.

As Popperian social scientists, we cannot reject Elster's conjecture; but we can say that available evidence using our crude but transparent test is not consistent with it. Would this convince Elster? It is hard to say. Our test is simple and relies only on cross-tabulations, not causal models. Perhaps it would meet Elster's approval, as he critiques complex statistical methods by noting: "Where the medians and means (and basic cross-tabulations) don't persuade, the argument probably isn't worth making."<sup>54</sup> Our simple empirical methods might be enough to convince him to revise his assumption about institutional self-interest. Alternatively, though, he might question our sample, as we do not segment the sample by democracy.<sup>55</sup>

A further critique is that Elster's own suggestion that legislators should stay out of constitution-making may violate his maxim to do no harm. As Donald Horowitz points out in a superb reply to Elster:

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<sup>49</sup> Carol Sanger, *Legislating with Affect: Emotion and Legislative Lawmaking*, in NOMOS LIII: PASSIONS AND EMOTIONS 38 (James E. Fleming ed., 2013).

<sup>50</sup> 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6 (1991).

<sup>51</sup> Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201 (2009); Zachary Elkins, Tom Ginsburg & Justin Blount, *The Citizen as Founder: Public Participation in Constitutional Approval*, 81 TEMP. L. REV. 361, 361 (2008) (examining the effect of ratification on constitutional outcomes).

<sup>52</sup> M. STEVEN FISH & MATTHEW KROENIG, *THE HANDBOOK OF NATIONAL LEGISLATURES: A GLOBAL SURVEY* (2009) (describing their "Legislative Power Survey").

<sup>53</sup> Ginsburg, Elkins & Blount, *supra* note 51, at 213.

<sup>54</sup> Elster, *Excessive Ambitions I*, *supra* note 25, at 24 (quoting AMAR BHIDÉ, *THE VENTURESOME ECONOMY: HOW INNOVATION SUSTAINS PROSPERITY IN A MORE CONNECTED WORLD* 244 (2008)).

<sup>55</sup> ELSTER, *supra* note 20, at 206 n.64 (2013) (criticizing another study of ours for including authoritarian constitutions).

If all one cared about was the conflict of interest manifested in the two roles of legislator and constitution maker, this is an inarguable proposition. The special benefits for legislators are a form of rent seeking that is exceedingly undesirable. But is conflict of interest the only, or the most important, issue in planning for a new constitution? . . . If a constitution is to be made by a body whose members are ineligible to serve later as legislators, such a requirement precludes the service of a large number of knowledgeable people who might wish to serve later in the legislature.<sup>56</sup>

Do no harm is unobjectionable at first blush. But if it is epistemically challenging to predict good outcomes, how can we be so confident that we are avoiding bad ones? That too would require fully specified causal models with high quality data to test them. As may be apparent, “do no harm” may be an excessively cautious maxim, since there is often an existing set of arrangements that may have little to recommend it other than that it exists.<sup>57</sup> Omission can be as harmful as commission.

This point has implications for constitutional advice. Some scholars, such as Mark Tushnet, are skeptical about the possibility of constitutional advice.<sup>58</sup> Constitutional success, according to Tushnet (recalling Alexander Hamilton), is determined mainly by the local conditions on the ground, and thus much constitutional advice-giving is, in his view, pointless.<sup>59</sup> Yet, as even Tushnet acknowledges, there is value in providing information about innovations elsewhere.<sup>60</sup> While no two constitutional design situations are ever alike, there may be the possibility of learning from others’ experiments and experiences. Designers should not be kept ignorant of these developments. And in analyzing these comparators, are we to simply use anecdote? This does not seem an improvement given the possibility of drawing the wrong conclusions.

Surely it is important to be cautious in extending social science results to any particular location, given the small number of constitutional systems. No serious scholar would argue for the mechanistic application of institutions from one system to another. Elster’s observation of the vast differences between the social and natural sciences is surely right. But rigor in method is still a worthy aspiration.

There is a point to this extended comment on Elster and his skepticism about social science of just the kind that Hirschl calls for. Elster’s approach, if taken to the extreme, strikes me as *insufficiently* ambitious. Just as we can do better than watch only a single inning of a baseball game, we can also try to get

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<sup>56</sup> Donald L. Horowitz, *Comment on “Excessive Ambitions (II)” (by Jon Ester)*, CAPITALISM & SOC’Y, Jan. 2013, at 4.

<sup>57</sup> *Id.* at 3.

<sup>58</sup> Mark Tushnet, *Some Skepticism about Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473, 1474-75 (2008).

<sup>59</sup> *Id.* at 1474.

<sup>60</sup> *Id.* at 1475 n.7.

purchase on constitutional studies through a vigorous, careful, and rigorous social science. Surely critical cautions about method are important. But I would submit that by failing to *try* to produce useful knowledge, we are dooming constitution-makers to the sin of omission. We need, as Hirschl shows, more social science rather than less.

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