
Getting rights right: Explaining social rights constitutionalization in revolutionary Portugal

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Constitutions are a key element of the normative script of the modern state. All constitutions lock in rights. Most include social provisions. Some are more generous than others in this regard. But none come close to the Portuguese Constitution of 1976 in the length and detail of its list of social and economic rights. Prevailing theories of institutional origins have generated hypotheses to account for the constitutionalization of second-generation rights. But they fall short of providing a full understanding of constitutionalization and the accompanying emergence of judicial review. Outlier cases, such as the Portuguese, are even more poorly explained by extant explanations. In this article, we test them against the Portuguese case, which, whenever appropriate, is compared with Spain. In doing this, we aim at two things: first, to identify shortcomings in the most familiar frameworks, theories, and hypotheses concerning the causal mechanisms leading to the inclusion of social and economic rights in constitutions; second, to propose alternative explanations where existing ones prove inadequate or insufficient.

1. Introduction

Of the 29 countries in the European Union, Portugal stands out for its constitutional pre-commitment to social and economic rights. Including as many as 29 articles spread over 10 pages, the catalogue of social rights in the Portuguese Constitution is unique in both its extent and detail. The contrast with other European countries is striking. Some European constitutions, such as those of Austria, the United Kingdom, and Germany, do not enshrine social rights at all. Most other European constitutions do include them. But they vary considerably in the precision with which they are defined, in the stipulation of their policy implications, and in the categories of individuals they cater to. In all these regards, the Portuguese Constitution is the most exhaustive. Its exceptional character becomes more apparent when we make a global

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comparison. In a recent 68-country comparative study of constitutional pre-commitment the Portuguese Constitution emerges at the top.¹

Despite the singularity of the case, there has been no study of the origins of constitutional social and economic rights in Portugal.² Political scientists have been particularly interested in analyzing the origins of constitutional arrangements through methodologies as diverse as large-n comparisons, small-n comparative methods, and historically detailed case studies. However, even in the latter case, countries such as India, South Africa, Israel, Hungary, Canada, and New Zealand have commanded most of the literature's attention, and prevailing theories and hypotheses regarding social rights constitutionalization and the establishment of mechanisms of judicial review have been habitually tested against them. This article re-examines the heuristic value of these explanations by means of a detailed analysis of the agents, mechanisms, and motives behind the constitutionalization of social and economic rights in an outlier case, which stands out in comparative large-n studies—Portugal. We further test the robustness of these explanations by contrasting Portugal with neighboring Spain.

Constitutionalization of social rights is often presented as being related to the background socioeconomic conditions of a country, or, more specifically, to the pressure of powerful clienteles upon constitutional bargaining.³ Sometimes their constitutionalization is linked more generally with particular legal traditions, the post-Second World War zeitgeist, as marked by the ascendancy of human rights, and the diffusion of a more egalitarian notion of democracy.⁴ But the most influential theory of the origins of constitutional social rights sees them as the product of a seemingly paradoxical pre-commitment, which eliminates some policy options from political actors' opportunity set, while committing them to considerable future public spending.⁵ The resolution of this paradox is said to lie in the self-interested nature of this "tying of hands." The reasoning here is that partisan politics around institutional solutions aims at producing distributional consequences which are beneficial for parties acting as strategic actors. Hence parties which lock in social rights in constitutions might do so with a view to enhancing their chances of obtaining or maintaining office, either by creating or simply responding to welfare-clienteles, or by deflecting difficult decisions to the judiciary.⁶ Others have claimed that the locking-in of social rights in constitutions is not so much strategic as primarily aimed at protecting them from the harmful desires of future majorities. This view contrasts with the equally common functionalist thesis that constitutionalized social rights are the expression of distrust of government

¹ Avi Ben Bassat and Momi Dahan, *Social Rights in the Constitution and in Practice*, 36 J. Comp. Econ. 107, 103–119 (2008).

² An exception is Pedro C. Magalhães, *Explaining the Constitutionalisation of Social Rights: Portuguese Hypotheses and a Cross-national Test*. Unpublished draft paper (2011).

³ See, e.g., EVELYNE HUBER & JOHN D. STEPHENS, *DEVELOPMENT AND CRISIS OF THE WELFARE STATE. PARTIES AND POLICIES IN GLOBAL MARKETS* (2001).

⁴ See, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

⁵ See, e.g., JON ELSTER, *SOLOMONIC JUDGEMENTS: STUDIES IN THE LIMITATION OF RATIONALITY* (1989).

⁶ See, e.g., RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

by experts and of the intention to limit the discretionary power of the state.⁷ Finally, there are those who regard the enshrining of social rights in constitutions as reflecting the ideological convergence of different parties on the desirability of an active welfare state, or, alternatively, of these parties' exploitation of social rights' strategic symbolism.⁸

These hypotheses underpin our study of the origins of constitutional social and economic rights in Portugal in 1975–1976. This case was selected according to the “outlier cases” principle, which suggests that if existing explanations fail to account for a given historical outcome, then the likelihood of having other explanations accounting for it increases. Typically, in outlier cases, the values on the dependent variable (entrenched social rights, in this case) are especially high, while the prevailing explanations fail to account for it.⁹ In our analysis we adopt a process-tracing approach, in an attempt to identify the complex causal relations linking a hypothesized cause or causes to the outcome of the dependent variable.¹⁰ To this end we draw on a wide range of primary source materials, from party manifestos and constitutional projects, to the public debates on social rights in the Constituent Assembly, and interviews with some of the chief actors in the constitution-making process.

The above-listed hypotheses on the origins of constitutional social and economic rights shape the structure of this article, the main purpose of which is to assess their strengths and weaknesses against the Portuguese case, while also generating new hypotheses that account for constitutionalization in this and similar cases. We begin by looking into background conditions for constitutionalization, both socioeconomic (Section 2) and legal (Section 3), and use the comparison with Spain to uncover unobserved contextual variables and processes whereby these conditions translated into two very different outcomes in each of these countries. In Section 4, we establish whether the “partisan politics” hypothesis is helpful in explaining the entrenchment of a vigorous charter of social welfare rights in Portugal, while also alerting the reader to some “functionalist fallacies” in which it can incur. We then assess the “ideological convergence” explanation for rights' constitutionalization by scrutinizing the nature of the constitutional settlement (Section 5). Finally, we examine the “thin” and “thick” versions of the “realist” strategic explanation for judicial empowerment through rights' constitutionalization (Section 6).

2. Socioeconomic conditions

The socioeconomic conditions and the legal traditions of a country are often given as explanations for the inclusion of social rights in its constitution. These factors are

⁷ See, e.g., Alec Stone Sweet, *Path Dependence, Precedent and Judicial Power*, in *ON LAW, POLITICS AND JUDICIALIZATION* 112 (Alec Stone Sweet & Martin Shapiro eds., 2002).

⁸ See HIRSCHL, *supra* note 6.

⁹ Ran Hirschl, *On the Blurred Methodological Matrix of Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 39, 58 (Sujit Choudry ed., 2007).

¹⁰ James Mahoney, *Revisiting General Theory in Historical Sociology*, 83 *SOC. FORCES* 459, 464 (2004).

structural in nature, and are taken to shape the conduct of political agents by defining the general parameters or background conditions within which they operate. Analysts typically aim at determining the nature, scope, and relative strength of these factors to produce explanations that seek to establish a causal relation between them and individual outcomes. For instance, if one is able to group individual outcomes in categories that match the predictable impact of these external factors, a causal relation between them is suggested. Applying this logic to constitutional social rights, the hypothesis is often raised that the more severe a country's socioeconomic conditions, as measured by its gross domestic product (GDP) per capita, the more likely it is to lock social rights in the constitution.

There is a general problem with this type of approach, however. The statistical methods used to estimate the average net effect of factors such as socioeconomic conditions fall short of identifying the reasons *why*, and the processes *whereby*, they produce the effects they do. In the absence of the establishment of a meaningful connection between factors and effects, whether the purported association implies true causation, or is dependent on a further, unidentified explanatory variable, to produce the identified effect, remains unsettled. To dig deeper into this question of factors as mere conditions or as causes, one must seek to account for outcomes by elucidating the mechanisms that generate them.

To establish this, we proceed to tracing the reasons why actors involved in two contemporaneous constitution-making processes, despite facing similar macro-socioeconomic conditions, arrived at two very different treatments of social rights in their constitutions: the Portuguese Constitution of 1976 and the Spanish Constitution of 1978, both of which are still in force. In selecting these two countries, we follow the “most similar cases” principle of research design:¹¹ i.e., by comparing cases that have similar background socioeconomic conditions but vary in the dependent variable—the level of constitutional pre-commitment to social rights—we seek to hold constant non-key variables, while isolating our main independent variables.

Both Iberian countries lived under rightwing dictatorships from the 1930s, made their transition to democracy in the mid 1970s, and underwent democratic constituent processes less than two years apart. In Portugal, the Constituent Assembly worked between July 1975 and April 1976, whereas in Spain, the Cortes—the two houses of the Spanish parliament—wrote the current Spanish Constitution between August 1977 and December 1978. At the time of the constitutional writing, the socioeconomic conditions in the two countries were fairly similar. Both countries had undergone comparable periods of robust economic growth in the decades preceding their democratic transitions, although this growth was partly a statistical illusion. In 1973, Iberia was still Western Europe's poorest region and one of its most unequal. The oil crisis of that same year, and the economic recession that followed, dealt a devastating blow to the Iberian economies, contributing significantly to the fall of the respective dictatorial regimes.

¹¹ See, e.g., HIRSCHL, *supra* note 9, at 40–51.

Insofar as the socioeconomic conditions were poor, and worsened on the eve of their democratic transitions, this would lead us to expect a high level of constitutional pre-commitment to social rights in both Portugal and Spain. Similar in their socioeconomic standing, they arrived, however, at two very different solutions in terms of constitutional pre-commitment to social rights. Whereas the Portuguese Constitution enshrines a huge amount of social rights, and conceives them as fundamental subjective individual rights, the Spanish Constitution does not have a section on social rights as such. The language of rights as subjective entitlements is dropped in favor of a vague language of *principles*. These are directive principles, “governing the social and economic policy” (Chapter 3, Part I), whose status comes across as merely declaratory. As to the demands constitutional social provisions impose on future governments, the contrast between the Portuguese and Spanish constitutions is again striking. In the Spanish Constitution, social provisions are defined cursorily and governments given an extremely broad range of discretion regarding their effectuation. In its turn the Portuguese Constitution describes each social right in excruciating detail and calls for the creation of the institutions of welfare necessary to their implementation (i.e., a national health service, a social security system, and a national education system). In addition, it lays down the fundamental principles underlying the founding of these institutions (e.g., universality, generality, freedom of charge) as well as their internal organization (decentralization, representativeness, participation). Besides locking in details of social policy, the Portuguese Constitution specifies a mechanism of judicial review for social rights—unconstitutionality by omission (Article 279). The Spanish Constitution, by contrast, adopts a more diffuse formula: “Recognition, respect and protection of the principles recognized in Chapter 3 shall guide legislation, judicial practice and actions by the public authorities” (Article 53, Chapter 4, Part I).

Socioeconomic conditions *per se* are not sufficient to account for these differences. As we saw, at the time of constitutionalization, the economic situation was similar in both countries. To explain why the constitutional settlements diverged, one has to look into possible explanations of why socioeconomic conditions were activated into reasons for strong pre-commitment to social rights in one country and not the other.

Legal innovations require legal innovators: people who adduce arguments for, and make choices as to the scope and extent of constitutional transformation. These choices are constrained by the structure of opportunities and the limits it poses on the kind of constitutional choices that might gain the acceptance of the relevant audiences. The process of transformation of conditions into causes must therefore be primarily understood as a *political* process that is contextually contingent, and whose distinctive nature in Portugal and Spain, we submit, was strongly determined by the nature of their democratic transitions—revolutionary in the first case, “pacted” in the second.

In Portugal, the military coup originated a process that is best characterized as a *rupture* than as a transition. From the political program of the military, which was given constitutional force right after the coup,¹² to the final text of the constitution,

¹² Constitutional Law 3/74, Diário da República No. 112/72, Série I, 14 May 1974, at 617–622.

the purpose of enshrining non-market notions of social justice is apparent. The poor socioeconomic conditions of the Portuguese, and the need to address them through social welfare, are priorities explicitly established both by the military and by the constituents. Given the tutelary powers of the military, and their support of social movements denouncing those conditions outside the assembly, one could be led to assume that the constituents were merely giving in to pressure when thematizing socioeconomic conditions as reasons for ensuring a progressive catalogue of social rights. But if the revolutionary hope of dramatic social change created a vigorous sense of constraint as to the range of legitimate constitutional choices, it would be wrong to infer that they configured a constitutional vision at odds with the vision of the political parties. Party constitutional projects exhibited a substantive commitment to social welfare programs designed to address the relative deprivation of the population. They knew the legitimacy of the constitutional settlement depended on its capacity to *break with a past* of “undeserved misery” (an expression much in use at the time), and realize a democracy that was not simply procedural, but intent on meeting the material needs of the population. The first sign of this commitment was the constitutionalization of a vast catalogue of social welfare rights as effective citizenship entitlements imposing coercive orders on future governments, rather than lofty promises, depending on their goodwill.

In Spain, the transition to democracy was evolutionary, and the constituent process counted on the participation of important sectors of the authoritarian regime. Although socioeconomic conditions provided a salient electoral theme in the 1977 elections to the Cortes, they failed to play a central role in the ensuing political struggle over the country’s new constitution. Other, more divisive themes, separating the conservative religious right from the secular republican left, captured the constituents’ agenda, such as divorce, abortion, the death penalty, electoral law, regional autonomy, and the role of the Church in the education system, none of which proved easy to settle.¹³ The Spanish Cortes were consumed by widely divergent positions as to the extent to which the new Constitution should effect a break with the authoritarian past, and exhaustive bargaining over deep-seated cleavages. As a result, social rights remained in the shadow, with the lack of firm commitment to them translating into the strategic use of ambiguity.

In Portugal, by contrast, political cleavages were being built anew upon the premise of a radical break with the past. Some of the main cleavages dividing parties (e.g., the architecture of political institutions and the economic model) were very deep, but subdued during the constitution-making process to appease the military, and reopened only post-1976. On other issues, a broader agreement on the desirable terms of the break with the past facilitated a relatively consensual settlement, even when disagreement over specifics persisted. All political forces blamed the authoritarian regime for its incipient investment in welfare provisions, and for the neglect of the needs of society’s most vulnerable groups. The constituents drew sharp lines between the regime

¹³ Richard Gunther, *Constitutional Change in Contemporary Spain*, in *REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE IN INDUSTRIAL NATIONS* 23, 51–54 (Keith Banting & Richard Simeon eds., 1985).

of social provisions under authoritarian rule and under the new democracy. First, there was the distinctive conception of social security, health care, and education as fundamental *rights* of citizens, creating a duty on the state for their provision, rather than mere charitable provisions. For instance, the universal and obligatory nature of the new social security system was contrasted with its optional nature under “Estado Novo.” The idea that beneficiaries of the system should be “provident,” and not expect the state to care for their future, was replaced with the notion that it fell on the state to cover risks and to secure social provisions. Besides being more generous, social entitlements should also be given emancipatory purposes. Social rights were no longer conceived as a form of satisfying the needs of the Portuguese for purposes of social control, but as an instrument of progressive politics: in a constituent’s words, as a “way for the state to redistribute wealth for those who need it the most.”¹⁴ Virtually all constituents agreed that “Estado Novo” calamitously failed to realize social justice. Until 1974, constituents observed, the state had been both unwilling and unable to take responsibility for redistribution and social welfare provision. Welfare services chronically lacked financial, human and technical resources to implement even residual policies, and were expected to back up the *status quo*. The new Constitution was to change all this. The welfare services were to be generous and emancipatory, both stimulating and benefiting from the active agency of their beneficiaries.

If the Portuguese constituents deliberately acted as legal innovators, mobilizing background conditions to erect a new welfare politics, they were not alone in their transformative effort. There were also pressure groups involved in promoting the welfare interests of a generally deprived population, whose mobilization contributed to the shaping of constitutional law. This was especially true of medical doctors. Moved by their concern with the limitations of the private healthcare market and by progressive leftist ideals, physicians were a leading force in social welfare policy reforms. In 1975, while the Constituent Assembly debated the right to health, a healthcare service to the periphery was created. This consisted in a one-year deployment of training polyclinic physicians to impoverished rural areas. Alongside this service, medical doctors created health centers in the main cities, which would become the embryo for the local units of the future national health service. Therefore, in medical doctors we find a leading occupational group, whose support for the constitutionalization of a national health service made itself felt in the works of the assembly and in the constituents’ views about what the social constitution ought to mean.

3. Legal traditions

Alongside socioeconomic conditions, legal traditions are often used to explain the inclusion of social rights in constitutions. The so-called “legal origins” hypothesis of Rafael La Porta and his collaborators centers on the economic effects of legal

¹⁴ Martelo de Oliveira, Partido Popular Democrático (PPD) quoted in MÓNICA BRITO VIEIRA & FILIPE CARREIRA DA SILVA, O MOMENTO CONSTITUINTE 114 (2010).

institutions¹⁵ through the categorization of countries according to their legal origin: e.g., it is hypothesized that countries whose legal systems have a common law origin emphasize freedom of contract and the protection of private property, whereas countries with civil law roots tend to favor a more active redistributive role for the state. In order to render this hypothesis empirically verifiable, La Porta suggests the use of dummy variables such as “English,” “French,” “German,” “Scandinavian,” and “Socialist” legal traditions to account for “legal origins.”¹⁶ The application of this to social rights constitutionalization is straightforward: common law countries are expected to be less likely to constitutionally pre-commit to social rights than civil law countries. But this correlation still explains very little, and tells us virtually nothing about the variance of time, scope, and nature of social rights constitutionalization within the same legal tradition.

Both Portugal and Spain, for instance, have a “French” legal origin,¹⁷ which can be traced back to the Napoleonic Code of 1804, and the French invasion of the Iberian Peninsula shortly afterwards. Moreover, there was a migration of constitutional ideas between the two Iberian states from this period onwards.¹⁸ However, there is no identifiable influence between the section on social rights of the Portuguese Constitution of 1976 and the Spanish Constitution of 1978. Only the Spanish Communist Party (PCE) took inspiration from the Portuguese Constitution, when proposing, without success, a lengthy catalogue of social rights, and insisting on the incorporation of constitutional mechanisms for their effectuation. This is proof of the different ideological positioning of the two Iberian party systems. Emerging from a left-wing revolution, the Portuguese party system was born confined to the left-hand of the political spectrum, whereas the Spanish reflected the “pacted nature” of the transition: it was more ideologically spread out and the main forces leaned towards the center.

The most immediate legal sources of the Portuguese Constitution echo this ideological alignment. Some of the sources were more politically sensitive and reinforced ideological cleavages between political forces; others were more consensual and reflected the neutralizing influence of legal experts over the constitution-making process.¹⁹ First among the latter, was the International Covenant on Economic, Social and Cultural Rights of 1966, of which Portugal was one of the first signatories.²⁰ The Covenant itself added a socialist perspective on rights to the traditional liberal emphasis on civil and political rights. Portuguese parties, with their leftist and/or social Catholic inspiration, entrenched a similar commitment to the indivisibility or at least the necessary interdependence of first and second-generation rights. The specific formulation of socioeconomic rights diverged, however, from that of the Covenant in its more

¹⁵ Rafael La Porta et al., *The Quality of Government*, 15 J. L. ECON. ORG. 222 (1999).

¹⁶ Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

¹⁷ See, e.g., Magalhães, *supra* note 2, at 23.

¹⁸ Zachary Elkins, *Diffusion and the Constitutionalization of Europe*, 43 COMP. POL. STUD. 969 (2010).

¹⁹ Although there are no specific numbers for the constituent assembly, legal experts represented roughly 24 percent of members of parliament (MPs) in the 1976 legislative assembly.

²⁰ The Covenant entered into force Jan. 3, 1976, and Portugal signed it on Oct. 7, 1976.

prescriptive approach—an attempt to break with the authoritarian practice of failing to give the constitution practical effect, and in its explicit use of socialist terminology. This comes as no surprise: the political program of the military was one of the sources of the constitution, and Eastern European constitutions, such as the Yugoslavian, figured in the electoral program of the Socialists as a model for the Portuguese “original route to socialism.” Other Communist bloc constitutions worked less as sources than as sites of political struggle. This was the case with the 1936 Soviet Constitution, also known as the “Stalin Constitution.” Its Article 118 made the right to work dependent on the collective appropriation of the means of production and a centrally planned economy. This was partly poured into the first article of the constitutional section on social rights, in a forced concession of the moderates to the revolutionary left. The discussion over the article was heated, but it made it to the constitution unchanged, as Article 50. This article would fall victim to the first constitutional amendment in 1982, as the tutelage of the military terminated and democratic politics normalized.

These miscellaneous and sometimes contending legal sources resulted in occasional legal innovations. This was the case with the explicit consecration of social rights as universal, but also as targeting the emancipation of workers and the protection of some of the most vulnerable groups in society, defined more ambitiously than in the 1976 International Covenant, and ahead of future covenants, as children, the youth, the elderly, and people with disabilities (Articles 69–72). The break with the corporatist past, where social entitlements belonged to some and were dependent on their occupational affiliation, was thereby made clear, but not always subsequently delivered, with sub-systems created under the authoritarian regime surviving to this day.

Constituents argued for these legal innovations in the floor debates. Many of their arguments did not have an articulate doctrinal base. They were rather advanced through emotional testimonial accounts, with constituents putting themselves in the shoes of vulnerable groups, whose experience they sometimes shared. A case in point is the intervention of Martelo de Oliveira, a Popular Democrat constituent, brought up in a state asylum. He felt legitimized in speaking on behalf of “all of those who, after having given all their efforts to society, were marginalized and thrown in the bin.” These were people now receiving their deserved “recognition from Portuguese society” through its fundamental law.²¹ Raised from their second-class citizenship by the new political covenant of the country, they were finally put on a par with, and bound to, all others by ties of mutual recognition. The “we the people” of the Portuguese Constitution was a claim about a reunified people yet to be, which the Constitution was already enacting.

This type of empathetic representation was essential in toning down ideological dispute and in generating platforms of agreement on specific formulations of social rights. However, in most accounts of the origins of constitutional social rights it would go unmentioned or discounted as vacuous rhetoric. This happens because discourse is rarely considered a form of agency, and in the dominant rational choice explanations for constitutionalization the motivations of the agents are aprioristically conceived

²¹ See BRITO VIEIRA & CARREIRA DA SILVA, *supra* note 14, at 117.

as strategic, in which case empathetic representation, and the narratives it generates, would be read as mere plebiscitary rhetoric. As became clear from our empirical analysis, however, real political behavior is often a more complex mix of beliefs about the legitimacy of different solutions, commitments, loyalties, emotions, solidarities, as well as strategic goal-directness. The aprioristic association of purposeful action, or action in search of an end, with a framework of utility maximization, risks overlooking a set of motivational factors that are critical in explaining political behavior in constitutional revolutions, especially where coinciding with social rupture. Empathetic concerns, understood as things we care about, or aspects of the situation that present themselves as reasons for or against action, have an especially compelling motivational force in these situations, both motivating action and figuring “in the justification of action or the norms that guide it.”²²

4. The partisan electoral market thesis

However, rational choice approaches dominate comparative constitutionalism, and their conception of agency contrasts with the expanded notion of agency delineated above.²³ Its most influential hypothesis for the constitutionalization of social rights portrays agents as preference maximizers and emphasizes the competitive nature of partisan politics. Agents, we are told, evaluate their options in light of their benefits and costs, and pursue the option that is most likely to maximize the difference between the two, given the constraints faced. Constitutional pre-commitment to social rights is accordingly expected to be at its highest when it maximizes the preferences of the political actor dominating the constitution-making process.

To test this hypothesis against the Portuguese case we need to unpack it into three related questions. First, which political actor(s) dominated the constitution-making process (Section 4.1)? Second, was the optimization of their preferences their primary mover or can we devise better alternative explanations for why they acted the way they did (Sections 4.2 and 4.3)? Third, to what degree were constituents bound by the politics of partisanship (Section 4.4)? The remainder of this section searches for answers to these questions.

4.1. Main political actors

The answer to the first question must be sought in the nature of the transition and the outcome of the election for the Constituent Assembly, which took place on April 25, 1975. Endowed with revolutionary legitimacy, the military was a key player in the constitution-making process. Days before the election for the Constituent Assembly, they forced the parties to sign a pact concerning the general ideological content of the constitution. This pact also established their overseeing of constitutional works and their requirement of being heard after the Constitution’s approval by the parties,

²² For the notion of “concern,” see SAMUEL BLACKBURN, *RULING PASSIONS. A THEORY OF PRACTICAL REASONING* (1999).

²³ See, e.g., ALEC STONE SWEET, *GOVERNING WITH JUDGES. CONSTITUTIONAL POLITICS IN EUROPE* (2000).

in what amounted to a quasi-homologation. Given the ideological proximity of the military's ruling faction to the Communists, and the latter's growing control over unions, media, and the provisional government, the politico-military revolutionary left was an undoubtedly dominant force. But to their surprise, the struggling moderate political parties emerged from the election as a political force to contend with. The electoral result changed the balance of power and the dynamics of the transition. The Socialist Party, which came out as the dominant party, holding 116 of the Assembly's 250 seats, bore the brunt of the anti-Communist struggle outside the Assembly and the leading political role within it. But since the Constitution needed approval by at least 126 constituents, this was not a one-party assembly.²⁴

4.2. Partisan politics in action

Having established that there were two main contenders to the position of dominant political actor, the military and the Socialist Party, we now turn to the testing of the so-called "electoral market thesis."²⁵ This suggests that when the political actor dominating the constitution-making process expects to lack control over future legislatures, constitutional entrenchment may emerge as a way to protecting its preferences.²⁶ This explanation seems to fit the Portuguese case insofar as there was no single core of post-authoritarian political power, and the military, in particular, could anticipate their future withdrawal from political institutions as well as electoral losses for the radical left party with which they were ideologically closest to, the Communist Party.

(a) *Partisan politics I: the military*

The military's political program, which gained constitutional status straight after the coup, did not speak of social rights as such, but it did pre-commit to a "new social policy" for the "defense of the interests of the working classes" and the urgent "improvement of the quality of life of the Portuguese."²⁷ Parties were constrained by these guidelines in drafting their constitutional projects. However, if in other subjects (e.g., the political institutions and the model of the economy) the military constraint openly ran against the parties' more moderate constitutional preferences, this does not seem to have been the case with social rights, where the constitutional visions of the military and the moderate parties were more attuned. This has consequences for the explanatory value of the electoral market thesis. If the entrenchment of social rights provided "insurance" to *both* prospective electoral losers *and* prospective electoral winners that their

²⁴ The Popular Democrats (PPD) secured 81 of the 250 seats; the Communist Party (PCP) held 30 seats; the Christian Democrats (CDS) won 16 seats; and Movimento Democrático Português (MDP)/Comissão Democrática Eleitoral (CDE), a satellite party for the Communists, held five seats; the two remaining left revolutionary parties summed between them two seats.

²⁵ J. Mark Ramseyer, *The Puzzling (In)dependence of Courts*, J. LEGAL STUD. 23 (1994).

²⁶ Pedro Magalhães, *The Limits to Judicialization: Legislative Politics and Constitutional Review in the Iberian Democracies* (Aug., 29 2003) (unpublished Ph.D. dissertation, Ohio State University (OhioLINK Electronic Theses and Dissertations Center)).

²⁷ Political Program of the Movimento das Forças Armadas (MEFA), April 1974, in AAVV, *O PROGRAMA POLÍTICO DO MEFA E DOS PARTIDOS POLÍTICOS* (1975).

policy preferences would be secured, therein must lie the reason for the durability of the Portuguese charter of social rights. As to the electoral market thesis, whose most common formulation presupposes the *oppositional* nature of the “insurance” (that the dominant constitutional actor insures its preferences *against* other actor(s) by forcing constitutionalization), it fails to explain the dynamics of constitutional entrenchment in this case.

(b) *Partisan politics II: the parties*

If the military were not an electoral player as such, the other dominant political actor, the Socialist Party, was. Applying the electoral market thesis to them, the question arises: Can the vigorous constitutional entrenchment of social rights be attributed to the Socialists and interpreted as their way of strategically locking-in their policy preferences in answer to the interests of the groups and constituencies on which they electorally depended?

First, there is the question of attribution. The drafting of the Constitution began with the submission of constitutional projects by the political parties. These projects were the basis for the work of drafting committees, specializing in different sections of the Constitution, in which parties were represented according to their electoral weight. The Socialist Party favored the inclusion of a progressive charter of social rights in the Constitution, and the draft emerging from the committee closely adhered to the Socialist’s project.

Does this mean that in pushing for the constitutionalization of social rights the Socialists were protecting their policy preferences against different preferences exhibited by other parties? The constituent moment was one of great party polarization, with parties vigorously engaged in shaping partisanship outside the assembly. However, the objective of enshrining the institutions of an active welfare state crossed partisanship lines. That much is clear from the parties’ constitutional projects. In all of them, social rights were not only present, but were also roughly the same. All projects stated these rights with an almost equal precision, and detailed the institutions and policies required for their effectuation. If in some cases the ideological convergence between parties’ constitutional projects was forced, and explained by the external military constraint (e.g., the commitment of future policy-makers to collectivization and a socialist classless society), when it comes to social rights, the military emphasis on the need for a new social policy found echo in the belief systems and policy positions of the parties, even if for different reasons and to a different extent. This was proved retrospectively by the fact that where forced consensus prevailed, the constitutional settlement was questioned the moment the military lost their bargaining power: namely, in the first constitutional amendment, in 1982. By contrast, the charter on social rights survived the change in the balance of forces, remaining virtually untouched up to now. If path dependency, dead law, and strategic symbolism partly account for its resilience, widespread party support for the desirability and legitimacy of constitutional social rights offers a far more plausible account of these rights’ political origins, and explains much, if not all, of their durability.

Returning to the electoral market thesis, once one specifies the Socialists' interests strictly in terms of partisan politics, it becomes doubtful that electoral concerns were the driving force behind their support for social rights. The doubt arises not because the Socialists faced no uncertainty about the prospect of dominance in future elections, and therefore did not feel the need to win the electorate with promises, such as the constitutional promise of an expansion in social benefits. Electoral uncertainty was undoubtedly there. But the fact that the Socialists faced no serious challenge with which they needed to compromise when pressing for the constitutionalization of social rights was public knowledge, and further made known in the plenary debates. This put the "politics of partisanship" on hold: i.e., there was no room for the Socialists to create a relevant electoral cleavage around the issue of social welfare in the forthcoming April 1976 general election (which they won by relative majority, as the major protagonists of the anti-Communist fight for democratic normalization).

The electoral variant of the partisan politics thesis faces yet a final challenge, both conceptual and empirical. One might be tempted to claim that in their decision to entrench social rights, the Socialists were influenced by the preferences of their constituencies and by organized interests who understood the politics of institutional choice and made demands or exerted pressure accordingly. Behind this view of legislative politics lies a particular model of representation: premised on the exogeneity of preferences, it takes a principal-agent format, and presupposes a linear dyadic model of influence, which moves from the expressed preferences of constituencies and/or interest groups to the preferences of legislators.²⁸ The suitability of this model of representation to normal politics is under question.²⁹ We submit that its adequacy to constituent politics is, if anything, more doubtful, especially when transitions from authoritarianism to democracy coincide with the reintroduction of party competition amongst newly formed parties.

The rationale is simple. Constituencies and preferences do not emerge directly from social divisions, nor gain consistency apart from the partisan politics in which they are formed. Rather, they are co-constructed and need for their existence to be interpreted, represented, personified, and even dramatized, by social movements and political actors. In other words, they are endogenous to the political process, and cannot serve as basis for party responsiveness, because they do not have the independent causal import normally assigned to them. If this is generally the case, it is all the more so when a party system and constituencies are being formed anew, as was the case in Portugal after the revolutionary break. The emergent parties—all but the Communist Party—did not have strong social roots or traditional constituencies. They were rather tentatively searching out and actively constructing them in competition with one another.

Despite their affiliation with the Socialist International and the European Social Democrats, the ideological template of the Socialists was broad, and included distinctively Marxist and utopian Socialist elements. On the eve of the election, they

²⁸ ADAM PRZEWORSKI ET AL., *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* (1999).

²⁹ DAVID RUNCIMAN & MÓNICA BRITO VIEIRA, *REPRESENTATION* (2008).

were unsure about their electoral base. Their proposed policies and discourse were clearly leftist, but their anti-Communist stance found them important support from constituencies more to the right. To convince voters on the one side, without losing those on the other, was to strike a fine balance. Their process of representation, like that of the other newly formed parties, had a distinctively generative and anticipatory quality: they were competing to shape the preferences of future voters by making representative claims in which they would hopefully see themselves retrospectively mirrored. In this process, they were hardly influenced by cohesive, let alone organized, constituencies; social movements “colonized” by the radical left; or pressurized by interest groups, namely welfare clientele. Social welfare under the dictatorship had been so incipient that these clientele were embryonic at best. Moreover, the self-declared purpose of all parties was to replace the corporatist welfare system, which molded any extant embryo-clientele along occupational lines, with a universal welfare system, which eliminated them, and, the moderate parties insisted, ought to co-exist with the right to private property. In light of this, the hypothesis that the party dominating the constitutional process was strategically responding to the pressures of pre-established constituencies or interest group policy preferences when locking-in social welfare rights does not fare particularly well when applied to Portugal.

(c) *The functionalist fallacy*

It would be even a greater stretch to suggest, from a functionalist perspective, that the Socialists were in a position to determine *ex ante* that constitutional pre-commitment to social rights was to advance their chances of obtaining, and keeping, office in the medium and long terms, namely by generating welfare-clientele that could cement their electoral hegemony. This would presuppose their command over legislatures responsible for erecting the welfare state, implementing welfare programs, and distributing social benefits. In 1976, however, the newly formed parties did not—and could not—foresee the evolution of their electoral performance in the medium and long terms. This meant they could not be sure whether it would be them or their competitors who would be in a position to claim the initiative for widening welfare provision. The situation was of great uncertainty, and further enhanced by the unpredictable role of the President and the adopted proportional electoral system, not least for the Socialists, who faced no possibility of coalition to the left, and no “natural” coalition to the right. The sense of uncertainty proved correct: between 1976 and 1983, there were no less than eight governments, some formed by the President, all of them short-lived, minoritarian, and integrating different political forces. Any strategic electoral projections were, therefore, virtually impossible in 1975.

This is not to say, however, that there were no beneficial long-term bargains stricken by the “tying of hands” that the constitutional pre-commitment to social rights imposed. But that actors pursuing a strategy of constitutionalization could foresee these bargains is doubtful. Only with time would it become apparent that Portugal was evolving into a two-party system, with the two major parties, the Socialists and the Popular Democrats, rotating in power. Eventually, the Communists

and the Socialists started claiming the paternity and the guardianship of the “social constitution” and the protective job market it created. As the welfare state expanded, public sector employees and other welfare-clienteles became increasingly important constituencies for the Socialists, the only ruling party of the two, and the potency of the language of constitutional rights came into increasing use for making political claims on the left of the political spectrum. To this day, the entrenchment of rights to social provisions continues to have a significant impact on the dynamics of party competition, with political debate often being drawn back to the relative positioning of different parties *vis-à-vis* social rights. Given the weight of welfare clientele, the mere suggestion that a party might be equating the removal of social rights from the constitution can be electorally very costly. But long-term consequences do not explain their causes, especially where no dispositional fact can be found linking them.

4.3. The nature of the assembly

There is a further reason why the partisan politics thesis might fail to explain the constitutionalization of social rights in Portugal: its “thin” strategic understanding of politics does not capture the dynamics of constitution making in the assembly as reconstructed from primary sources materials, notably interviews with constituents.

The interaction between constituents was heavily conditioned by both the nature and the “status” of the assembly. Let us start with the nature. The Portuguese Constituent Assembly was a quasi-sovereign body, directly elected by a staggering 91 percent of the population, which would not be heard in the constitution’s ratification. Endowed with constitution-making powers, the Assembly was to be dissolved once its constituent mission was over, with some of its prominent members not presenting themselves for re-election. The exceptional character of the Assembly contributed significantly to its partial insulation from partisan politics and normal political decision-making.

The contrast with Spain is instructive. Because in Spain “legal continuity” prevailed, the Spanish “constituent” assembly was a bicameral legislature, elected on the basis of a “Law for Political Reform” passed by the last Francoist Cortes for a normal legislature lasting beyond the making of the constitution. In Spain, therefore, constituents were also normal MPs, with high stakes in post-constitutional politics, and the constitution-making process was more deeply embedded in partisan politics and highly permeable to the pressures of organized interest groups, most notably the Catholic Church. The constitutional negotiation process was so divisive that it came to a stalemate, and a new decision-making procedure had to be adopted: constitution-drafting was delegated to a small group of representatives of the two main parties, who struck difficult compromises, amid hard bargaining, behind the closed doors of a Madrid restaurant.

Different in nature, the “constituent” assemblies were also different in status. Whereas in Spain the Cortes had the country’s attention and were the epicenter of political struggle, in Portugal the constituent assembly was taken to be a mere

sideshow to the radicalizing revolutionary process outside. This marginalization of the assembly, together with the impending menace of its disbandment, resulted in its relative insulation from the yoke of partisan polarization and in socialization between constituents across party lines. The marked difference between how constituents acted on the floor and behind closed doors attests to this. The moderate parties used publicity moments as an outlet for their grievances against the revolutionary left provisional governments and for messages addressed to the military. The plenary debates, in particular, were taken as an opportunity to demarcate themselves from aspects of the constitutional settlement they would eventually be forced to agree to, whilst ideologically at odds with, as well as to demarcate themselves from one another before their targeted constituencies. Out of the limelight, in the committees, plebiscitary rhetoric gave way to a more cooperative stance. Constructive compromises were facilitated by the neutralizing influence of legal experts representing different parties, whose proposals would sometimes succeed in trumping those with a clearer “party mark.”

The relative insulation of drafting committees from partisan polarization was reinforced by their freedom from excessive party leadership interference. Although this did not necessarily apply to the radical left, their parties being very centralized and hierarchical, constituents representing moderate parties benefited from a freer mandate. Their most prominent members acted as trustees rather than mere delegates of the party’s leadership. Although there were party coordination mechanisms in place for each parliamentary group, these mechanisms were loose and allowed for considerable freedom of action, negotiation, deliberation, and compromise within the committees. Constitutional writing could therefore be somewhat creative, especially where the military guidelines were looser.

Besides benefiting from the relative insulation of the Assembly *vis-à-vis* politics outside, in Portugal constitutional settlement on social rights also benefited from its falling between two highly divisive issues, on which political struggle concentrated. First, there was the question of the relative positioning of social rights with regards to civil and political rights, with the moderate parties insisting, against the revolutionary left, on the logical, normative, and historical priority of the latter over the former. Second, there was the question of the relation of social rights to the country’s economic system, with the Communists making social rights dependent on the collectivization and central planning of the economy, and thus seeking to place the sections of the Constitution on economic organization and social rights before that on civil rights. Questions of relative priority, as reflected in the discussion of the different regimes of civil and social rights’ legal and judicial protection, rather than the charter of social rights as such became the center of ideological divergence. As a result, the entrenched list of social rights became a kind of “mixed bag,” into which the utopian expectations of a poor country, undergoing a social revolution, were more or less freely poured. The symbolic value of social rights for a Constitution in search of its legitimacy was widely acknowledged, and far from negligible: they were the written proof that the social meaning of the revolution was not to be lost, but realized, as the country moved towards democratic normalization.

5. Ideology

Although the literature on social rights constitutionalization tends to focus on the partisan politics of structural choice, this politics may also be commanded by ideological commitments. Thus, the thesis follows that if the dominant actors in the constitution-making process share a particular ideology, they are likely to use the constitution to lock in policies that are based on that ideology. Was this the case in Portugal?

In October 1975, the section on social rights was eventually approved by unanimous vote. However, this tells us very little still about the nature of the consensus reached, which, we shall argue, threaded a middle ground between a mere *modus vivendi* and a full-blown ideological consensus.

Rather than trying to maximize their constitutional benefits in proportion to the force of their electoral mandate, the moderate parties, led by the Socialists, were intent on minimizing the risks of a worst-case scenario: i.e., giving the revolutionary left reasons to abandon the constitutional process. Forging a workable constitutional settlement—not necessarily the settlement they would have most wanted, but one with which all the parties were able and willing to live—within a reasonable deadline was therefore at the top of their priorities. Continuous tinkering risked leading the country into civil war. This is why the committee's project on social rights sought to reflect the balance of power between various political forces, bringing together articles from different party projects roughly in proportion to their electoral mandate. In some cases, this represented a significant concession on the part of the Socialists to views radically to the left or (in fewer cases) significantly to the right of their ideological stance and policy preferences.

If the menace of radicalization pushed for some sort of *modus vivendi*, it would be wrong to reduce the parties' commitment to constitutional social rights to a strategic affair. Their support for social rights, and the constitutionalization of guarantees of social provision, sprang primarily from the parties' origins in ideological doctrines traditionally favoring an active welfare state. Born out of the last left-wing revolution in Europe, the nascent Portuguese party system concentrated at the left end of the political spectrum. While decidedly distanced from the Communists, and their orthodox Marxism, the Socialists espoused some Marxist and utopian socialist beliefs, and shared the European Social Democrats' deep commitment to progressive social welfare rights and an interventionist welfare state. The second largest party, the Popular Democrats, was a centrist-social democratic party, bringing together Social Democrats, Liberals, and some Christian-Democrats, while the Christian Democrats were a more conservative party. On both these parties, however, the influence of Catholic social thought was strong, and explained their commitment to market social regulation and a distributive welfare state, intent on protecting human dignity and well-being. It was from these multiple and sometimes intersecting ideological families that each party drew principled reasons to commit to social rights as essential to break away from the social injustices of the past and set social cooperation on new and fairer terms.

But profound ideological divergences subsisted, namely over the historical meaning and the desirable ways of implementing these rights. If for the radical military

and the Communists social rights were those conquered by the working classes from the bourgeoisie, Popular Democrats eschewed the Communists' historical materialism in favor of an idealist reading of social rights as the historically necessitated partner to civil and political rights. Different understandings of the genesis of social rights resulted in different understandings of their meaning: as human rights for the parties more to the right; as citizenship rights for the Socialists; as workers' rights for the Communists. This had implications for their implementation. Communists wanted workers and their families to be the chief beneficiaries of the welfare system, whose funding should fall on other classes. Socialists granted social rights universally, but put them at the service of a strongly redistributive politics. Popular Democrats saw social rights as reformist measures designed to benefit workers and the poor alike, within the framework of a non-state controlled economy, while also reminding other parties that "workers" included small property and business owners. Ideological disagreement extended also to the institutions responsible for welfare. Whereas for Communists and Socialists the provision of welfare belonged to the state as the collective agent of popular emancipation, Popular Democrats and Christian Democrats insisted that welfare was primarily a social responsibility binding each to every other member of society. Hence the delivery of social provisions ought to be secured by state and civil society alike (especially the Catholic Church), a partnership on which, they claimed, the liberty of the person from the state depended.

In the face of these and other disagreements, the agreement of all parties to the articles on social rights could have been achieved by carrying them to a high level of abstraction or by settling on loose formulations, as would happen in Spain. Instead, in Portugal, social rights and their implementation mechanisms were constitutionalized in excruciating detail. In face of unresolved dissensus, parties were able to agree on detailed individual provisions by following essentially two routes. An avoidance strategy, whereby especially contentious formulations and unnecessarily divisive elaborations of the rationale behind the rights were voiced in the debates, but kept away from the written word of the Constitution. This was complemented by the decision of keeping ideological tension within the Constitution, with social rights showing a double framing, within the Socialist–Marxist constitutional model imposed by the military tutelage and a less prevalent, but important, western model, infiltrated by the moderate parties. An example of this is the incorporation in the section of articles at odds with it, and with one another: e.g., one making social rights dependent upon the collectivization of means of production and central planning of the economy (Article 50), the other affirming the right to private property (Article 62). This tendency to incorporate, without necessarily integrating conflicting ideological views, supporting social rights from very different value perspectives, has given the Constitution its notorious "baroque" flair,³⁰ and an intrinsic plasticity, making it possible to salvage most of the charter of social rights as the country progressed towards democratic normalization. Prominent jurists were key to this: they influenced jurisprudence in

³⁰ Jorge Miranda, *A Constituição de 1976 no Âmbito do Constitucionalismo Português*, in PORTUGAL. O SISTEMA POLÍTICO E CONSTITUCIONAL 1974–1987, at 630, 609–46 (M. B. Coelho ed., 1989).

devaluing the Socialist–Marxist aspects of the constitution when interpreting social rights and their implementation, thus opening the way to the de-Marxization, as it were, of the original framing of social rights, in the first constitutional amendment, and to its replacement with a new, and more mainstream social Catholic “value base”: namely, the dignity of the human person and solidarity.

6. Strong rights, weak courts

The staggering expansion of constitutional social rights in the 1976 Constitution coincided with a very significant increase of the powers of judicial review. In this last section, we examine two variants, “thin” and “thick,” of the dominant hypothesis for the constitutionalization of rights and the establishment of judicial review: the so-called strategic realist hypothesis.³¹

The “thin” version of this hypothesis relates to the “electoral market thesis” discussed earlier (Section 4.2). This thesis submits that judicial empowerment occurs as an “insurance strategy” when actors dominating the constitution-making process anticipate losing control over future legislatures. It predicts that where the design of judicial review occurs in a context of uncertainty and in which no single political actor dominates, judicial review will be constitutionalized in moderate terms and in a way that prevents any single political actor from enjoying control over how constitutional rules will be interpreted. By contrast, the more the constitution-making process is dominated by a single actor anticipating no control over future legislatures, the more strongly this actor will seek to entrench his powers of constitutional review.

For proponents of this hypothesis, like Pedro Magalhães, the difference between situations one and two explains the difference between constitutional review powers in the Spanish and Portuguese Constitutions of 1978 and 1976, respectively.³² In Spain, the constitutional process was not dominated by a single political actor, therefore judicial review was designed to prevent its control by any single political force. In Portugal, by contrast, the military was in command, and fearful of losing control over future legislative elective institutions, they would have imposed on parties the incorporation of both social provisions and a strong military guardianship over the implementation of those provisions into the constitution.³³

This appears to offer a suitable explanation for the pact imposed by the military on parties on the eve of the Constituent Assembly’s election, whereby they claimed for themselves broad jurisdiction: the power to ask the constitutionalization of a “new social policy” and to “determine, with general binding force, the constitutionality of future laws.”³⁴ The truth, however, is that the basis for the constitutionalization of judicial review was to be, not this first pact, but a second pact, signed in the aftermath of the military counter coup of November 1975. This radically shifted the balance of

³¹ HIRSCHL, *supra* note 6, at 40.

³² Magalhães, *supra* note 26.

³³ *Id.* at 41.

³⁴ First Platform of Constitutional Agreement, Apr. 13, 1975.

power in favor of the moderate forces, both military and political, and further shook the military's status as single dominant political actor.³⁵ The consequences for the pact were considerable, and force us to reconsider Magalhães's streamlined interpretation of the application of the "thin" electoral market hypothesis to the Portuguese case.

In the aftermath of the coup, judicial review was renegotiated between military and parties on a more equal footing. The parties submitted proposals, ranging from the radical left's support of absolute military control over judicial review to the proposal by the parties on the right to extinguish the Council of the Revolution, and to replace it with a Council of the Republic or State, with a strong civilian component, on which control over judicial review was to be conferred. In their counterproposal, the military continued to claim broad jurisdiction, including *a priori* and *a posteriori* abstract review of legislation and the right to declare unconstitutionality by omission when legislatures failed to implement constitutional rules, amongst them social rights. In case of unconstitutionality by omission, they reserved the power to issue recommendations to legislatures, and, where legislatures did not abide by them, to take their place in order to ensure implementation. This was a daring proposal that faced resolute objection by all moderate parties, and did not enter the Constitution.

The military seemed to be pursuing a strategy well above their powers. Yet when one examines the origins of the then-innovative idea of unconstitutionality by omission, it becomes clear that it sprang from an enthusiastic small group of legal experts, closely tied to the Socialist Party, which was advising the military.³⁶ Legal experts were especially sensitive to the need for a break with a past in which judicial review had been ineffective and much of the constitution "dead law." The willingness to render efficacious new constitutional commitments which were not immediately applicable, such as those to social rights, had weak expression amongst Spanish parties, but was clearly a matter for concern amongst members of the Portuguese "Socialist" legal and military elite, and can partly explain the strength of the review mechanism ultimately proposed by the military to the parties. The collaboration between military and legal experts resulted in yet another crucial institution, this time checking the power of the military. In the exercise of their review powers, they had to pay heed to a body, whose composition (a majority of legal experts, many of them judges known for their conservative leanings) was designed to grant impartiality and technical expertise to the military's rulings. This was the Constitutional Commission, and was conceived by the legal experts advising the military as the embryo of the future Constitutional Court.

What emerges from this account is no longer a single dominant actor, uncertain about the electoral future, and using their current force to secure the guardianship of the constitution. Instead, we have a circumstance-imposed collaboration between ideologically attuned elites to find a more balanced constitutional solution, in which the Socialists (not to speak of the other moderate parties), knowing of the transitory

³⁵ For instance, their power of homologation of the Constitution was dropped in the second pact.

³⁶ These were Miguel Galvão Teles and Luís Nunes de Almeida. See Miguel Galvão Teles, *A Segunda Plataforma de Acordo Constitucional entre o MFA e os Partidos Políticos*, in *PERSPECTIVAS CONSTITUCIONAIS NOS 20 ANOS DA CONSTITUIÇÃO DE 1976* (Jorge Miranda ed., 1996).

nature of the settlement on judicial review, were ready to make partial concessions, to gain the goodwill of the winning moderate military faction in the interim.

When recognizing that the constitutional settlement on judicial review resulted from the interplay among legal innovators coming from dominant elites, we seem to be moving into the ground of the “thick” strategic explanation for judicial empowerment through constitutionalization. This is known as Ran Hirschl’s “hegemonic-preservation thesis,” and it explains the constitutionalization of rights and judicial review as the byproduct of the strategic interplay between hegemonic elites—political, economic, and judicial—threatened by widening representation and democratization. They are said to pay lip service to social and economic rights, while attempting to insulate policy-making from the vicissitudes of democratic politics, which can seek to promote progressive notions of distributive justice potentially disadvantageous to the *status quo*.

Hirschl calls his thesis “thick” because it takes into account the worldviews, belief systems, and policy preferences informing the elites and political struggle.³⁷ But it is exactly when we reconstruct these value-dimensions from contemporaneous sources that we find evidence that tells against Hirschl’s thesis: in Portugal, the ruling elite was, for the most part, new and progressive, rather than conservative; driven by a leftist or Catholic social reformist agenda; and genuinely committed to the use of social rights to produce significant redistributive and power-diffusing effects.

Drawing on a limited range of cases, all located in the Anglo-Saxon common law tradition, and deriving the elites’ intentions directly from their “elite” standing, Hirschl arrives at an explanation for the constitutionalization of rights and the establishment of judicial review with claims to generality, but which faces decisive historical, geographic, and cultural constraints, all of which remain insufficiently specified. The examination of the Portuguese case, an outlier case, has enabled us to bring to the fore some of these limitations.

Inferring the motives for constitutionalization from subsequent restrictive patterns of judicial interpretation of social rights, one could easily be led to believe that there was a conservative agenda in place from the start in Portugal. But this would be to falsely read history backwards. The Portuguese Constitutional Court, responsible for many of those restrictive rulings, was not created before 1982, when the first constitutional amendment was passed. As the partisan politics thesis predicts, parties sought to frame the Court after their own preferences, and to avoid the unpredictable influence of the President of the Republic. While the center-right wanted to pack the Court with members of higher echelons of the judiciary, for their conservative inclination, the Socialists proposed a more mixed composition, of higher and lower rank judges, and members of parliamentary and presidential appointment. The hard bargaining and incapacity of either side to impose its preferences on the other led to a settlement that retained the broad powers of judicial review inherited from the past virtually intact. It also relocated them to a Constitutional Court for which the leftist and rightist blocks would appoint an equal number of judges, with a further judge,

³⁷ HIRSCHL, *supra* note 6, at 42.

co-opted by ordinary judges, breaking the tie between them. In other words, now that the settlement on judicial review had a longer time frame, and the military were gone, each main party of the center-right and the center-left made sure that the other would not have complete control over the constitution's future interpretation, as the "thin" strategic thesis suggests. If the equal say of the two main parties, Socialists and Social Democrats (the former Popular Democrats), in the composition of the Court led to immediate accusations of its being a "political court," in which legislatures would be judging in their own cause, the understanding of party negotiators was rather that, whereas the Court's composition was perfectly predictable, its perfect internal balance *plus* the existence of a casting vote of the co-opted third judge made its rulings unpredictable to either bloc.

Experience tells us otherwise. The Constitutional Court has eschewed protagonism and acting as a contra-majoritarian force. Its rulings regarding social rights, in particular, have been few and self-restrained. While the political analyst would probably be warranted in seeing this as a by-product of the alignment of beliefs and policy preferences between political and judicial elites, legal experts tend to attribute the conservative character of the rulings on social rights to the weakness of the mechanism of judicial review and the dominant influence of German legal doctrine. Seen as cutting-edge at the time of its creation, and subsequently targeted by center-right parties as purely political, unconstitutionality by omission survived the first constitutional amendment, and is seen today as a weak judicial guarantee.³⁸ Besides depending on the pre-existence of a constitutional affirmative duty to legislate, citizen access to it is indirect, and its enforcement mechanisms residual. All that the Constitutional Court does is to inform the legislature of the unconstitutionality; then it must wait for the legislature to act and give it efficacy. Unsurprisingly, unconstitutionality by omission has been found in a handful of cases, only one relating to social rights. The weakness of the judicial guarantee is reinforced by the dominance of German legal doctrine. Whereas the Portuguese Constitution entrenches social rights and the duties of the state in realizing them in detail, social rights do not even figure in the German Constitution, only the principle of a "social state" does. Yet Portuguese justices seem more receptive to claims of unconstitutionality founded upon notions extracted from German doctrine than from the letter of the Portuguese Constitution. The justices of the Constitutional Court tend to leave a wide margin of discretion to executives and legislatures, leaving them judgment of the options that best secure the financial sustainability of the welfare system and the fair distribution of resources. Eventually, the prescriptive and progressive character of the social rights originally invested in the constitution came to be filtered by their restrictive interpretation. But to take the Court's reasons as the rationale for social rights and judicial review constitutionalization in revolutionary Portugal would be more than mere anachronism: it would blind us to the fact that conservative outcomes can have progressive origins.

³⁸ MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 156 (2009).

7. Conclusion

Taking the origins of social rights and judicial review seriously in comparative constitutional law implies critically surveying the theoretical, methodological, and interpretive choices that currently inform their study, and the hypotheses these background choices generate. The outlier case analyzed in this article allowed us to test the limits and expand the possibilities of extant explanations.

Theoretically, we have exposed the shortcomings of the application of analytical models devised for the study of “normal politics” to the study of the “extraordinary politics” of constituent moments coinciding with revolutionary change. Our case study presented several constraining factors that made the models of “normal politics” far less helpful in explaining social rights’ constitutionalization and that might not be exclusive of the Portuguese case. Chief amongst these factors were the military tutelage and ensuing ideological constraining of the politics of partisanship; the prevalence of worst-case scenario avoidance over preference maximization; the scale of uncertainty faced by political actors; the absence of consolidated constituencies and/or clienteles; the associated difficulties of strategic prediction; and the preponderance of a politics of ideological confrontation over, and sometimes having its epicenter in, social rights-related issues, rather than about a partisan politics of institutional choice.

The concurrence of these factors is unlikely to repeat itself, but at least some of them will play out in other constitutional making processes, such as those prompted by the Arab Spring. There, like in 1975 Portugal, constitution-making originated from political and social revolution, and constituents are, in many cases, bound to work with two sources of legitimacy (electoral and revolutionary) and the aspirations of two audiences in mind: the military and the people who took to the streets. To make sense of how this impacts upon the politics of constitutionalization, one needs to expand the conception of politics underpinning the explanation of entrenched social rights beyond the realm of institutional party politics to include agonistic forms of extra-institutional politics, notably those relating to social movements. Their role in influencing constitutional law by offering, and acting according to, alternative constitutional visions, is frequently significant, and calls for a more dialogical understanding of constitution making.

The standard political science strategic modeling of the interaction between political forces involved in constitution making tends to turn a blind eye to these societal forces as well as to the specific nature and dynamics of the process of constitutional change and the constituent assembly itself. Yet as our analysis of the Portuguese case suggested, it might be impossible to explain why social rights enter the constitution the way they do without considering aspects such as these. The stages of the constitutional process and the different actors involved in them (e.g., the formulation of proposals, their pre-negotiation, and the eventual submission to popular ratification of the new constitution); the nature of the assembly (e.g., revolutionary or elected; directly elected or indirectly elected; sovereign, quasi-sovereign, or non-sovereign; constituent assembly, ordinary parliament or constitutional expert commission); its

organization and composition (e.g., ratio of legal experts, their influence, and distribution amongst parties); its internal processes and behavioral dynamics; and its level of insulation from normal partisan politics, are important dimensions to take into account when searching for the origins of social rights. Different institutional settings, with different levels of insulation from partisan politics, might allow for different types of constitutionalism and for a different treatment of social rights: more technocratic, in some cases; more aversive and defensive, in others; and more freely aspirational, in others still.

Methodologically, our study pointed out the dangers of interpreting social rights constitutionalization after a conception of human agency that restricts it to some limited *a priori* set of motivations, and reduces constitutionalization to a form of self-interest. The hermeneutic or interpretative strand of historical analysis we adopted allowed us to capture a broader range of motivations behind the willingness to protect social rights constitutionally. Questions of time and of located agency were integral to our inquiry into primary sources: How did political actors conceive of themselves? How did they see their historical role? How did they construe the past and the future society they were enacting? All of these questions proved essential to determining whether the origins of social rights and judicial review in Portugal were benevolent and progressive or primarily strategic and conservative.

The question of the actors' time horizons proved decisive for yet another aspect of our analysis. Most constituent assemblies drafting a wholly new constitution act after a revolutionary change of some kind. Under these circumstances, political actors cannot rely on the operation of well-institutionalized contexts to frame their options and structure their actions. At several points of our study, we saw how easy it would have been to misread the causes of social rights and judicial review constitutionalization by ascribing unrealistic, prescient mid- and long-term bargaining projections to the actors leading the constitutional process. Yet this would have compounded the functionalist fallacy of taking the fact that institutions are doing something for political actors as explaining their creation.

As the welfare state developed in Portugal, social welfare provisions did indeed become functional—albeit arguably by different measures—to the two ruling parties, who have sought support of welfare clienteles and control over the composition of the Constitutional Court reviewing the implementation of social rights. It would be misleading, however, to infer from this outcome that constitutional rights must have been the product of an instrumental calculus of electoral prospects or of a defensive strategy by a coalition of hegemonic, yet threatened, elites, of a conservative kind.

At a time when cutting back on social provisions is no longer a choice, but a budgetary demand imposed by international lenders, Portuguese elites face a constraint on political choice much greater than the painstaking constitutional social provisions ever were. Judging from the Constitutional Court's refraining from enforcing social welfare rights against governments, and from its bipartisan composition, as controlled by the two parties who bound themselves to the austerity program, it is highly unlikely that the Court will offer resistance to welfare retrenchment as its Hungarian counterpart did in the mid-1990s. But this will not free Portuguese elites, both political

and judicial, from needing to act to meet a considerable challenge: to preserve their menaced legitimacy while rolling back the constitutionally protected expectations of a people for whom democracy and social rights—which it took one generation to realize—are co-original and inseparable.

Today, more than ever, real-life constitutional politics in Portugal depends on getting rights right.