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## Inscribing the State: Constitution Drafting Manuals as Textual Technologies

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## Inscribing the State: Constitution Drafting Manuals as Textual Technologies

### Governing through Text

The production of states is often regarded as matter of power: of drawing together political elites, proxies for external interests, and sentiments that tap into what is figured as the “popular will.” In a more critical vein, the production of states is read in relation to postcolonial inheritances that continue to haunt contemporary state structures. State-building technologies have evolved into technocratic exercises in ensuring that rights are protected, internal forms of state power are separated and subjected to checks and balances, and principles of fairness and constraint are enshrined in legislation. Many of these objectives appear as legal problems to be addressed through the drafting of a written constitution, an emblem of modern political statehood. Yet these projects appear to be increasingly delegated to technocratic “experts” who are thought to have harnessed the formulae for producing viable states. Constitutional production has expanded beyond a process of political deliberation into an industry of expert knowledge.

The rise of expert knowledge in constitutional matters marks a turn toward “constitutional technicity,” where constitution drafting is regarded as a domain of technical expertise inhabited by neutral and politically divested actors.<sup>1</sup> This essay considers the emergence of the constitution drafting manual or handbook in the post–Cold War period as a genre in which technical expertise seeks to confront and regulate the political. Produced by and circulated within a diverse network of actors, these documents consolidate a view of what constitutes “best practice” in the production of contemporary state identity. Yet, in claiming that they merely reflect what they present as an existing consensus of state construction, these manuals also act into the field of state-building, naturalizing particular understandings of the ontology of the state that reflect liberal legalist norms.

This essay takes up and interrogates these texts to consider their underlying presumptions, revealing the active role of textual practices in the production of contemporary state forms. The provision of information is not only a matter of recording and presenting an account of what exists, but also a way of acting into the world through forms of inscription.<sup>2</sup> The state is increasingly inscribed not only through the constitution itself, but also by what precedes its emergence: expert consultations; trainings in legislative drafting; and the content of constitution-drafting reports, manuals, and handbooks that influence the texts of state constitutions. In this sense, the constitution-drafting manual forms part of a broader *dispositif*, an assemblage of multiple elements such as “discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures,

scientific statements, philosophical, moral and philanthropic propositions” and the “system of relations” between elements that enable the tracing of power beyond its most apparent locations.<sup>3</sup> It has become a familiar feature of the more avowedly political practice of constitution drafting: a technocratic accompaniment that seeks to shape and inform the discursive terrain on which terms and phrases are translated into foundational legal authority.

The constitution drafting manual is one of many technologies of state formation, which include textual as well as material practices. State-building can be regarded as a conceptual project, as with James Scott’s claim that states come to “see” through technologies such as property registers, censuses, and legal codes, and Timothy Mitchell’s description of “modernising” practices from the colonial era that entail extending logics of technical control over territories and populations.<sup>4</sup> Constitutions offer another political optic of modern statehood, and the broader context from which they emerge now includes a range of interventions in the formative stages of constitution drafting. In the post–Cold War present, situated within a normative order structured by “rule of law” and “good governance” discourses and policy agendas, states that are viewed as unable to render their territory and population sufficiently visible for governing are subjected to forms of assistance to bring them into line with standards of contemporary “state-ness.” As Nehal Bhuta argues, the end of the Cold War brought “a new technico-practical discourse of state-ness, in which the state is understood as (partly or predominantly) a *technical achievement*, amenable to a variety of programmes of intentional institutional design . . . and expert knowledge claims about how to generate ‘state strength’ and combat ‘state weakness.’”<sup>5</sup> Constitutions are one such site of technical interventions, where states are encouraged to properly “see” in line with a set of values that are presented as politically neutral and universalizable. Sovereignty, constituent power, conceptions of the *demos*, and political values are given discursive and textual form at the site of the constitution, which answers back in increasingly standardized ways about devolution, rights, and electoral systems.<sup>6</sup> How have these values and forms been normalized, and how have constitution drafting manuals emerged as part of the contemporary state-building *dispositif*?

Conceptions of constitutionality and the optics of “state-ness” are transmitted through a broad network of agency, from state representatives to UN agencies, nongovernmental organizations and scholar-practitioners. Many of these actors participate in the production of modern constitutionality under the ambiguous and presumptively shared category of “technical expertise.” David Kennedy describes international legal “experts” as ruling by articulation, through practices of description that are considered neutral and advisory. By drawing together and providing advice, “experts” also shape the background scene in which later decisions are taken.<sup>7</sup> In this sense, those who produce and provide “expert” knowledge help to establish the frame for the political discussions to follow among legislators, legislative advisors, and the assemblage of actors who inscribe a constitution into being. The language of technocratic “expertise” suggests that this background work is apolitical and divested, and yet, as Kennedy argues, such expertise itself is a form of politics.

A growing body of literature has addressed the phenomenon of expert knowledge in the international legal field, such as rule of law and transitional justice interventions as well as what is broadly referred to as state-building.<sup>8</sup> By contrast, the emergence of the constitution drafting manual in the decades following the end of the Cold War has received

little scholarly attention. The following sections explore how such texts govern, beginning from the manual or handbook itself as a distinct genre in constitution drafting. Taking up two examples of these manuals, I show how they seek to consolidate a vision of state-ness that is exportable, risk-averse, and ultimately utopian. While their background role in constitutional formation makes it harder to trace their direct causal contribution to the political process, the very existence of constitution drafting manuals reveals the technicity of our time and how it shapes perceptions of the global legal order. The constitution drafting manual increasingly sets the framing terms and logics from which state forms are drawn, inscribing limits through exclusions and inclusions, and manifesting part of a broader apparatus of state-ness that could be examined outside and beyond the directly political matter of legislating constitutional forms.

### **The Rise of the Manual**

As textual approaches that inform the development and interpretation of law, manuals and handbooks have become a common feature of legal practice, yet relatively little has been written about them.<sup>9</sup> They perform functions that range from articulating the state of the law, a more descriptive exercise, to shaping the development of future law. Yet even “restatements” of applicable law act into the legal field. For example, Wouter Werner has shown how international humanitarian law manuals both restate existing law and contribute to the development of law through repetition, seeking to consolidate and make normative sense of an ongoing interpretive practice.<sup>10</sup> Although not formal acts of lawmaking, these manuals have two temporal orientations, facing toward both past restatement and future development of the law. As restatements operating through repetition, international humanitarian law manuals also alter the content of the law through this iterative process, asserting and re-contextualizing rules and principles. Werner compares these manuals to the more familiar form of the consumer product manual, illustrating their shared objectives of reducing complexity and offering concrete instructions to foreseeable users. Yet the particular kind of “product” that law manuals offer is distinct, produced through expert knowledge and articulating normative requirements. The constitution drafting manual shares some of these attributes that Werner identifies in international humanitarian law manuals, but the link to *lex ferenda* is even stronger here: beyond restating the law as it is, constitution drafting manuals seek to establish and fix the field of possibilities for legal frameworks still to come. The “products” of juridical technologies are grid formations and classification schemes—forms of ordering—and the act of legislation translates the political and administrative into these legal forms.<sup>11</sup> Constitution drafting manuals seek to participate in these acts of translation from the political into the legal. The field of information that they consolidate and present to legislative drafters may ultimately shape the constitutional conditions of possibility.

While the constitution drafting handbook or manual as a site of *international* expert knowledge became more prominent in the post-Cold War era, precursors existed from at least the nineteenth century. Tailored manuals were developed to inform specific constitutional conventions, as with a late-nineteenth-century manual for the constitutional convention for the State of New York, which compiled the constitutions of states from Europe and Latin America as well as Japan for comparison and possible borrowing. In

addressing the convention attendees, who sought to pass what would become this US state's fourth constitution, the manual's editors claimed that:

By a perusal of these constitutions the delegate may be informed upon the systems of government under which many of the citizens of this great State, more cosmopolitan in character than any under the sun, have been governed in their native lands. It is possible that in more than one of these plans of government the Convention will find provisions which, modified and improved under its wise deliberation, may be found especially adapted to the wants and requirements of the citizens of the Empire State.<sup>12</sup>

The compiling exercise appeared to serve multiple purposes, according to the text itself: to understand how the “cosmopolitan” composition of New York's citizenry had been governed elsewhere “in their native lands,” and to draw insights into how a new version of the state's constitution might benefit from incorporating “improved” provisions of other constitutions. The manual's text reveals the backdrop of the territory's settler colonial history as well as its interest in comparing other state constitutional provisions as opposed to indigenous practices of governing. The reference manual for drafting an Australian federal constitution followed similar logics, aiming to guide members of the Australasian Convention by reference to three different constitutional models (the United States, Canada, and Switzerland).<sup>13</sup>

Scholars have argued that the formal settings of the constitutional convention or the treaty negotiation do not capture the ways in which constituting a people or a foundational moment are products of negotiation and adaptation, and political outcomes involved far more contingency and local interactions than formal documents would suggest.<sup>14</sup> Yet constitutional manuals and the conditions of their making can be read as indexing certain assumptions—in the New York example, of the form that a constitution should take in light of the polity's composition of citizens from a plurality of backgrounds, with fellow citizens assembling comparative constitutional provisions as political actors. How does this shift with the rise of technical or expert advice from outside?

The example of the redrafting of the New York state constitution is distinct from the twentieth-century provision of technical advice during decolonization, marking a shift from a kind of romanticism concerning constitutionality to what could be termed “constitutional civility.”<sup>15</sup> Constitutional romanticism regards constitutions as harboring a sacral or mythic character in capturing “the will of the people” or revolutionary potential, whereas constitutional civility seeks to develop more predictable and beneficial future relations through constitutional forms, as with the departing French, British, and Belgian colonial powers who sought to imprint their own legal forms on nascent postcolonial states. Rather than comparing provisions from elsewhere to see whether they would conform to a polity's specific political needs, colonial state forays into postcolonial state-building revealed a desire to produce states in their own image and to enhance trade with former colonies. According to Nehal Bhuta, colonial state-building projects were “laboratories for the liberal reformist fantasy that whole peoples could first be grasped as objects of knowledge, and then reconstituted as political subjects through long-term intervention and oversight.”<sup>16</sup> These relations unfolded in multiple directions. Colonial authorities introduced legislative assemblies and appointed representatives who were hosted

at constitutional conferences for emerging postcolonial states, which were held in former colonial centers. Meanwhile, British legislative drafters were sent to decolonizing states and produced manuals to aid their successors. One commentator noted that these manuals “preserved the myth that drafters do not make substantive decisions” by maintaining that they are merely putting into words the policy decisions that had already been taken, yet drafters were encouraged to contest provisions that were considered contrary to the rule of law.<sup>17</sup> The resulting texts shored up the authority of the departing colonial powers; for example, the Kenyan independence constitution was a product of British legislation, deriving its validity from an act of the British parliament or crown.<sup>18</sup>

As postindependence states redrafted their independence, constitutions that had been shaped by former colonial powers, ideals of constitutional autochthony—indigeneity or nativity—drove some of the reforms.<sup>19</sup> In comparative constitutional law, scholars have referred to the tensions between autochthony and borrowing as the “transplants debate.”<sup>20</sup> For example, Mark Tushnet describes what he claims is a common view among scholars of comparative law: “However transplants work in private law fields, they work differently, and almost certainly less well, in constitutional law.”<sup>21</sup> Political scientists have also criticized “the export of continental European-style federal boilerplate constitutions to new federations of the developing world.”<sup>22</sup> From constitutional reforms by postcolonial states to contemporary scholarship on the provision of constitutional assistance, there is considerable awareness of the attendant risks of “constitutional civility,” whether in the forms assumed during decolonization or in less visible contemporary iterations that appear in the provision of expert knowledge.

Contemporary constitution drafting guidelines emphasize inclusion, public participation, and transparency, values that are cast as universal in nature as a kind of global public good.<sup>23</sup> Claiming allegiance to these values, the UN has been involved in constitution reform around the world through the UN Development Programme (UNDP). Among the various manuals for UN mediators, handbooks for the peaceful settlement of disputes, and implementation manuals and handbooks for various treaty obligations, the UN secretary general’s office has produced a “guidance note” for “United Nations assistance to constitution-making processes” that sketches a policy framework for UN engagement.<sup>24</sup> A subsequent UNDP “guidance note” builds upon this policy framework, claiming that it “aims to provide a framework for the application of these principles in UNDP support to constitution-making.”<sup>25</sup> The “notes” themselves highlight the importance of engaging and collaborating with national actors and local populations; rather than constitution drafting manuals, however, they serve more as articulations of what the UN considers to be “best practices” of supporting constitution drafting processes. Additional techniques followed: a “Constitutional Focal Point” position was established in 2013 in the UN Department of Political Affairs (UNPA) to “strengthen capacity” and to “develop resources and tools”; the subsequent UN “Constitutionmaker” was developed jointly by UNDP and UNPA as an online constitutional assistance resource center available internally to UN staff.<sup>26</sup> The field of activity around constitution drafting assistance continues to expand, encompassing a wide range of nongovernmental actors operating outside UN reform programs who share an interest in the politically divested and technocratic *ethos* of contemporary state-building.

The experience of decolonization and the provision of legislative drafting manuals

illustrates that the form of the manual itself is not new, but its presumptions and contents have shifted in line with changing approaches to constitutionalism in the post–Cold War era. Contemporary constitution drafting manuals present their work as the product of politically divested technical experts. For example, the Stockholm-based International Institute for Democracy and Electoral Assistance (IDEA) notes in the front matter of its manual, entitled *A Practical Guide to Constitution Building*, that “this publication is independent of specific national or political interests.”<sup>27</sup> The Geneva-based nonprofit Interpeace similarly states that “Interpeace’s publications do not reflect any specific national or political interest.”<sup>28</sup> Both of these manuals further claim that their views do not reflect the views of their respective organizations, leaving the impression that they represent a kind of de-localized and authorless concretion of neutral “best practice.” Yet, unlike the recent “Constitute Project” website, which acts as a repository of existing state constitutions and allows comparative analysis of different provisions, these manuals are structured to provide advice on how constitutions *ought* to be drafted.<sup>29</sup> In this way, they are political actants, as described by Bruno Latour: they engage as “acting agents, interveners” that “modify other actors” as part of a broader network of agency.<sup>30</sup>

Rather than apolitical and inert archives of congealed, neutral expert knowledge, constitution drafting manuals are products of situated interests that inform contemporary state-building. With the standard disclaimer that “views expressed in this publication do not necessarily represent the views of International IDEA, its Board or its Council of Member States, or those of the donors,”<sup>31</sup> IDEA’s *Practical Guide to Constitution Making* reveals the broader network of agency in which the manual acts, including the council of member states and donors that serve to reinforce the value of its work and that enable its material conditions of possibility. In looped relations of reference and citationality, International IDEA and the US Institute of Peace work as external reviewers for the UNDP guidance note, further reinforcing consensus around “best practice” within a community of technical experts. Before turning to the composition of this technical *dispositif*, or assemblage, I first consider how the constitution drafting manual harbors presumptions of what is rendered possible through administrative ordering and particular optics of governing.

### Governing the Calculable

As textual artifacts, constitution drafting manuals emerged from a broader constellation of post–Cold War state-building interventions. They circulate through what James Ferguson terms a “transnational apparatus of governmentality,” and enlist and are enlisted by a range of political entities, from states and international nongovernmental organizations to “local” civil society.<sup>32</sup> While the perceptions of “state-ness” in these texts reflect a contemporary consensus around what would and should constitute good governance, the logics through which they operate can be located within a longer history of technocratic intervention from the colonial period to the present.

Scholars have explored how forms of calculability were brought to bear within colonial projects, such as Timothy Mitchell’s account of Britain’s late nineteenth-century interventions in Egypt that sought to render its territory governable.<sup>33</sup> Diagnosing a “modern techno-politics” that engages in projects of improvement through expert knowledge, Mitchell’s work shows how the figure of the expert is enmeshed in a



constellation of forces and elements, including technology itself, that are not fully within human control despite the conceit of calculability accompanying technocratic expertise. James Scott makes related observations about the “high modernist” social projects of the early twentieth century, though rather than the state appearing as the site of intervention and improvement, these projects were carried out through the state. What these two studies share is an interest in the role of technocratic elites and their techniques of governing, including legal logics such as the establishment of the law of property in formalized rules, and sanctions that are seen to be based upon “principles true in every country.”<sup>34</sup> Scott contends that “the standardization of language and legal discourse” is one way in which state optics take shape, informing what can be observed and rendered legible, and in turn, susceptible to calculation and refinement.<sup>35</sup> Guy Fiti Sinclair’s article in this dossier observes how UN technical assistance programmes for public administration and economic development were premised upon interwar ideas of scientific management and practices of colonial administration, molding nascent states in line with technologies of government.<sup>36</sup>

As an orientation or mindset, constitutional technicity shares an administrative ordering of society through simplifying techniques that attempt to streamline and standardize for the purposes of governing: like mapping practices, state simplifications “did not successfully represent the actual activity of the society depicted, nor were they intended to; they represented only that slice of it that interested the official observer.”<sup>37</sup> In this sense, constitution drafting manuals frame the field of what can be seen in a particular way; they depict aspects of the society that can be measured and compared against others (as with comparative constitutionalism) or in relation to a set of abstract values and institutional forms that are deemed to be “best practice.” The post–Cold War and millennial turn to constitution drafting as a technology of modern state-ness also harbors presumptions about the perfectibility of political and social forms.

This is not to claim that constitution drafting experts and their textual instruments are remaking the world through imperial logics. As constitution-drafting manuals maintain, their suggested practices for ordering the state are meant to provide checks on centralized power and to foster active civil society involvement in state formation and oversight. Commentators on contemporary constitution drafting observe that citizen engagement with and participation in constitutional processes has increased, driven in part through the development of new technologies.<sup>38</sup> Yet reading the claims made in constitution drafting reports and manuals and by technical consultants reveals the way in which its broader “best practice” discourse naturalizes particular modes of governance, presenting them as given forms rather than inherently political interventions.

One example of this in the wake of the 2011 “Arab Spring” is the privileging of federalism and devolution in constitutional forms. A report developed jointly by IDEA, the Center for Constitutional Transitions, and the United Nations Development Programme on the relationship between decentralization and constitutional law in the Middle East and North Africa (MENA) region “has as its ultimate objective to provide assistance to the effort to modernize and reform constitutional frameworks in the Arab region.”<sup>39</sup> The language of modernization is explicit here, with the presumption that entering into modern constitutionality takes specific forms that are drawn from “global best practices”: “This report aims to bring together global best practices on a number of

discrete elements of decentralization, by reviewing arrangements for decentralization around the world. The objective is to present these global best practices as options for further decentralization in the MENA region.”<sup>40</sup> Each iteration of the phrase “global best practices” seeks to solidify the authoritativeness of the report’s claims, with the term “global” suggesting a kind of universal applicability that can remain unvoiced. To raise universalism also invokes its opposite, particularism, which the report would best avoid, as it suggests a leveling of difference between systems. Instead, the report suggests that it has undertaken a comparative analysis from “around the world” to distill the best constitutional arrangements, presenting these shared elements as part of an immanent *global* legal system, much like arguments for general principles as sources of international law. Similarly, the logic here involves identifying convergences by way of comparisons, with the impression that there is a backdrop of shared order and a progressive arrival within that ordered frame—Kant’s “Perpetual Peace” rendered as a contemporary template of best practice.

Critical political scientists have noted the ways in which comparative federalism as a field of study has been used to shore up and reinforce a preference for decentralization: “Our findings based on the federations of the industrialized world are increasingly more systematic and cumulative. Yet does this gain justify the prescription of prescribing a one-size-fits-all federal treatment for the developing world?”<sup>41</sup> Scholars have noted how existing federal systems in the industrialized world have drawn upon custom and informal practices, and how at times these informal elements may override institutionalized constitutional procedures. Furthermore,

the workings of federalism can only be captured once uncodified factors like ethnicity, language, demographics, culture, and class structure are brought into the picture. Over the long-term, federal constitutions of the industrialized world have come to interact with such structural factors, creating political dynamics that cannot be reduced to formal constitutional provisions.<sup>42</sup>

Despite these limitations to what can be rendered constitutionally explicit, scholars of comparative federalism at times may prescribe “these incomplete sketchings from the industrialized world . . . to divided societies of the developing world as federal cures for all political, economic, and social ills.”<sup>43</sup> The move by academics from the analytical to the prescriptive and applied may result from pressure to demonstrate the policy relevance of scholarship in the social sciences.

This desire for prescribing “best practices” is even stronger among the community of practitioners that forms part of the direct political economy of constitution drafting, from the United Nations Development Programme and the Commonwealth Secretariat to the various specialized nongovernmental organizations such as IDEA, the Center for Constitutional Transitions, and the Public International and Policy Group, a self-described “global *pro bono* law firm.” These purveyors of technical expertise may offer policy prescriptions as if they are analytically grounded truths, as with the jointly drafted report on decentralization and constitutionalism in the MENA region. The report presents a set of political preferences for decentralization as a series of grounded analytical claims that will lead to clear and calculable effects:

Political decentralization can also foster political competition by allowing for the emergence at the local level of new political parties that may eventually be able to compete nationally. . . . Strengthening local governments increases the appeal and importance of local elections, thus lowering the stakes of national elections and discouraging the use of violence to gain political power.<sup>44</sup>

The report's language expresses a series of presumptions: among other things, that political competition is good, that progression of a political party from the local to the national level is desirable, and that political participation at the local level decreases the possibility of violence at the national level. Each of these claims is rendered as truth in the rhetorical form of the expert report, which presents prescription as fact through the discourse of "global best practice." Yet other empirical accounts of devolution suggest otherwise; as Mitchell observes in *Rule of Experts*, USAID promotion of decentralization in the Nile Valley reinforced existing inequalities despite shifts from the state to the local:

To weaken the power of the central bureaucracy might have been a positive step for rural Egyptians, but the actual political outcome would depend on the distribution of resources and power at the provincial, district and village levels to which authority and funds were transferred. Local government or the private sector is not necessarily more democratic, or even more efficient, than central government. . . . Decentralization was likely to do no more than shift exploitation from one agency to another.<sup>45</sup>

Others have noted how this push for decentralization in rule of law and development reflects presumptions about the character of the state, particularly in the Global South. Ferguson describes a "new state-and-society approach" in African governance literature and practice that assumes "the national level (state) is corrupt, patrimonial, stagnant, out of date, and holding back needed change; while the local level (civil society) is understood as neither ethnic nor archaic, but as a dynamic, emerging, bustling assemblage of progressive civic organizations that could bring about democracy and development if the state would get out of the way."<sup>46</sup> A milder version of this diagnosis appears in a "constitution-building manual" for Libya, considered in greater detail in the following section, whose authors claim that decentralization "requires political will, especially on the national level, where incentives are otherwise aligned to retain as much power as possible." Meanwhile at the local level, "political decentralization itself provides an important accountability mechanism for local populations to restrain authorities that might otherwise act contrary to their interests, either benignly through a lack of expertise or capacity, or self-interestedly to benefit local elites or special interests."<sup>47</sup> Here the problems appear to derive from consolidated nation-state power combined with insufficient "expertise," political diagnoses that can masquerade as neutral descriptions under a "best practice" discourse that naturalizes particular modes of governance.

Constitution drafting manuals attempt to simplify and standardize in order to render governance more effective, in line with an ideological framing that presumes societies can be rendered calculable and designed in accord with scientific laws, and where normative positions are presented as descriptive facts. The following section considers how this

process takes place through the textual form of the manual, focusing on textual structures and practices as actants within a broader state-building frame.

### Seeing Like a Manual

How do constitution drafting manuals act into the broader political economy of post Cold War state-building? As textual forms of state inscription, what do they reveal and presume about their own objectives and potential effects? From the many examples of constitution drafting manuals that could be considered here, I take up two: one directed to a particular state form (post-conflict), and the other directed to a particular state (Libya). The Washington, DC-based Public International Law and Policy Group (PILPG) 2012 “Post-Conflict Constitution Drafter’s Handbook” illustrates contemporary convergences around peace-building, state-building, and judicial accountability for grave crimes. The International Institute for Democracy and Electoral Assistance (IDEA), headquartered in Stockholm, produced the “Libya Constitution-Building Manual” in 2014, which was developed to “assist the constitution drafters and all other interested parties in their efforts to establish a democracy in the region.”<sup>48</sup> Although a comparative survey of constitution-drafting handbooks and manuals would be a revealing exercise, I forego breadth in the interest of closer readings, focusing on these two sites in order to explore what they reveal about textual practices of state formation. Both PILPG and IDEA are active participants in the production of expert knowledge around constitution drafting, and have broad portfolios that have taken them throughout the world in the interest of consolidating best constitutional practices.

The PILPG handbook reveals a constellation of different actors and interests, both public and private, as shown by the NGO’s composition of former US State Department staff and attorneys from elite law firms.<sup>49</sup> The handbook itself takes a specialized form, directed at postconflict states, and claims that it “draws from PILPG’s experience in facilitating post-conflict constitution drafting processes, as well as comparative state practice, and is based upon analysis of over 150 constitutions from post-conflict and stable states.”<sup>50</sup> Two annexes are included, one listing the cited constitutions and their locations, and the other compiling sample language for specific topics, such as incorporating recognition of international human rights norms.

The handbook’s structure and composition is revealing for what it includes and excludes as subjects of its sixteen chapters. For example, the decision to foreground international legal obligations appears to reflect the organization’s own interests and values, with three separate chapters on rights (human, minority, and women’s, in that order) located between a chapter on “financial matters and the central bank” and another on “defense and security.” Situated between such fundamental matters for state sovereignty—namely, the economy and defense—the handbook’s structure suggests that the language of international human rights law should figure centrally within constitutions.

Chapters are structured through a descriptive introduction—“States typically begin their constitutions with a preamble”—followed by observations of what typical articles may include: for example, by noting that a state’s source of sovereignty “commonly derives from and is vested in the people.” The suggested “sample language” text that follows under the category of “State Identity” works in this conception of popular sovereignty, moving

from an analytical observation to a prescriptive suggestion: “Sovereignty is inalienable, indivisible, non-transferable, and is derived from and vested in the people of [State].”

The presentation of “sample language” is the overarching structural feature of the handbook itself. It works as a textual device, often presenting two or more options, that offers an amalgam of different approaches. Extensive footnotes provide specific examples from the language of different constitutions, though the “sample language” itself is an editorial decision, reflecting what the handbook drafters consider to be the best possible options. These options may or may not directly mirror the language of specific constitutions, and the way in which this decision is taken is not explained—which language from which constitutions feature most heavily, whether there might be a more ideal form that is not reflected in existing constitutional texts, and so on. In this sense, the “sample language” device operates as a black box, transforming a series of hidden editorial steps into congealed best practice.

As a form of constitutional technicity, the textual device of “sample language” is one of the ways in which political investments and decisions are rendered as neutral and technical expert advice. More overt politicality is found in relation to PILPG’s own particular areas of interest at the intersection of peace-building and state-building. For example, a chapter entitled “Selecting a State Structure and Devolving Power” begins with the claim that “post-conflict states frequently restructure the state and develop a new system for devolving powers. These new systems seek to reflect the values of the post-conflict state, restore stability, and prevent future conflict.”<sup>51</sup> With such claims, the handbook appears to blur the distinction between descriptive and prescriptive, conflating what is with what its drafters believe ought to be. It goes on to express opinions, such as the claim that “confederations tend to be unstable, and may serve as a phase in the process towards full independence of the parties,” or provide advice about what categories are best to use for devolution: “When delineating provinces, states often use criteria such as geography and economic viability or identity-based criteria such as ethnicity, language, and religion. For instance, most federal states create provinces based on criteria related to historical and group identity, as geography and economics can become matters of contention.”<sup>52</sup> The footnote used to support this claim refers to one scholarly article on federalism.<sup>53</sup> The handbook itself offers the choice between geography and economics as opposed to history and group identity as if these are discrete categories that can be evaluated in relation to one another to determine de-contextualized, de-historicized best practice. The limits of this either/or approach are not discussed, and the language itself suggests that categories of historical or group identity are unlikely to “become matters of contention.”

Perhaps most notably, the handbook seeks to further shore up the role of expert knowledge in constitutional state-building. In a section on “phased assumption of powers,” for example, an ongoing role for experts is quite literally written in:

To facilitate effective governance during the post-conflict period, states may implement a phased approach to the assumption of powers by provincial governments. A phased approach requires the establishment of criteria and a roadmap for provinces to allow them to assume additional powers. Such criteria may include a certain time frame or attaining a certain level of economic development. The assessment of this criteria might

include an evaluation process, starting with a panel of experts to determine if criteria have been met, followed by a vote in a legislative body.<sup>54</sup>

The footnote references language from the Spanish and Italian constitutions on this point, which does not mention the role of experts. Yet in the suggested “sample language” on the gradual assumption of power over time, the handbook authors suggest:

Criteria Used: To assume these powers and responsibilities, the provinces must fulfill certain objective criteria established by law. Such law shall include requirements relating to [the size of the population/the maturity of the public administration and infrastructure/the degree of economic development/a determination of financial capability].

Evaluation of Criteria: Upon a decision of the province(s) to assume additional powers, a panel of independent experts appointed by the [Constitutional Court] shall determine whether the objective criteria have been met.

The decision of the experts shall be forwarded to the [Assembly]. The [Assembly] must approve the assumption of power by a resolution adopted by a majority of its members.<sup>55</sup>

The handbook extends a dominant logic regarding the advantages of devolution, discussed in the previous section, which it presents as part of a progressive and evolutionary development of the state. Within this suggested frame, a panel of experts would then offer future pastoral assistance, shepherding nascent provinces toward “the assumption of power” in a properly devolved state. What becomes clear from this passage is the fear of an overly generous interpretive frame, where the act of evaluating criteria might serve as a weak link best left to expert knowledge.

Through textual devices—for example, suggesting “sample language” and reifying technical expertise—the PILPG manual conceals its own editorial-political logics, following the move described above of presenting policy prescriptions as analytic truths. This manual aspires to address a broad audience of transitional states, which are understood as transitioning from conflict to post-conflict “stable” state forms. By contrast, the IDEA manual focuses on a single post-conflict state, Libya, asserting that it is a “unique country in a unique situation” that requires particular attention to this unique context. For this reason, its authors contend, it covers not only “traditional areas of importance (including the separation of powers, fundamental rights, and decentralization)” but also “some areas that are specifically relevant to Libya (including natural resources and corruption).”<sup>56</sup> If the PILPG manual was designed to address post-conflict states writ large, the IDEA manual for Libya offers a bespoke alternative: “It focuses mainly on those areas that have been identified as particularly relevant to Libya” rather than proceeding “along classical lines.”<sup>57</sup>

The IDEA manual performs its act in five parts, moving from fundamental rights to separation of powers to decentralization, followed by the two tailored topics of “oil and gas provisions” and “constitutional reform and the fight against corruption.” Unlike the PILPG manual, it does not offer “sample language,” but rather a set of comparative observations drawn from constitutions throughout the world on each point of governance

that it addresses, beginning from the formulation of supremacy clauses that establish fundamental rights and ensure that they are binding upon all branches of the state. Further, the manual is as interesting for what it omits as it is for what it includes; while working through the various options of executive form, for instance, there is no mention of Libya's own constitutional formation of its executive branch, despite asserting in the preface that "Libya has the benefit of being able to draw from a number of traditions, including its own 1951 constitution."<sup>58</sup> The manual compiles examples from different constitutions, compares their merits and disadvantages, and highlights the contextual specificities of the Arab region (lack of strong judiciaries, the use of legislation to restrict rights, privileging of executive power and centralized governments), imagining a terrain on which a constitutional form could be constructed *de novo* based upon best practice.<sup>59</sup> In this sense, the manual appears to approach Libya as a state without an existing constitution, or with one that must be abandoned so that a new legal order can be constituted to undo a legacy of abuse through legal forms.

Reading into the text of the manual for its subtle diagnostic work, a narrative emerges of how this aspirational legal order may avoid the mistakes of the past. Like the more general PILPG manual, the "Libya Constitution Building Manual" takes care to avoid overt prescriptive formulations. Yet normative positions emerge from the interstices of the text, between the constitutional excerpts and the detached authorial voice analyzing them. The manual adopts a standpoint of skepticism toward the state: absent a clearly posited constitutional framework leaving little room for interpretation, rights will be curtailed through legislation. Parliaments, presidents, and the judiciary are not to be trusted. For example, the manual states that particular phrasing in the Chilean constitution "is problematic, because it invites the government, parliament, and courts to limit freedom of conscience based on three highly subjective values"—morals, good customs, and public order—"that are not defined anywhere in the constitution."<sup>60</sup> Interpretive discretion is risky; instead, constitutions should be liberated from "vague and subjective phrases" and "ambiguous language that will allow for arbitrary limitations" of fundamental rights. "Terms such as public order, welfare, and morals are highly subjective and have no settled legal definitions," the manual contends: "International attempts to define these terms still leave limitations essentially unrestrained," which makes them "vulnerable to the will of a country's leaders."<sup>61</sup>

Within this narrative of constitutionalism, vagueness opens space for interpretive abuse, and discretion for political interest. The manual appears to valorize detail, clarity, clear definition of terms, and express restrictions on power with the objective of diffusing it. At the same time, there are risks of stating too much, and sometimes it is possible that explicitly inscribing what is prohibited may be seen as authorizing what is *not* said: "Listing some rights as non-derogable may, however, make other fundamental rights appear more limitable and make them more vulnerable to complete derogation during times of emergency."<sup>62</sup> In this way, the manual might be said to engage in what Eve Sedgwick describes as "paranoid reading," an interpretive stance of suspicion that anticipates negative surprises and produces a "future-oriented vigilance."<sup>63</sup> These constitution manuals seek to construct a regulatory architecture that will mitigate risks, limit harms, and address injustices in post-conflict states in which political actors and forces have misappropriated legal forms. The foil to the untrustworthy state and the threat of law's capture by political

interests is the pure dream of the constitution itself: a messianic form that can only exist aspirationally in the margins of these texts, “sample language” unmediated by the political contestations of legislating a constitution into being.

### Aspirations and Archives

As a textual intervention in statecraft, the constitution drafting manual is only as felicitous as its broader political context allows. These texts are pre-constitutional, informing the background work of constitutional production without taking on a distinct life of their own. Once their use-value is extracted, they seem to recede from view, as artifacts or remains of a process that lives on through constitutions themselves and the mobile field of technicians that continues to inform their drafting. In the assemblage of constitutional production, the constitution drafting manual or handbook appears relatively inert, overshadowed by the broader political economy of statecraft.

Yet these texts offer rich sites for exploring an under-theorized technology of state-ness. Contrary to the idea that constitution drafting manuals are inert forms, they serve as sites of normative production and reproduction, repositories of value that belie their seeming technical and apolitical self-presentation. In this sense, they offer a case study for considering law’s material forms—legal materiality—by addressing one of the mediums through which constitutional law and statehood are produced.<sup>64</sup> Writing about record keeping and filing practices, Cornelia Vismann observes how certain textual forms reveal histories of legal production:

[Files] not only fix a result but also shed light on their own development, on that which precedes grand acts of writing such as the clean copy or the legal institutes and institutions. That is, they allow access to that which came before the law, the legally binding verdict, the issued deed. Within the imagined chain of supplements for the spoken language, *supplements*, files are closest to the presence of speech. Hence they attract all researchers who are interested in origins and who leaf through written documents in search of the words that once were spoken.<sup>65</sup>

Just as files operate as traces of institutional practices, mediating and acting into the production of law, manuals and handbooks that provide guidance for constitution drafting speak the background code of contemporary constitutional thinking. They record a possibility of what may have set the terms “which came before the law,” registering the convergence of constitutional technicity around certain forms and vocabularies of governance. As part of a broader *dispositif* or apparatus of state formation, their practices of knowledge production and ways of naturalizing particular views of state-ness require further consideration.

### NOTES

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1. I explore this turn in detail in Sara Kendall, “‘Constitutional Technicity’: Displacing Politics through Expert Knowledge,” *Law, Culture and the Humanities* 11, no. 3 (2015): 363–77.

2. For example, Peter Miller and Nikolas Rose draw upon Bruno Latour’s notion of “inscription devices”



to illustrate the role of record-keeping in the operation of power. Peter Miller and Nikolas Rose, *Governing the Present: Administering Economic, Social and Personal Life* (Cambridge: Polity Press, 2008).

3. Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings, 1972–1977*, ed. Colin Gordon (New York: Pantheon Books, 1980), 194–95. Alain Pottage takes up Foucault’s formulation for a legal materialist approach, also drawing upon the work of Bruno Latour and Niklas Luhmann, “The Materiality of What?” *Journal of Law and Society* 39, no. 1 (March 2012): 167–83.

4. James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998); Timothy Mitchell, *Rule of Experts: Egypt, Techno-Politics, Modernity* (Berkeley: University of California Press, 2002).

5. Nehal Bhuta, “State Theory, State Order, State System—Jus Gentium and the Constitution of Public Power,” in *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, ed. Stefan Kadelback, Thomas Kleinlein, and David Roth-Isigkeit (Oxford: Oxford University Press, 2017), 401.

6. James Tully characterizes modern constitutionalism as an “empire of uniformity” that holds “concepts of popular sovereignty which eliminate cultural diversity as a constitutive aspect of politics.” James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), 63.

7. David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton, NJ: Princeton University Press, 2016).

8. For example, a recent special issue of the *Journal of Intervention and Statebuilding* addresses the theme of “Knowledge Production in/about Conflict and Intervention: Finding ‘Facts,’ Telling ‘Truth’” (Volume 11, 2017), with several articles addressing expert knowledge.

9. Alain Pottage notes that “Handbooks were once law books of a certain kind. . . . the genre of the handbook or manual was an essential resource for the government of Christian subjects. *Manuale*, from which the terms ‘handbook’ and ‘manual’ were directly derived, originally referred to the case or binding which held the book together and ensured its portability and durability. The contents had to be durable too, in the sense of being a resource to which the confessor could return often, and to productive effect.” Alain Pottage, “Literary Materiality,” in *Routledge Handbook of Law and Theory*, ed. Andreas Philippopoulos-Mihalopolous (London: Routledge, 2019), 409–30, 409.

10. Wouter Werner, “The Law at Hand: What Does it Mean to Restate International Humanitarian Law in the Form of a Manual?,” unpublished chapter manuscript from forthcoming book, on file with author. Werner considers the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, the 2006 San Remo Manual on the Law of Non-International Armed Conflict, the 2009 Harvard Manual on International Law Applicable to Air and Missile Warfare, and the 2013 Tallinn Manual on the International Law Applicable to Cyber Warfare.

11. On juridical technologies and the fabrication of law, see Tim Murphy, “Legal Fabrications and the Case of ‘Cultural Property,’” in *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, ed. Alain Pottage and Martha Mundy (Cambridge: Cambridge University Press, 2004), 122.

12. The Convention Manual of the Sixth New York State Constitutional Convention, “Foreign Constitutions, Comprising the Constitutions of Argentine, Belgium, Brazil (Empire and Republic), Colombia, Ecuador, France, Germany, Honduras, Japan, Mexico, Prussia, Switzerland and Venezuela” (Albany: The Argus Company, 1894).

13. Richard Chaffey Baker, *A Manual of Reference to Authorities for the Use of the Members of the National Australasian Convention which will assemble at Sydney on March 2, 1981, for the Purpose of Drafting a Constitution for the Dominion of Australia* (Adelaide: W.K. Thomas & Co., 1891).

14. See generally Vicki Hsueh, *Hybrid Constitutions: Challenging Legacies of Law, Privilege and Culture in Colonial America* (Durham, NC: Duke University Press, 2010), and Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Durham, NC: Duke University Press, 2010).

15. Kendall, “‘Constitutional Technicity.’”

16. Nehal Bhuta, “Against State Building,” *Constellations* 15, no. 4 (2008): 519.

17. Robert Seidman, “Law, Development, and Legislative Drafting in English-Speaking Africa,” *The Journal of Modern African Studies* 19, no. 1 (March 1981): 133–61, 155.

18. Yash Ghai, “Constitutions and the Political Order in East Africa,” *The International and Comparative Law Quarterly* 21, no. 3 (July 1972): 403–34. Ghai observes that the governor used this power of appointment to exclude the deputy leader of the largest party and to set up a favorable political environment to the Kenya African Democratic Union (KADU) under the new constitutional arrangements.

19. See, generally, Andrew Harding, “The ‘Westminster Model’ Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States,” *The Oxford University Commonwealth Law Journal* 4, no. 2 (2004): 143–66. Ghai defines autochthony as “home grown,” “rooted in the country itself”; see Ghai, “Constitutions and the Political Order,” 414.

20. Vlad Perju, “Constitutional Transplants, Borrowing, and Migrations,” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012).

21. Mark Tushnet, “Constitution,” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 220.

22. Jan Erk, "Federalism and its Discontents: the Limits of New Institutionalism," Foundation for Law, Justice and Society Policy Briefs, 5.
23. Jason Gluck and Brendon Ballou, United States Institute of Peace Special Report, 2014, "New Technologies in Constitution Making," [https://www.usip.org/sites/default/files/SR343\\_New-Technologies-for-Constitution-Making.pdf](https://www.usip.org/sites/default/files/SR343_New-Technologies-for-Constitution-Making.pdf).
24. United Nations, "Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes," 2009, [https://www.un.org/ruleoflaw/files/Guidance\\_Note\\_United\\_Nations\\_Assistance\\_to\\_Constitution-making\\_Processes\\_FINAL.pdf](https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf).
25. "UNDP Guidance Note on Constitutional Support," 2014, [http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/parliamentary\\_development/GuidanceNote\\_ConstitutionMakingSupport.html](http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/parliamentary_development/GuidanceNote_ConstitutionMakingSupport.html)
26. On the "Constitutional Focal Point," see UN Department of Political Affairs Fact Sheet, 2016, [https://peacemaker.un.org/sites/peacemaker.un.org/files/ConstitutionMaking\\_Factsheet\\_May2016.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/ConstitutionMaking_Factsheet_May2016.pdf); the Constitutionmaker is based here: <https://constitutionmaker.un.org/user/login?destination=node/114> (accessed October 13, 2019).
27. Markus Böckenförde, Nora Hedling, and Winluck Wahiu, "A Practical Guide to Constitution Building" (International Institute for Democracy and Electoral Assistance, 2011).
28. Michele Brandt, Jill Cottrell, Yash Ghai, Anthony Regan, "Constitution-making and Reform: Options for the Process" (Interpeace, 2011).
29. The Constitute Project, <https://www.constituteproject.org/>. The Constitute Project arguably does shape constitutional thinking through the thematic search categories it contains on the website, though it mainly operates as a repository.
30. Bruno Latour, *Politics of Nature: How to Bring the Sciences into Democracy*, trans. Catherine Porter (Cambridge, MA: Harvard University Press, 2004), 75.
31. Böckenförde, Hedling, and Wahiu, "Practical Guide."
32. James Ferguson, *Global Shadows: Africa in the Neoliberal World Order* (Durham, NC: Duke University Press, 2006), 103.
33. Mitchell, *Rule of Experts*. Mitchell builds upon German sociologist Georg Simmel's observation about "the character of calculability."
34. Here Mitchell invokes the words of a British colonial administrator; *ibid.*, 11.
35. Scott, *Seeing Like a State*, 2.
36. Guy Fiti Sinclair, "Forging Modern States with Imperfect Tools: United Nations Technical Assistance for Public Administration in Decolonized States," *Humanity* 11, no. 1 (Spring 2020).
37. Scott, *Seeing Like a State*, 3.
38. Gluck and Ballou, "New Technologies." Vivien Hart notes that "Constitution making traditionally has carried an aura of learning and technical expertise that has discouraged inexpert participation," but argues that participation is becoming increasingly common. Vivien Hart, "Constitution Making and the Right to Take Part in a Public Affair," in *Framing the State in Times of Transition: Case Studies in Constitution Making* (Washington, DC: United States Institute of Peace Press, 2010), 31.
39. Center for Constitutional Transitions, International IDEA, and the United Nations Development Programme, *Decentralization in Unitary States: Constitutional Frameworks for the Middle East and North Africa*, 2014, 9.
40. *Ibid.*, 14.
41. Jan Erk, "Engagé Intellectuals, Technocratic Experts, and Scholars," in *The Global Promise of Federalism*, ed. Grace Skogstad, David Cameron, Martin Papillon, and Keith Banting (Toronto: University of Toronto Press), 259–78, 260.
42. Jan Erk, "Federalism and its Discontents," 3.
43. *Ibid.*, 3.
44. Center for Constitutional Transitions, International IDEA and the United Nations Development Programme, *Decentralization in Unitary States: Constitutional Frameworks for the Middle East and North Africa*, 2014, 19.
45. Mitchell, *Rule of Experts*, 227–28.
46. Ferguson, *Global Shadows*, 96.
47. International IDEA, "Libya Constitution-Building Manual," Draft, 2014, on file with author, 78.
48. *Ibid.*, 5.
49. "To provide *pro bono* legal advice and policy formulation expertise, PILPG draws on the volunteer services of more than sixty former legal advisors and former Foreign Service officers from the US Department of State and other foreign ministries. PILPG also draws on *pro bono* assistance from major international law firms including Baker & McKenzie; Cleary, Gottlieb, Steen & Hamilton; Covington & Burling; Davis, Polk & Wardwell; Debevoise & Plimpton; DLA Piper/New Perimeter; Jones Day Milbank, Tweed, Hadley & McCloy; Orrick, Herrington & Sutcliffe; Shearman & Sterling; Skadden, Arps, Slate, Meagher & Flom; Sullivan & Cromwell; White & Case; and WilmerHale. Annually, PILPG is able to provide over \$15 million worth of *pro bono* international legal services."

50. PILPG, "Post-Conflict Constitution Drafter's Handbook," 2012, on file with author.
51. *Ibid.*, 10.
52. *Ibid.*, 12–13.
53. Sujit Choudhry and Nathan Hume, "Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism," in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Northampton, MA: Edward Elgar Publishing, 2011), 356–57.
54. PILPG, "Post-Conflict Constitution Drafter's Handbook," 18.
55. *Ibid.*, 19.
56. International IDEA, "Libya Constitution-Building Manual," 5.
57. *Ibid.*
58. *Ibid.* Libya's constitution is mentioned once, in relation to a limitations clause, and then states that "although all Arab constitutions provided for the existence of specific rights, hundreds if not thousands of laws were passed that so restricted those rights that they rendered the rights themselves completely meaningless" (9).
59. The manual grants that "no modern constitution will be written in a vacuum," and that "constitutional drafters will have to take the preexisting framework into consideration when deciding how to shape the future state," but little analysis of the preexisting framework within Libya exists in its pages. *Ibid.*, 68.
60. *Ibid.*, 10.
61. *Ibid.*, 14–15.
62. *Ibid.*, 18.
63. Eve Kosofsky Sedgwick, "Paranoid Reading and Reparative Reading, or You're So Paranoid, You Probably Think This Essay is About You," in *Touching Feeling: Affect, Pedagogy, Performativity* (Durham: Duke University Press, 2003), 130. See also Jill Stauffer, *Ethical Loneliness: the Injustice of Not Being Heard* (New York: Columbia University Press, 2015).
64. On legal materiality as a method of analysis, see Hyo Yoon Kang and Sara Kendall, "Legal Materiality," in *Oxford Handbook on Law and the Humanities*, ed. Maksymilian Del Mar, Bernadette Meyler, and Simon Stern (Oxford: Oxford University Press, 2019).
65. Cornelia Vismann, *Files*, trans. Geoffrey Winthrop-Young (Stanford, CA: Stanford University Press, 2008), 8 (footnote omitted).