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Introduction

IN EARLY August 2016, I traveled to Yangon, Myanmar, to attend a meeting with representatives of some of the country's ethnic minorities. The subject: constitutional reforms. Myanmar has a tough history of conflict between the central government and the ethnic states. In some parts of the country—for example Karen State—a civil war has been ongoing since independence in 1948. In other parts, the conflict has formally ceased, but ethnic demands have hardly been heeded. A mere three weeks after the ratification of the Nationwide Ceasefire Agreement (NCA) in October 2015, the party of Nobel Peace Prize winner Aung San Suu Kyi—the National League for Democracy—won in a landslide election. Since then, three peace conferences were held, in August 2016, May 2017, and July 2018. They are referred to as “21st Century Panglong,” after the historical 1947 Panglong agreement between Aung San (Aung San Suu Kyi's father) and representatives of Kachin, Shan, and Chin ethnic groups. The Panglong agreement established the principle of “full autonomy in internal administration for the Frontier Areas” (Tinker 1983: 404–5). But no full autonomy ever materialized for Myanmar's ethnic groups. Aung San was assassinated in his office five months after Panglong. Within a year, parts of the country had devolved into civil war. In 1962, the military (Tadmadaw) took power—and kept it for almost half a century. Today, the relationship between the government and the ethnic groups remains fraught, despite the transition to electoral democracy. Not all ethnic groups have signed the NCA, and there is frustration around the lack of progress of the 21st Century Panglong.

Myanmar's path to peace and prosperity faces many obstacles. One of these is the 2008 constitution. The preamble captures the problem concisely, where it states that “We, the National people, firmly resolve that we shall steadfastly adhere to the objectives of nondisintegration of the Union, nondisintegration of National solidarity, and perpetuation of sovereignty.” These objectives justified half a century of military rule, and they are tightly enshrined in constitutional provisions that endow the military with an enormous amount of power,

provide for a strong centralized control of the country (largely through the Office of the President and the General Administration Department), and pay little more than lip service to federalism and other forms of devolution of power (Williams 2014). These objectives are hard to square with ethnic demands for meaningful forms of self-determination. For Myanmar to achieve a lasting peace, the 2008 constitution will have to be significantly, if not completely, rewritten.

We live in an era of constitution-making. More than half of the world's constitutions have been drafted in the last half century. Of these, forty-two were born since the dawn of the new millennium.¹ The trend is not likely to end any time soon. At the time of writing in April 2019, some countries are discussing major constitutional amendments to curtail the influence of all-powerful actors, like the Tadmaw in Myanmar and the Office of the President in Liberia. Other countries are waiting to formulate permanent constitutional agreements, like South Sudan, and Yemen. Others yet have pursued constitutional change as a vehicle to shake ossified democratic institutions, like Italy—but failed.

In response to this trend, the study of constitutions has also burgeoned. But one question remains elusive to scholars and practitioners in the field, despite its centrality to the design of governance institutions: How do stable, growth-enhancing constitutional structures emerge and endure?

The existing literature does not provide a comprehensive answer to this question. In part, this is due to a lack of interdisciplinary engagement. We have a wealth of descriptive historical accounts of how particular constitutions have emerged; a number of positive theoretical analyses of the conditions that foster constitutional stability; and a growing set of empirical studies of the relationship between constitutional provisions and economic performance. A parallel literature in political economy explores the institutional foundations of political and economic development, but pays little attention to the role of constitutions.

In this book, I combine tools and methodologies from institutional analysis, political economy, and history. I argue that the creation of a stable, growth-enhancing constitution requires a set of steps. These include a *consensus* on a shared set of values capable of commanding support over time, a *self-enforcing*

1. These are Hungary, Kyrgyzstan, Turkmenistan, Kosovo, Montenegro, Dominican Republic, Ecuador, Bolivia, Tunisia, Egypt, Syria, Morocco, Iraq, Afghanistan, Qatar, Bahrain, Chad, Cote d'Ivoire, Central African Republic, Congo, Zimbabwe, Somalia, Kenya, Angola, Guinea, Niger, Madagascar, DRC, Swaziland, Burundi, Mozambique, Rwanda, Senegal, Comoros, Nepal, Bhutan, Maldives, Pakistan, Thailand, Myanmar, East Timor, and Fiji. The number grows to forty-six if we count the interim constitutions of Libya, Yemen, South Sudan, and Sudan. Data: Comparative Constitutions Project (accessed Feb. 5, 2019).

institutional structure that reflects those values, and regulatory mechanisms for policy-making that enable *trade-offs of inclusion*. By trade-off of inclusion, I mean a process whereby institutional access is extended differentially across the domains of politics, economics, law, and society to increase prosperity without jeopardizing stability.

I.1. Existing Accounts

Positive accounts of constitutional stability from the field of institutional analysis focus on the role of self-enforcing rules—that is, rules that make all parties better off, eliminating the need of a third-party enforcer tasked with sanctioning violations.² These rules impose limits on the government, provide incentives for actors to acquiesce, and create institutional mechanisms to punish those who renege (Hardin 1989; North and Weingast 1989; Ordeshook 1992; Greif 1998; Gonzales de Lara, Greif and Jha 2008; Mittal and Weingast 2013).³ Self-enforcing constitutional *equilibria* are thus, by definition, stable. They are also associated with increases in economic performance (see especially North and Weingast 1989; Greif 1998). The notion of self-enforcing constitutions is therefore a useful heuristic to investigate how constitutions may support political stability and economic growth.

However, analyzing constitutional stability as a product of self-enforcing rules tells us nothing about the processes that brought those rules into being. One example will suffice. North and Weingast's (1989) influential study of the Glorious Revolution in seventeenth-century England focuses on the Crown's arbitrary and confiscatory power as the driver of constitutional breakdown, and describes the fiscal and institutional changes that successfully addressed that problem as the elements of a self-enforcing pact (1989: 808–12, 815–17). But how did actors with profoundly different interests and preferences (the Crown and the Parliament) come to agree to those changes? North and Weingast's story does not say.⁴

2. On self-enforcing democracy: Przeworski (1991; 2006); Weingast (1997; 2004); Boix (2003); Acemoglu and Robinson (2006); North, Wallis, and Weingast (2009); Fearon (2011). On self-reinforcing institutions: Greif and Laitin (2004).

3. Like Hardin (1999) I highlight the relevance of processes of consensus-building for a coordination theory of constitution-making. But consensus here is not mere acquiescence. It is instead a positive (because it aids coordination) and normative (because it is grounded on a shared view of the basic elements of good government—what I later refer to as legality) building block of constitution-making.

4. Similarly, Mittal and Weingast's (2013) theory of self-enforcing constitutions posits consensus as one of the conditions for stability but does not explain how the consensus emerges.

Scholars in other disciplinary fields have similarly downplayed this preconstitutional stage. In some important respects, the trend began as early as 1651, when political philosopher Thomas Hobbes postulated the existence of an original covenant, a “unity of . . . all,” at the heart of the foundational act of government—the establishment of Leviathan (1994 [1651]: 109). But Hobbes never addressed the question of how exactly humankind would reach this foundational agreement, given the obstacles to cooperation that doom people to live in the state of nature to begin with.⁵ More recent studies of constitution-making also begin, so to speak, when the struggle ends. The Comparative Constitutions Projects (CCP) relies on the existence of constitutions as documents (Elkins, Ginsburg, and Melton 2009: 6 and ch. 3; Ginsburg and Huq 2016). Indubitably, constitutional provisions reflect compromises, but then again it remains unclear why the parties chose the option to compromise in the first place. Similarly, constitutional political economy (CPE) moves from the existence of constitutions to assess the impact of different provisions on various political and economic outcomes (Persson and Tabellini 2003; Voigt 1997; 2011).⁶ Comparative constitutional analyses have shed much-needed light on

In the authors’ application of the theory to America’s early constitutional struggles, the focal solution is derivative of the equilibrium constitutional rules. The 1787 constitutional pact in the United States imposed limits on the power of the federal government—including separation of powers, federalism, enumerated powers, the bill of rights, and parity between North and South (2013: 290–91). Those limits constituted “bright lines focal solutions defining for citizens the appropriate use of governmental power” (2013: 291). But it remains unclear how federalist and anti-federalists came to agree on a particular set of bright-lines rules that satisfied their differing views of what an optimal constitutional solution would look like.

5. More specifically, by appealing to reason, individuals can understand that it is in their long-term interest to establish Leviathan. However, it is unclear that rationality can trump other features of human nature (e.g., competition, greed, and diffidence) and that it can do so for all at the same time. These objections concern the commonwealth by institution more than the commonwealth by acquisition. Many thanks to Arash Abizadeh for helping me clarify this important distinction.

6. Constitutional political economy emerged as a field in the 1980s as part of the revival of institutional analyses connected with the New Institutional Economics of Douglass North. The founders of the discipline, James Buchanan and Gordon Tullock (1962), pioneered the normative approach to constitutional political economy, stressing the relevance of consensus. For Buchanan and Tullock, consensus required unanimity as a means to achieve, at great costs, a Pareto-optimal result. The positive strand of the literature began with an assessment of whether constitutional rules affect economic and political outcomes, including macroeconomic, fiscal policy, and governance variables (cf. Voigt 2011: 210). Other contributions have focused on the procedures for choosing or amending constitutional rules. Elster (1993) focused on constitutional conventions, and later analyzed the motivations guiding framers (1995; 2000). Riker

constitutions as critical determinants of state performance. But like studies of institutions-as-*equilibria*, these analyses fail to account for the processes that bring constitutions into being.

To say that the question of constitutional origins has been downplayed in some branches of the literature does not mean of course that the question has never been asked. An influential theory attributes constitutional origins and design to processes of diffusion and imitation across countries (Simmons and Elkins 2005; Tushnet 2009). Another explanation focuses on the role of framers (Ackerman 1991; Elster 1995; 2000; Schofield 2006).⁷ These studies concentrate on the processes that bring constitutions into being, but tend to downplay the question of constitutional endurance.⁸

The goals of this book are twofold. First, to weave these strands of the literature to provide a theoretically rigorous and empirically new account of constitutional emergence and endurance. Second, to connect the study of constitutions to the study of the conditions that foster political and economic development.⁹

(1983; 1984) focused on the role of creative processes (heresthetics) in structuring bargaining among actors. More recent work in constitutional political economy has sought to endogenize constitutional provisions, but no comprehensive theory of constitutional emergence and performance has yet been developed (on presidentialism vs. parliamentarism: Aghion et al. 2004; Robinson and Torvik 2016; cf. Voigt 2011: 246–47).

7. On cooperative vs. distributional models of framers' behavior: Negretto (2013: 49–53). Negretto's own account of constitution-making processes in Latin America blends a choice model with endogenous and exogenous drivers of constitutional emergence. For Negretto, constitutional choice depends on preexisting constitutional structures, partisan interests, and the relative power of reformers. My account is compatible with Negretto's approach in that it highlights actors' choices, as well as exogenous shocks and endogenous processes. However, the case of Athens highlights a different set of factors driving constitutional choice.

8. Ackerman's (1991) discussion of constitutional change is of course related to the question of constitutional endurance, but endurance is not the focus of his contribution (on constitutional change and popular constitutionalism, see also Griffin (1996); Kramer (2004)). Similarly, Ginsburg and Huq (2018: ch. 6) focus on constitutional design to minimize the risk of democratic backsliding. Finally, a number of studies of political transitions, peace processes, and interim constitutions address, if tangentially, the question of constitutional process (see, e.g., Alston and Ginsburg 2017).

9. My account is compatible with Alston et al.'s (2018) recent analysis of constitutional change as driven by changes in what they term "core beliefs" (see also Alston et al. 2016). By "core beliefs" the authors mean beliefs about how the world works, to be distinguished from "behavioral beliefs," defined as beliefs about other people's behavior. In their model, constitutional change occurs when core beliefs become malleable as a result of a gap between expectations and outcomes. Malleable beliefs, in turn, create "windows of opportunity" for leaders.

Recent work in political economy has highlighted the critical role of inclusive institutions for development (North, Wallis, and Weingast 2009; Acemoglu and Robinson 2012; 2016). Existing theories, however, remain rather vague on the causal mechanisms driving the emergence of inclusive institutions. For Acemoglu and Robinson (2012), inclusive institutions develop at “historical conjunctures” that jumpstart “virtuous cycles.”¹⁰ North, Wallis, and Weingast’s theory of social orders provides somewhat more detail, but the question of how a polity moves through stages of development—from natural state to the doorstep conditions and finally to open access, where inclusion is more fully realized—remains undertheorized.¹¹

We know, therefore, relatively little about how inclusive institutions emerge. But we know that constitutions matter. Findings from the CCP suggest that constitutional endurance is correlated with constitutions that are more flexible, more inclusive, and more specific—that is, constitutions that can adapt to changing circumstances, include relevant social and political actors, and incorporate more detailed provisions (Elkins, Ginsburg, and Melton 2009: 8, ch. 4). The CCP thus suggests an important correlation between inclusivity and constitutional endurance. I further probe this correlation by analyzing how constitutional structures may support the emergence of inclusive institutions.

Core beliefs create a new institutional structure during “constitutional moments,” and take root through a process of “institutional deepening.” This book provides a more fine-grained lens to understand the processes that take place during the critical stages of “window of opportunity” and “institutional deepening.”

10. Acemoglu and Robinson (2012) suggest that economic development relies on the establishment of inclusive political institutions. Inclusive political institutions, in turn, rely on state capacity and on a broad distribution of power in society. More recently (2016: 41), the authors argued that the processes of building state capacity and fostering a broad distribution of power occur in a “basin of attraction,” and understanding this basin of attraction is a key to “understanding the emergence of inclusive political institutions.” Here, the authors take up the case of ancient Athens at the time of the transition to democracy, suggesting that the institutionalization of informal social norms within the polis’ central structure enabled the Athenians to strengthen the state while maintaining a broad level of citizen control over state institutions.

11. North, Wallis, and Weingast (2009) speak of development as the transition from a natural state to an open-access order via three doorstep conditions: perpetuity for the state and other organizations, rule of law for elites, and political control over the sources of violence. An open access society, for the authors, features impersonal, perpetual, and inclusive political and economic institutions.

I.2. Constitution Building in Ancient Athens

To explore the conditions that enable stable, growth-enhancing constitutions to emerge and endure, I analyze the case of ancient Athens.

Many readers will be familiar with the fact that, in the classical period (roughly from 508 to 322 BCE¹²), the ancient city-state (*polis*; pl. *poleis*) of Athens created the world's first large-scale experiment in democratic governance. For almost two hundred years, the Athenians governed themselves through institutions that featured the active participation of the entire adult male population (ca. forty thousand to sixty thousand people).¹³ Some readers may even be familiar with the fact that, in the same period, Athens sustained remarkable levels of economic and social development (Morris 2004; Ober 2015a; Bresson 2016): economic growth matched that of the most successful polities on the eve of the Industrial Revolution;¹⁴ the population was healthy and urbanized (Morris 2004; Lagia 2015; Hansen 2006a; 2008); real wages were surprisingly high by premodern standards (Scheidel 2010); and inequality—in terms of wealth, landholding, and income—was low, indicating a reasonably fair distribution of the proceeds of prosperity (Kron 2011; 2014; Morris 1998; Ober 2015a; 2017).¹⁵

But classical Athens was not always democratic, stable, and prosperous. In the late fifth century, the polis' democratic institutions succumbed to the joint pressure of coups and institutional erosion, the two leading causes of contemporary democracies' death (O'Donnell 1973; Linz 1978; Levitsky and Ziblatt

12. All dates are BCE unless otherwise specified.

13. A complete history of Athens' constitutional development would encompass the original transition to democracy, as well as the events that I discuss here. Tracking this development in its entirety, however, goes beyond the scope of the present book. I focus on the events that took place in the late fifth and fourth centuries for two reasons: first, Athens' democratization has been the object of much recent social scientific scholarship (e.g., Fleck and Hanssen 2006; Lyttkens 2006; Ober 2008; McCannon 2012; Hanssen and Fleck 2013; Acemoglu and Robinson 2016); second, in the fourth century, the absence of the empire provides a cleaner case for an analysis of Athens' institutions.

14. Population growth measured at 0.4% per annum; aggregate consumption measured at 0.6–0.9% per annum (as compared to Holland's 0.5%); per capita consumption measured at 0.15% per annum (as compared to Holland's 0.2% and Rome's 0.1%): Morris (2004; 2005); Saller (2005); Ober (2010; 2015a). Ober (2015a) modifies Morris' earlier estimate of per capita consumption (as ranging between 0.07 and 0.14%).

15. Gini coefficients for wealth, landholding, and income have been estimated at 0.708; 0.382–0.386; and 0.40–0.45, respectively. The last measure includes slaves and resident foreigners.

2018; Ginsburg and Huq 2018). In the span of a decade, roughly from 413 to 403, Athens experienced five constitutional transitions, lost the empire that was the foundation of its economic structure, was bereaved of half of its citizen population, and ultimately devolved into civil war. After the civil war, the Athenians reestablished democracy. The new democracy remained in place until the Macedonian conquest of Greece eighty years later. During this period, Athens was once again stable and remarkably prosperous (Ober 2008).

Why was democracy reestablished, after it had failed? Why was the new democracy stable, after a decade of instability? And how did the polis manage to restore prosperity, after such a tremendous shock to its economic structure?

I argue that Athens' political and economic development owed to the creation of a new constitutional order that shaped the direction of institutional change, social choices, and economic policy throughout the fourth century. By "constitution," I do not mean a written document laying out detailed principles of government. Athens produced no such document. Instead, following Ordeshook (1993: 232), I define the Athenian constitution, minimalistically, as a "mechanism . . . to guide the formulation of legislation and law."¹⁶

Athens' constitution was grounded on a consensus on legality that opposing parties hammered out during a decade of violent constitutional struggles.¹⁷ The consensus inspired the creation of a set of new, self-enforcing institutions. These included the creation of a written law code; an additional legislative institution; new procedures to regulate the process of lawmaking; and measures to protect people's freedom, property, and dignity. As such, the new institutions defined both a series of substantive rights—or, with Ober (2000), "quasi-rights"¹⁸—as well as the rules for making rules. The rules for making rules regulated the decision-making process in ways that encouraged policy innovation without threatening the social order. Throughout the fourth century, bargaining under the constitution enabled a gradual expansion of institutional access to economically productive noncitizen actors in the spheres of law, the economy, and society. Access to political institutions, and thus to the

16. This definition does not mean to suggest that we should understand the Athenian constitution as a small-c constitution (constitution qua constitutional order: Elkins, Ginsburg, and Melton 2009; or core beliefs: Alston et al. 2018). Instead, as I explain below, despite the absence of a written document, the Athenian constitution laid out both substantive rights and procedural rules for making rules.

17. My reading offers support to recent arguments concerning the importance of consensus in Athenian politics and deliberative settings (Canevaro 2018b), regardless of whether majority rule was or was not the decision-making mechanism of choice (Schwartzberg 2013b).

18. With the label "quasi-right," Ober (2000: 30) distinguishes between the modern definition of right as "natural, innate and inalienable," and the Athenian notion of rights as "performative and contingent."

decision-making process, remained instead restricted to Athenian citizens. The constitution therefore enabled a trade-off of inclusion between political, economic, legal, and social institutions that fostered prosperity without jeopardizing stability.

The case of ancient Athens allows us to take an additional step in the exploration of the institutional bargains that lie on a country's road to development. The existing paradigm focuses on political inclusion as the precondition for access to other goods. This process is well captured in North, Wallis, and Weingast's "incorporation of citizens" (2009: 118–21). In their account, political inclusion in England, as well as in France and the United States, yielded access to the rule of law, infrastructure and education, labor protection, and social insurance programs.¹⁹ The practice goes back at least as far as the Romans, who extended citizenship as a result of both conquest and emancipation.²⁰ But in postulating the primacy of the political, the existing paradigm obscures the possibility of a series of intermediate steps. The story of Athens suggests that meaningful forms of welfare-enhancing inclusion need not await the high-stakes bargains that compel dominant elites to share power (Carugati 2019b).

I.3. Methodology

Ancient Athens provides a remarkable laboratory to study the determinants of successful constitution building. First and foremost, Athens' constitution was, like Athens itself, relatively simpler in its institutional make-up compared to modern constitutions. Second, constitution building in Athens was a thoroughly experimental process not driven by external models or preexisting commitments to a given normative or institutional structure—it was constitution building, so to speak, in the wild.²¹ Third, insights derived from considering

19. The expansion of access to nonpolitical institutions is not unique to ancient Athens. In France, for example, economic rights for women preceded the franchise, but still may have had empowering effects (Dermineur 2014). Similarly, enforceable property rights existed for merchants in many parts of medieval and early modern Europe (Milgrom, North, and Weingast 1990; Kadens 2015). Athens provides a particularly suitable laboratory to study these processes for reasons that I discuss below.

20. By the beginning of the first century BCE, all those residing in the Italian peninsula were Roman citizens. The process continued during the imperial period, and culminated in Caracalla's edict of 212 CE, which extended citizenship to all free men in the Roman Empire.

21. Athens' previous democratic structure should not lead us astray. As I argue in chapter 2, Athens' commitment to democracy was shattered in the late fifth century. If democracy was restored, it was due in part to the failure of alternative constitutional options, and in part to the Athenians' ability to adapt democratic institutions in response to the crisis.

consensus mechanisms within a population are arguably much clearer than those derived from analyzing consensus mechanisms within a group that weakly represents a population. Bargaining among elites necessarily implicates the organizations and groups they represent, which in turn implicates complex theories of political representation (see e.g., Wallis, in progress; Alston et al. 2018: ch. 8). For all these reasons, ancient Athens offers a cleaner case for analysis, enabling the study of the *minima* of successful constitution building.

Another reason to select ancient Athens as a case study is that constitution building there was strikingly successful. According to the CCP, the average life-span of a modern constitution is nineteen years, and only a handful of constitutions have survived for more than fifty years (Elkins, Ginsburg, and Melton 2009: 1–2). Athens' constitution lasted for over eighty years, presiding over a period in which the polis rose from the ashes of a civil war to reach the zenith of Greek prosperity.²²

Finally, Athens provides a remarkably well-documented case of constitution-making and development. First, we have a number of literary accounts of the constitutional struggles and reforms, written by firsthand witnesses of the events (like the orator Andocides and the historian Thucydides), as well as later commentators (like the philosopher Aristotle). The literary sources are complemented by a wealth of epigraphic and archaeological evidence regarding, first and foremost, inscribed laws and policies. In addition, two recent landmark books have compiled and distilled this evidence (Shear 2011; Carawan 2013), providing new and compelling accounts of many aspects of this important period of Athenian history. Alongside primary and secondary accounts of the constitutional struggles, there are a number of new interdisciplinary studies of Athenian politics and economics. Indeed, this ancient case study is rapidly becoming a favorite among political economists (e.g., Acemoglu and Robinson 2016; Fleck and Hanssen 2006; forthcoming; Hanssen and Fleck 2012; 2013; Tridimas 2011; 2012; 2014; 2015; 2016; 2017), economists and economic historians (e.g., Bergh and Lyttkens 2014; Lyttkens 1991; 2008; 2010; 2013; Kaiser 2007), and legal scholars (e.g., Lanni and Vermeule 2012; 2013; Werhan 2012; Gowder 2014; 2016).²³

22. In this context, it would be interesting to systematically compare the average lifespan of constitutions among what North, Wallis, and Weingast (2009) call “open access orders.” The constitutions of open access orders in Western Europe and North America, arguably the most developed countries in the world, average eighty-seven years. It is harder to determine which countries are open access in other regions of the world, but it is nevertheless clear from the data that the average lifespan of constitutions in other regions is much shorter.

23. The list is not meant to be exhaustive. In the course of the book, I will return to these contributions and add many others, including the work I conducted with my coauthors in

There are, of course, gaps in the historical record. As we will see, in order to track the development of Athenian policy in the fourth century, I support the existing ancient evidence with a model of decision-making. The model allows me to reconstruct the incentives regulating the behavior of actors in the public institutions of the polis, even if we do not have a complete record of the policies passed during the eighty years in which the constitution was in place. Additionally, two types of evidence would be ideal to establish a causal relationship between the constitution and political and economic development. First, comparative evidence from other Greek poleis suggesting that similar arrangements yielded stability and growth elsewhere and, conversely, that the absence of such arrangements yielded unrest and stagnation. But because we know so little about other Greek poleis, this investigation is unfeasible. Second, evidence that the collapse of the constitutional structure in Athens coincided with a decline in political and economic development. This evidence exists, but is largely inconclusive. After the Battle of Amorgos against the Macedonians in the year 322, the institutions that sustained the fourth-century constitutional order—most notably the law-making institution of *nomothesia* (on which more in chapter 2)—were dismantled and never resurfaced (Canevaro 2011: 58). The collapse of the constitutional structure coincided with frequent constitutional transitions and a slow, yet ineluctable decline in Athens' prosperity.²⁴ It would however be preposterous to push this evidence too far. Massive changes affected Athens' stability and prosperity after 322, which go well beyond the demise of its constitutional structure. The year before the Battle of Amorgos, Alexander the Great had conquered the entire known world, and the Macedonian Empire reached as far as India. In the vastly expanded Hellenistic world, the Greek poleis became pawns in the endgame of world conquest—first with Alexander himself, and later with his successors. As the epicenter of the Mediterranean shifted abruptly toward the East, the loss of the polis' constitutional structure remains an important, but perhaps only a secondary factor in its political and economic decline. To address these evidentiary constraints, in chapter 5 I collect and analyze the available comparative and

economics, political science, and law: Randy Calvert, Robert Fleck, Gillian Hadfield, Andrew Hanssen, and Barry Weingast.

24. Greek economic growth declined in the third century compared to the peaks reached in the fifth and, particularly, in the fourth (Ober 2015a: 3), though perhaps not as abruptly as previous scholarship suggested. Athenian prosperity followed the general trend, though the city's prosperity may have declined somewhat more abruptly than that of other Greek poleis (compare Ober 2015a: 3 with Ober 2008: 293). Note, however, that development proxies are different in the two studies: Ober (2008) measures Athenian state capacity as proxied by military power, public buildings, and domestic programs, while Ober (2015a) measures development in terms of population and consumption.

counterfactual evidence to show that, in the absence of the new constitution, Athens' development in the fourth century would have lagged.

The case-study approach raises the important question of the generalizability of the results presented here. While there are obvious limits to what ancient Athens can teach us about constitution-making today, any in-depth case study would be subject to similar limitations. Constitutions are indeed written under special circumstances, but that does not mean that endogenizing them is a “nearly impossible” task (Voigt 2011: 246–47). After all, if we take this historicist-sounding argument to its logical extreme, the whole field of comparative politics (including positive constitutional political economy) would cease to exist.

There is much to learn from this unique historical case study. Indeed, the features that make Athens the perfect case to study the question that animates this book—how do stable, growth-enhancing constitutional structures emerge and endure?—also make it unparalleled in comparative politics. While I discuss several contributions to a number of different disciplinary fields below, one preliminary point deserves specific mention here. Studying constitution-making in ancient Athens is not meant to yield a set of institutional outcomes to be replicated in modern nations. The question for the people of Myanmar, to return to the case with which I opened this introduction, is not so much whether to choose between the models of, say, the United States, Germany, or ancient Athens. Whereas the details of Athens' case cannot and should not be generalized—for example, as we will see, the specific content of Athens' consensus on legality was rooted in Athens' legal culture and traditions—the case of Athens suggests a series of minimal conditions for successful constitution-making that consider both institutional structures and the values that sustain them. Moreover, Athens' case shows that the goals that contemporary societies seek to achieve by designing complex formal constitutional arrangements—namely, democracy and economic growth—were historically achieved in the absence of such arrangements. As such, Athens offers a new body of theoretical and empirical evidence that we can build on to spur theory development and testing.

I.4. Alternative Explanations

In this book, then, I argue that a new constitution fostered political and economic development. But what other variables could have caused Athenian development in the fourth century?

To begin, Athens' development could have been indebted to geographic or cultural factors—the two alternative leading explanations for differential developmental outcomes in the literature (Acemoglu and Robinson 2012).

Geographic explanations are the easiest to rule out. Athens was not always democratic, and it was not always stable. As to the city's prosperity, the classical peak was not replicated until the twentieth century (cf. appendix B; Ober 2015a). As we will see in chapter 5, geography did play a role in Athens' development—particularly when it came to endowing the polis with a fine harbor—but geography alone certainly did not determine Athens' stability and prosperity in the classical period. Ruling out cultural explanations is perhaps more difficult—after all, in the fifth century, the Athenians were known for their “interventionist hyperactivism,” or “busybodiness” (*polypragmosynē*, Thuc. 6.87.3). In a famous passage from Thucydides' *History of the Peloponnesian War* (1.70.2–3; trans. Strassler 1996), the Corinthians describe the Athenians as “addicted to innovation . . . adventurous beyond their power, and daring beyond their judgment.”²⁵ So perhaps the Athenians' cultural traits are responsible for the performance of their polity. But then again, if cultural variables were to explain Athens' success, it is hard to justify why such growth- and stability-enhancing traits thrived only in the classical period. Hiving off culture from institutions makes it impossible to answer this question.

Institutions thus played a role in Athens' political and economic development. But was Athens' development simply the product of path-dependent institutional processes? Because Athens was democratic, stable, and prosperous before and after the late fifth-century crisis, critics may argue that the new constitution had no impact on stability and growth. In terms of political structure, the costs of creating nondemocratic institutions after a century of democracy were sufficiently high that it was neither in the interests of the elite, nor of the masses to incur those costs. In terms of economic structure, the imperial fifth century had placed Athens and its harbor, Piraeus, at the center of Eastern Mediterranean trade and the costs of finding another commercial hub were prohibitively high for both Athenian and non-Athenian traders, especially in the short run.²⁶

25. All translations of Thucydides are from Strassler 1996, unless otherwise noted. To facilitate access to the ancient sources, throughout the book, I used translations from the online database Perseus (<http://www.perseus.tufts.edu/hopper/>) or other standard translations.

26. A more nuanced version of the argument runs as follows: Athens' prosperity in the fourth century depended on a relatively quick recovery (before investing in building new port facilities elsewhere became an attractive solution for rival poleis), and a quick recovery was made possible by two quite obvious factors: first, the extent of the war-led crisis, which yielded a large peace dividend in its aftermath; and second, cash from Persia, which, in an effort to curtail the rising power of Sparta after the Peloponnesian War, funded a military revolt in Greece. The question of whether Athens received money from Persia is problematic. Xenophon denies it (*Hell.* 3.5.2), but other sources confirm the disbursement (*Hell. Oxy.* VII.2ff.; Plut. *Artax.* 20; Paus. 3.9.8), and the fact is accepted by many scholars (cf. Seager, 1994: 98). Persian

Neither of these arguments is supported by the evidence. In the last decade of the fifth century, not one, not two, but three oligarchic governments ruled Athens. This fact suggests a willingness to invest in oligarchy. If we want to understand why oligarchy was not the option of choice, we must investigate the reasons for its failure—a task to which I turn in chapter 2. Similarly, path-dependent economic explanations fail to take into account the massive changes in Athens' economic structure after the loss of the empire. The harbor of Piraeus surely provided a favorable location for trade (and thus foreign merchants had conspicuous incentives to stick with Piraeus). But Piraeus was not the only such location in the Aegean (cf. chapter 5 and appendixes A and B). In fact, after the Macedonian conquest of Athens in the year 322, Piraeus ceased to provide the primary destination for Aegean trade. As Athens' power declined, Rhodes and Alexandria rose to prominence. There was nothing intrinsic to Piraeus that prevented this shift. Without the empire, Athens had to come up with an entirely new set of policies to incentivize foreign merchants to trade in Piraeus. Path-dependent explanations cannot account for these aspects of policy innovation. As such, path-dependent explanations fail to provide a robust account of Athens' fourth-century political and economic development.

In the book *Democracy and Knowledge*, Josiah Ober offers an alternative explanation of Athens' development. For Ober (2008: 37–38), “democratic Athens was able to take advantage of its size and resources . . . because the costs of participatory political practices were overbalanced by superior returns to social cooperation resulting from useful knowledge as it was organized and deployed in the simultaneously innovation-promoting and learning-based context of democratic institutions and culture.” For Ober, then, Athens' development owed to the polis' democracy, and, in particular, to the ability of democratic institutions to aggregate, align, and codify useful knowledge dispersed across the population. It was because Athens knew what the Athenians knew (2008: 118) that the polis was so successful. The argument of this book is not incompatible with Ober's. Indeed, I show that if democratic institutions were critical to Athens' performance, in the fourth century the Athenian constitution was critical to the existence of democratic institutions.

The late fifth century constitutional struggles and institutional reforms have been the object of much attention among classical scholars.²⁷ However, the

money, then, played a part in Athens' recovery, as it enabled Athens to build a new fleet, construct new walls, and regain control of the grain-rich islands of Lemnos, Imbros, and Scyros. Once the polis acquired the means for its own defense and expansion, it was able to harness the advantages of its former success.

27. Despite the increasing attention devoted to classical Athens as a comparative case study, few social scientists have focused on this period. Ober (2015a) focuses on Greece as a whole.

existing literature is lacking in two respects. First, in terms of periodization, most studies concentrate on reconstructing one (or more) episode in a long chain of constitutional transitions, and keep the events before and after the end of the Peloponnesian War in the year 404 rigidly separate (e.g., Krentz 1982; Kagan 1987; Strauss 1987a; E. M. Harris 1990; but not Shear 2011, as we will see). Second, in terms of analytical focus, much has been written on the restoration of democracy in the year 403, but the assumption animating these studies is that democracy in Athens was the only game in town and oligarchy is never considered a real possibility (this assumption, as I will show in chapter 2, is mistaken). As a result, existing accounts seek to explain not why democracy was reestablished, but only why the new democracy was stable. Among these explanations, some focus on the strength of Athens' democratic culture, especially as enshrined in the amnesty agreement that put an end to the civil war (Loening 1987; Loraux 2002); others focus on the role of Sparta as a third-party enforcer of the amnesty (Todd 1985); and others yet focus on the institutional reforms that followed the restoration of democracy (Harrison 1955; MacDowell 1975; Hansen 1978; 1979a; 1979b; 1985; 1987b; 1990a; 1999; Robertson 1990; Rhodes 1980; 1991; 2010; Eder 1995; Carawan 2002; R. Osborne 2003). Few studies consider the question of the long-term stability of the new institutional structure, but rarely analyze the evidence beyond the third decade of the fourth century (Wolpert 2002; Quillin 2002).²⁸ None of the studies mentioned above considers the question of the relationship between Athens' new institutions and the polis' economic performance in the post-war period, let alone in the rest of the fourth century.

Acemoglu and Robinson (2016); Lyttkens (2006); Fleck and Hanssen (2006); McCannon (2012); and Hanssen and Fleck (2013) focus on the archaic period. Fleck and Hanssen (forthcoming) do take up the transition between the fifth and fourth century, suggesting that economic opportunities drove institutional change. When the loss of the empire made credible commitment necessary to Athens' ability to generate revenues, the Athenians established a set of rule-of-law institutions to constrain the power of the Assembly. One may counter that when the Athenians designed new institutions in the late fifth/early fourth century, allegedly to match new wealth-generating opportunities, such wealth-generating opportunities were not yet quite obvious. But by focusing on economic opportunities, Fleck and Hanssen complement the analysis offered here, which focuses on the role of political and resource constraints in shaping the process of institutional change.

28. Carawan (2013) considers the relationship between the amnesty and the reforms, as well as the issue of stability. I discuss his contribution in greater depth in chapter 2.

I.5. Contribution

The argument that I formulate in the pages that follow differs from existing accounts in the field of classics in two major respects. First, I take seriously the possibility that oligarchy could have provided an alternative to democracy. Therefore, I seek to reconstruct the conditions that made democracy once again a viable constitutional option after the collapse of the fifth-century structure. Second, I address the question of Athens' post-imperial success as a long-term process that encompasses the reasons behind the collapse of the fifth-century democratic equilibrium, the conditions that enabled the emergence of a new equilibrium, and the sources of the new equilibrium's stability and prosperity over time. Taking a broader view of the causes and consequences of institutional change, I provide a genuinely new and testable account of the sources of Athens' political and economic development.

Moreover, the argument adds to the political economy of ancient Greece by focusing on the role of legal institutions, which are frequently ignored in the literature. Studies of the political and economic development of ancient Greece have largely followed two parallel paths. On the one hand, analyses of economic structures and performance—often focused on broad categories such as “Greece” or “the Mediterranean”—have tended to neglect their political dimension (e.g., Scheidel, Morris, and Saller 2007; Bresson 2016; E. M. Harris et al. 2016). On the other hand, research focusing on political regimes and political institutions has largely avoided the thorny question of how these institutions influence economic growth (e.g., E. W. Robinson 2011; Simonton 2017; Teegarden 2014). Only very recently, ancient political economy has begun to receive greater attention. Important contributions include Josiah Ober's *Democracy and Knowledge* (2008) and *The Rise and Fall of Classical Greece* (2015a), Emily Mackil's *Creating a Common Polity* (2013), and Monson and Scheidel's *Fiscal Regimes and the Political Economy of Premodern States* (2015). Yet, few of these studies investigate the role of laws and constitutions in supporting political and economic outcomes. This book builds a bridge across the realms of law, politics, and economics. In doing so, I move beyond the selective focus on citizen actors to uncover how citizens and noncitizens negotiated the distribution of social goods through law in the course of the fourth century. As such, the book also contributes to the growing literature that focuses on noncitizen actors and sub-polis institutions in ancient Greece (e.g., Ismard 2010; 2015; Forsdyke 2012; Kamen 2013; Kierstead 2013; Gottesman 2014; Taylor and Vlassopoulos 2015; C. Taylor 2016; 2017).

But the implications of the argument proposed here go beyond the fields of classical history and Greek political economy as such. First, the theory of how a stable, growth-enhancing democratic constitution may emerge and endure contributes to the comparative study of constitutions by identifying a series of

minima of successful constitution building in an out-of-sample, analytically cleaner case for analysis. Second, these *minima* add a dynamic dimension to existing theories of political and economic development by highlighting the role of constitutions in fostering inclusion by enabling institutional trade-offs.

Third, although a large portion of the book is devoted to the positive analysis of institutions, the argument contributes to democratic political theory by focusing on the values that sustain a robust democracy. Political theorists, ancient and modern, emphasize equality and freedom as the hallmarks of democracy. This book stresses legality as the third fundamental attribute of democratic discourse and practice. The evidence from Athens suggests, however, that *law* need not be conceptualized as a set of rules emanating from a sovereign authority—a *state*—that is endowed with the coercive power to enforce such rules.²⁹ Rather than the command of a sovereign power, or a sovereign power in its own right, law in Athens is best understood as a coordination device—a tool that helped citizens solve the coordination problems that plague successful bargaining in the absence of strongly centralized coercive institutions (Hadfield and Weingast 2012; 2013; 2014; Wallis and North 2013; Wallis in progress). This nonreified notion of law-without-sovereignty and the legal and constitutional structure that was built around it, I suggest, played an important role in enabling the citizens of the world's first democracy to overcome the challenges that political theorists, ancient and modern, have traditionally seen as preordaining the fate of democracy as a system of governance. These include the erosion of the democratic advantage in times of crisis, which requires delegation of the *demos*' authority to an all-powerful executive (Schmitt 2004); the necessary devolution of democracy into tyranny (Plato); and the likelihood that a democratic constituency—especially when made up by laymen sitting on a hill—will eventually make some awful policy mistake (Thucydides). The Athenian democracy was not everlasting, but, in the long period analyzed in this book, a cooperation-enhancing consensus on legality helped the polis remain participatory, tyrant-free, and effective in promoting

29. For a discussion of the limits of this assumption in economic theory: Dixit (2004: ch. 1). Classical scholars have variously sought to apply modern definitions of “law” and “state” to ancient Athens. As a result, debates over the nature of Athenian law and the institutions of the polis have been framed in terms of “sovereignty,” “rule of law,” and Hobbesian/Weberian “statehood.” On sovereignty: Hansen (1975); Ober (1989 a and b); Ostwald (1986); and Sealey (1987). On rule of law: E. M. Harris (2006 a and b; 2007a; 2013); Gowder (2014; 2016); contra Lanni (2004; 2006; 2009; 2016). On the statehood of the polis: Berent (1996; 1998; 2000a and b; 2004); Anderson (2009); Hansen (2002). For an overview of these debates: Carugati (2015). I return to some of these issues in the conclusion of chapter 2.

policies conducive to stability, growth, and the well-being of many, if not all of its residents.

Finally, Athenian legality as reconstructed in this book shares many elements with the modern notion of rule of law. Indeed, as I show in chapter 2, Athenian legality measures well against thick definitions of rule of law—for example, the definition proposed by legal philosopher Lon Fuller (1964).³⁰ This finding confirms that the relationship between rule of law and political and economic development is not just a modern phenomenon. But in significant ways, Athenian legality departed from modern notions of rule of law—first and foremost in the way in which the concept was implemented in institutional practice. No privileged body of expert judges and lawyers emerged to shepherd the Athenians toward a more accurate understanding of the laws. No public prosecutor or police force appeared to bring wrongdoers to justice or punish them on behalf of the demos.³¹ The Athenians developed a concept of legality very similar to our idea of rule of law, but without any of the institutions that we are familiar with. Generations of jurists steeped in the Roman tradition looked at Athenian law with contempt. Athenian law and legal institutions, I argue, provide instead a unique alternative institutional model for building the rule of law.

I.6. Outline of the Book

Chapter 1 supplies the necessary context for the discussion of institutional change that takes place in the chapters that follow. First, I provide an account of the early development of Athens' laws and legal institutions. Second, I reconstruct Athens' political and economic structure in the period that preceded the constitutional crisis. Third, I offer an analysis of the reasons behind the collapse of democracy: namely, a combination of external pressures and a crisis of legitimacy rooted in the Assembly's inability to credibly commit to policy.

In chapter 2, I focus on the constitutional crisis and the reforms that followed it. After the collapse of democracy four distinct governments—three oligarchic and one democratic—rose and fell in the span of roughly a decade. As the Athenians responded to the failures of these governments, they came

30. Fuller's definition of rule of law includes eight attributes: generality, publicity, prospectivity, clarity, noncontradiction, constancy, possibility to obey, and general applicability.

31. Athens did employ small groups of individuals who performed various police functions, but the polis lacked an organized police force (Hunter 1994: 143–49). Similarly, even if a number of magistrates were responsible for prosecuting crimes that fell under their jurisdiction, private individuals initiated most public (and all private) cases (MacDowell 1978: 62; contra E. M. Harris 2007b; 2013: ch.1).

to identify, collectively, the basic features that a governmental structure had to display to command their consent. The process of consensus-building revolved around the notion of *patrios politeia* (lit. the constitution of the fathers). The meaning of *patrios politeia* evolved during the struggles. If under the first oligarchic government the notion expressed a vague connection with Athens' past, by the end of the civil war, it became closely associated with the concept of legality, particularly as embodied by Athens' archaic lawgiver Solon. When the constitutional struggles came to an end, the consensus on Solonian legality inspired a set of reforms, which created a new self-enforcing democratic constitution. The reforms were self-enforcing in the sense that they made both the oligarchs and the democrats better off. The oligarchs were better off under a constitutional structure that protected their rights and curtailed the excesses of the fifth-century democracy than they would have been if the winning democrats had imposed a more radical form of democracy or chosen the path of retaliation and revenge. But the democrats were also better off. First, the new constitution was a democracy. Second, going after the oligarchs would have sown the seeds of renewed conflict. Given the challenges that the city faced after the civil war, renewed conflict was not merely a costly option, but a threat to the very survival of the polis.

Identifying a set of new rules that would prevent recurring instability and civil conflict, however, was only the first task that the Athenians faced. In fact, the problem with constitutional agreements is that, over time, things change, bargaining power shifts, and shocks destabilize existing *equilibria*. But as I mentioned earlier, the Athenian constitution proved remarkably long lasting—surpassing by a long shot the average lifetime of modern constitutions—and presided over a period of remarkable economic prosperity.

In chapter 3, I argue that the constitution fostered political stability and economic growth by imposing a set of constraints on the decision-making process based on the consensus on Solonian legality, while at the same time enabling citizens to introduce innovative new measures. To overcome evidentiary concerns, I build a model that reconstructs the incentives regulating actors' behavior under the new constitutional rules. The model yields four results: first, institutional design incentivized proposers of new measures to take into account the preferences of the median, or the average Athenian. Moreover, because the median was relatively stable throughout the fourth century, preferences did not dramatically shift, ensuring a modicum of predictability and consistency over time. Third, institutional design and actors' preferences interacted to enable proposers of new measures to depart from the status quo, sometimes in significant ways. Finally, innovation was more likely to occur when sub-elite actors were involved in politics.

In chapter 4, I show that the available evidence for fiscal and economic policy is consistent with the model's predictions. In particular, I show that fiscal and economic policy reflects growth-enhancing, innovative departures from the status quo, but departures crafted with an eye to preserving the balance of power among domestic actors. Throughout the fourth century, the Athenians sought to regulate the burden of taxation on the elite. But regulating elite taxation made it even harder for the state to generate revenues in a post-imperial era. In the first half of the century, the Athenians sought to extract rents from abroad while developing market incentives at home. After the defeat in the Social War (357–355) ruled out the coercion option, the Athenians sought to intensify the exploitation of domestic natural resources, most notably the harbor of Piraeus and the Laurion silver mines. But in order to intensify the exploitation of Piraeus and Laurion, the polis had to provide incentives to those actors that were primarily involved in such exploitation. As a result, forms of access to social, legal, and economic institutions were extended to selected categories of noncitizens. Access took a variety of forms, including honors and privileges for trade-related services, mining rights, litigation rights in maritime commercial cases, and land grants. The Athenians did not, however, extend political access to these or other actors. The evidence thus reveals the existence of a trade-off of inclusion in Athens' path to development that emerged from the conflicting demands of social order and growth.

In chapter 5, I deploy the available comparative and counterfactual evidence to show that, in the absence of the new constitution, Athens' development in the fourth century would have lagged. First, I use comparative evidence from the Greek polis of Syracuse in Sicily and from Rome under the Republic. Rome and Syracuse experienced crises similar to that of Athens, but responded in different ways. In Syracuse, recurring violence yielded frequent constitutional transitions and a boom and bust cycle where productivity gains were eroded in the long run. In Rome, civil conflict generated unsustainable growth gains for the masses, and was followed by a permanent transition to authoritarianism, which yielded political stability, but also a probable decline in prosperity and an increase in inequality. Second, I counterfactually reconstruct Athens' developmental potential under an alternative constitutional option—namely, oligarchy. I identify the commercial port of Piraeus as central to Athenian prosperity and I show that, had Athens been ruled by an oligarchy, Piraeus' potential would not have been fully tapped. I conclude that an oligarchic Athens would have looked a lot like a retrenched state with limited growth potential. In the conclusion, I summarize the main findings and discuss how the theory developed here can be productively applied to reflect on constitution-making processes today.

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