ARTICLE

# The Elite Threat to Constitutional Transitions

WILLIAM PARTLETT*

*Democratic constitutional transition conjures up images of a better form of politics involving enhanced popular participation and rational deliberation. But what institutions should be used to create this higher form of politics? The universal answer—focusing primarily on enhancing popular participation—argues that extraordinary institutions such as constituent assemblies and referendums are preferable to ordinary legislatures in creating this kind of elevated politics. This universal account is drawn from the theory and practice of revolutionary constitution-making in eighteenth-century America and France and its legacy in Western developed democracies today.*

*Recent experience of post-communist constitution-making, however, challenges the universality of this answer. In this context, extraordinary institutions did not elevate the politics of constitutional transition. Instead, they did the opposite, providing a platform for partisan elites to claim popular mandates and then dominate constitution-making. These self-interested elites then abused this dominant position to insert constitutional rules into new constitutions that undermined individual rights and entrenched their own power. Ordinary legislatures, by contrast, were able to help build more impartial constitutional orders by constraining elite self-dealing and unilateralism in constitutional drafting.*

*This post-communist experience suggests the dangers of transplanting this revolutionary constitution-making tradition into post-authoritarian contexts. In these settings, an extraordinary and revolutionary form of constitution-making politics can enable elite self-dealing. Post-communism therefore suggests that an ordinary form of constitution-making politics—centered around ordinary legislatures and ordered politics as bargaining—can help to solve this elite threat and therefore encourage a more deliberative, popularly engaged, and therefore successful process of constitutional transition.*

---

*Senior Lecturer, Melbourne Law School. I would like to thank Andrew Arato, Joel Colón-Ríos, Joel Harrison, Claudia Haupt, Amalia Kessler, David Landau, Henry Monaghan, Bernadette Meyler, Tom Poole, David Pozen, Mark Tushnet, and Wojciech Sadurski for very useful suggestions and comments. I would also like to thank the participants in the Columbia Law School Comparative Law Roundtable, the Columbia Law School Associates' and Fellows Workshop, the Law & Society Roundtable on Democratic Transitions, and the Southeastern Association of Law Schools Panel on Building New Democracies. I also wish to thank the members of the University of New South Wales Comparative Constitutional Law Roundtable for their comments on this project.

I. INTRODUCTION ..... 409
II. THE GOALS OF CONSTITUTION-MAKING: IMPROVED PARTICIPATION AND DELIBERATION ..... 414
*A. Popular Participation* ..... 415
*B. Elite Deliberation* ..... 417
III. THE ALLEGED NECESSITY OF EXTRAORDINARY INSTITUTIONAL DESIGN ..... 418
*A. Popular Institutions* ..... 418
*1. Constituent Power Theorists* ..... 419
*2. Participatory Constitution-Making Theorists* ..... 422
*B. Deliberative Institutions* ..... 424
*C. Empirical Basis for these Findings: Eighteenth-Century United States and France as well as Contemporary Western Practice* ..... 426
IV. POST-COMMUNIST CONSTITUTION-MAKING ..... 428
*A. Post-Communist Similarities* ..... 429
*B. Countries in the Study* ..... 430
*1. Real Political Competition* ..... 431
*C. Institutional Variation in the Seventeen Post-Communist Countries* ..... 432
*1. Parliamentary Constitution-Making* ..... 432
*2. Presidential Constitution-Making* ..... 435
V. POST-COMMUNIST EXPERIENCE: POPULAR PARTICIPATION ..... 436
*A. Extraordinary Institutions and Popular Engagement* ..... 437
*1. Circumvention Referendums: Belarus and Armenia* ..... 437
*B. Parliamentary Constitution-Making and Popular Engagement* ..... 441
*1. Hungary* ..... 441
*2. Restoration Constitutionalism: Latvia, Lithuania, Czech Republic, Georgia* ..... 442
*3. Ex Post Referendum: Estonia* ..... 443
*4. Post-Founding Legitimation: Poland* ..... 444
*C. Conclusion: Rethinking Elites, Institutions, and Popular Participation* ..... 445
VI. POST-COMMUNIST EXPERIENCE: ELITE DELIBERATION ..... 447
*A. Specialized Mechanisms and Deliberation* ..... 447
*B. Did Parliamentary Involvement in Constitution-Making Lead to More Self-Interested Constitution-Making?* ..... 450
*1. Protective Constitution-Making? Romania and Bulgaria* ..... 450
*2. Negotiated Constitution-Making: Poland and Ukraine* ..... 451
*C. Conclusion* ..... 453
VII. CONCLUSION ..... 454

## I. INTRODUCTION

We live in an era of democratic constitution-making.[1] When authoritarian governments collapse, one of the first things that the new authorities—and in many cases international experts—focus on is the creation of a new written constitution.[2] This process of "transitional" constitution-making is seen as a critical step in state-building and the transition to accountable and democratic self-government.[3] One of the most important—but under-explored—questions in the transitional process involves the best institutional design for this process of constitutional transition.[4]

Normative considerations play a critical role in the dominant understanding of this process of constitution-making.[5] In particular, most theorists argue that the politics of constitution-making should be *better* than ordinary politics.[6] A majority of the literature focuses on popular participation, with scholars arguing that constitution-making should generate a higher level of popular engagement than ordinary politics.[7] This enhanced popular participation has both the intrinsic value of allowing the people to engage in self-rule, as well as the instrumental value of entrenching constitutional law as higher law that will remain stable in the face of future political majorities.[8] A much smaller literature focuses on the elite components of constitution-making.[9] These scholars argue that

---

1. Vivien Hart, *Special Report: Democratic Constitution Making*, U.S. INST. OF PEACE SPECIAL REPORT 107, 2 (July 2003), http://www.usip.org/sites/default/files/sr107.pdf [hereinafter Hart, *Democratic Constitution Making*] (explaining how more than half of the constitutions in existence today were written in the last twenty-five years).

2. U.N. Secretary-General, Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes (April 2009), http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINA-L.pdf (describing how constitution-making processes are a "central aspect of democratic transitions").

3. Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction*, 14 CARDOZO L. REV. 497, 497 (1993) ("The realization of the spirit of constitutionalism generally goes hand in hand with the implementation of a written constitution.").

4. Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 ANNU. REV. L. SOC. SCI. 201, 202 (2009) (describing how knowledge of the institutional design of constitution-making is "cloudy at best").

5. *Id.* at 210 (discussing the dualist basis of research which "proceeds from the assumption that constitutional politics are fundamentally different in character from ordinary politics").

6. Nathan J. Brown, *Reason, Interest, Rationality, and Passion in Constitution Drafting*, 6 PERSPECTIVES ON POLITICS 675, 675 (2008) (describing how scholarly analysis places emphasis on "deliberation, considerations of the general public interest, and long-term political reasoning" in constitution-making).

7. Hart, *Democratic Constitution Making*, *supra* note 1, at 4-5 (discussing the importance of enhanced participation in constitution-making); JOANNE WALLIS, CONSTITUTION MAKING DURING STATE BUILDING (2014) (arguing for the importance of public participation in constitution-making).

8. *See infra* notes 48-55.

9. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L. REV. 364, 394 (1995) [hereinafter Elster, *Forces and Mechanisms*] (discussing the importance of "rational, impartial

constitution-making should encourage better and more publicly-minded elite deliberation than ordinary politics.[10] This improved deliberative process in turn helps to ensure a constitutional order that produces impartial institutions that will protect individual rights and ensure robust political competition.[11]

This vision of constitution-making as a better form of politics, theorists argue, requires a different kind of institutional design. In particular, constitution-making should avoid political bargaining in ordinary legislatures and instead utilize specialized, revolutionary institutions like constituent assemblies and referendums.[12] Embedded within this approach to institutional design are two arguments about the deficiencies of ordinary legislative institutions in encouraging enhanced popular engagement and impartial decision-making.[13] First, many theorists argue that ordinary legislatures are captured by special interests and are therefore less likely to allow the people to directly take part in constitution-making.[14] Extraordinary mechanisms of popular action are necessary, it is argued, to ensure that the people can participate in the creation of a new constitutional order.[15] Second, some also argue that ordinary legislatures are more likely to be the site of self-interested bargaining.[16] This self-interested bargaining will lead

---

argument" in constitution-making). Much of the elite literature on constitution-making comes from the political science literature and is not explicitly normative. *See also* GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES (1986); Rafael Lopez-Pintor, *Mass and Elite Perspectives*, *in the Process of Transition to Democracy*, *in* COMPARING NEW DEMOCRACIES: TRANSITION AND CONSOLIDATION IN MEDITERRANEAN EUROPE AND THE SOUTHERN CONE 79 (Enrique Baloyra ed., 1987); James Malloy, *The Politics of Transition in Latin America*, *in* AUTHORITARIANS AND DEMOCRATS: REGIME TRANSITION IN LATIN AMERICA 235 (James Malloy & Mitchell Segilson, eds., 1987); John Higley & Michael G. Burton, *The Elite Variable in Democratic Transitions and Breakdowns*, 54 AM. SOC. REV. 17 (1989).

10. Jon Elster, *Deliberation and Constitution-Making, in* DELIBERATIVE DEMOCRACY 105 (Jon Elster ed., 1998) (describing the importance of creating a "deliberative setting" that moves toward "arguing" and away from "bargaining" for better decision-making) [hereinafter Elster, *Deliberation and Constitution-Making*]; *see also* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* DEBATES IN CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY 342, 345–48 (Derek Matravers & Jon Pike, eds., 2003) (discussing how deliberation should proceed through public argumentation and reasoning toward a consensus about the public good).

11. CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 16–19 (2001) (discussing how more inclusive drafting rules are likely to increase the likelihood of institutions that will protect minority rights and pluralism).

12. *See, e.g.*, Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 348 (2000) (describing how constituent assemblies are more likely to be the site of an improved form of constitution-making politics) [hereinafter Elster, *Arguing and Bargaining*].

13. Brown, *supra* note 6, at 675 (describing how many criticize a constitution-making process that is "merely the product of partisan horse trading, emotional appeals, and short-sighted calculations").

14. *See, e.g.*, Joel I. Colón-Ríos, *Notes on Democracy and Constitution-Making*, 9 N.Z. J. PUB. & INT'L L. 17, 28–29 (2011); Stephen M. Griffin, *California Constitutionalism: Trust in Government and Direct Democracy*, 11 U. PA. J. CONST. L. 551, 563–564 (2009).

15. *See infra* notes 76–114.

16. *See infra* notes 116–123

legislatures to protect their own institutional interests in constitution-making, therefore creating poorly entrenched constitutional norms. Scholars therefore argue that extraordinary mechanisms are needed to ensure the decision-making process is more deliberative and grounded in arguments about the common good.[17]

These normative claims draw much of their support from the eighteenth-century tradition of revolutionary constitution-making in United States and France and its legacy of specialized, extra-parliamentary institutions for democratic constitution-making.[18] They also draw in part on republican critiques of ordinary representative politics (and its institutions) that also draw on this legacy of revolutionary eighteenth-century constitution-making.[19]

This article will test these institutional design claims in a different context: written constitution-making in twenty-one post-communist countries of Europe, the Caucasus, and Central Asia.[20] This experience fundamentally challenges this universal normative vision of extraordinary institutions as improving popular participation and elite deliberation. In the post-communist era, extraordinary institutions did not improve either

17. Elster, *Deliberation and Constitution-Making*, *supra* note 10, at 105-107; STEPHEN TIERNEY, CONSTITUTIONAL REFERENDUMS: THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION (2012).

18. Elster, *Arguing and Bargaining, supra* note 12, at 410–11 (looking at the encouragement of deliberation in the Philadelphia and French constitution-making assemblies). *See generally* Lawrence G. Sager, *The Birth Logic of a Democratic Constitution*, *in* CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 111 (John Ferejohn, Jack N. Rakove & Jonathan Riley, eds., 2001) (describing the role of this historical narrative in our "constitutional folklore"); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 356 (1994) (relying on the American founding to argue that constitution-making should involve the "best possible decisions in pursuit of the common good under a condition of popular sovereignty") (emphasis omitted).

19. TIERNEY, *supra* note 17 (formulating a republican vision of constitutional referendums based on the use of referendums in developed democracies); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984) (drawing on American history to describe a republican vision of constitution-making characterized by "Publian appeals to the common good, ratified by a mobilized mass of American citizens expressing their assent through extraordinary institutional forms"). *See generally* James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 304-305 (1990) (discussing a republican theory of politics, specialized institutions based on an account of American constitution-making); *see also* J. G. A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975) (describing the historical origins of the republican ideas during the American founding).

20. Timothy Frye, *A Politics of Institutional Choice: Post-Communist Presidencies*, 30 COMP. POL. STUD. 523, 523–24 (1997) (describing how the post-communist transitional experience is particularly good to study because "the cases hold many temporal, cultural, and economic variables relatively constant" but we still find "significant variation"). The countries surveyed include: Eastern Europe (Former Warsaw Pact) – 6: 1. Bulgaria, 2. Czech Republic, 3. Hungary, 4. Poland, 5. Romania, 6. Slovakia; Eastern Europe (Former Soviet republics) – 7: 7. Russia, 8. Belarus, 9. Estonia, 10. Latvia, 11. Lithuania, 12. Moldova, 13. Ukraine; Central Asia (Former Soviet republics) – 5: 14. Tajikistan, 15. Turkmenistan, 16. Uzbekistan, 17. Kyrgyzstan, 18. Kazakstan; Caucasus (Former Soviet republics) – 3: 19. Armenia, 20. Azerbaidzhan, 21. Georgia.

participation or deliberation; instead, the greater the role these institutions played, the "less constitutionalism matter[ed] as a political force."[21] In fact, these extraordinary institutions enabled elite self-dealing, providing platforms for partisan elites commanding temporary majorities to circumvent opposition and entrench their power by inserting partisan provisions into new constitutions.[22] This kind of "abusive constitutionalism" suggests that extra-parliamentary institutions can worsen the dangers of elite self-dealing in constitutional transitions.[23]

By contrast, the post-communist countries that have had the most success in transformative constitution-making—and have built systems that ensure political competition and individual rights—chose not to center the constitution-drafting process around extra-parliamentary institutions.[24] They used inherited legislatures—"redeemed" through competitive elections—to constrain self-dealing elites and build a broad consensus in the drafting stage.[25] The resulting drafts were then often ratified by the people in *ex post* referendums.[26]

The centering of constitutional drafting in ordinary legislatures contains "remembered wisdom that constitutional theory has forgotten."[27] It represents an institutional solution to the danger of elite self-dealing in

21. Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 275, 290 (Sanford Levinson ed., 1995).

22. David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 938–58 (2013) (describing how extra-parliamentary process has given charismatic executives a democratic tool to circumvent parliamentary opposition in Venezuela and Bolivia) [hereinafter Landau, *Gone Wrong*]; William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT'L L. 193 (2012) (also in Russia, Belarus, and Kazakhstan) [hereinafter Partlett, *The Dangers*]; *see also* Henry E. Hale, *Formal Constitutions in Informal Politics: Institutions and Democratization in Post-Soviet Eurasia,* 63 WORLD POL. 581 (2011) (explaining that formal constitutional rules are critical in ensuring the concentration of power even in countries where informal politics are important).

23. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

24. ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950-1990 18–27 (2000) (discussing democracy as about alternation in power by elites); Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1254 (2008) (defining constitutionalism as "a sufficiently shared willingness to use law rather than force to resolve disagreements; to limit government power and to protect human rights through law and defined processes; to provide a reasonable degree of predictability and stability of law that people may rely on as they structure their lives; and to maintain a government that is legitimate and effective enough to maintain order, promote the public good, and control private violence and exploitation").

25. ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION, AND LEGITIMACY (2000) (discussing this process in Eastern Europe) [hereinafter ARATO, CIVIL SOCIETY]; MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY (2010) (discussing the overall trend toward legal transition that started with Spain in the late 1970s and that spread into Eastern Europe) [hereinafter ROSENFELD, THE IDENTITY].

26. Maija Setälä, *On the Problems of Responsibility and Accountability in Referendums*, 45 EUR. J. POL. RES. 699, 718 (2006) (exploring the benefits of ex post referendums in encouraging better deliberation).

27. Jacob T. Levy, *Not So* Novus *An* Ordo*: Constitutions Without Social Contracts*, 37 POL. THEORY 191, 193 (2009).

constitution-making. In particular, the constraints of ordinary legislatures and politics improved elite deliberation by blocking one elite faction from dominating the constitutional drafting process. It therefore encouraged negotiation and compromise, making it less likely that the drafters would know their position in the future political system. This uncertainty increased the likelihood that they would create a more impartial and less self-interested document.[28]

The post-communist experience forces us to rethink our universal theory of revolutionary institutional design in constitutional transitions. It is a strong reminder that constitution-making is a multi-stage process wherein drafting and ratification are distinct stages.[29] At the drafting stage, seeking to mobilize extraordinary institutions in the service of an elevated and revolutionary kind of politics was a serious mistake: post-communist societies lacked the stable institutions, norms of cooperation, and cohesiveness to ensure the necessary negotiation and compromise in this revolutionary institutional setting. The post-communist context instead suggests that ordinary legislatures can serve as the basis for a better form of constitutional drafting by constraining the elite threat of factions "entrench[ing] themselves in power for the long haul."[30] This constrained and non-revolutionary form of ordinary "politics as bargaining" in constitutional drafting served as a foundation for more structured popular participation.[31] In fact, it ultimately increased the quality of popular engagement by "refin[ing] and enlarg[ing] the public views" through a negotiated and more consensual process of deliberative drafting.[32] Extraordinary institutions in the form of referendums could then be used in the ratification stage of constitution-making to ensure more direct popular participation.

---

28. Frye, *supra* note 20, at 524 (arguing that under conditions of uncertainty, actors are less likely to create institutions that are biased in their favor).

29. Cheryl Saunders, *Constitution-Making in the 21st Century*, 4 INT'L REV. L. 1 (2012) (describing constitution-making as a multi-stage process).

30. Landau, *supra* note 23, at 227; *see also* ARATO, CIVIL SOCIETY, *supra* note 25, at 252 ("[T]he temporal gap between two democratic procedures provides special opportunities for a public discussion that now has a complete proposal available, one that can still be changed by those sufficiently active and organized.").

31. GIOVANNI SARTORI, THE THEORY OF DEMOCRACY REVISITED 224 (1987).

32. THE FEDERALIST NO. 10 (James Madison); HANNA ARENDT, ON REVOLUTION 227 (1980) (arguing that a pluralistic process best encourages consensus by allowing "a process of exchange of opinion against opinion[;] their differences can be mediated only by passing them through the medium of a body of men, chosen for the purpose"); *see also* James Bohman, *Complexity, Pluralism, and the Constitutional State: On Habermas's* Faktizität und Geltung, 28 L. & SOC'Y REV. 897 (1994) (discussing the importance of institutional pluralism in Jürgen Habermas's Arendtian-influenced theory of democratic deliberation and consensus building). Recent empirical evidence also supports the argument that pluralism leads to democratic constitutionalism. John M. Carey, *Does It Matter How a Constitution Is Created?*, *in* IS DEMOCRACY EXPORTABLE? 155 (Zoltan Barany & Robert G. Moser eds., 2009) (describing quantitative empirical work showing that the more institutions involved in constitution-making, the more democratic the constitutional order was).

More generally, this experience suggests the dangers of transplanting a revolutionary tradition of constitution-making into a post-authoritarian setting. Because these post-authoritarian contexts are often less well-institutionalized, a key consideration must be how to impose stable and impartial rules on the process that can ultimately constrain self-dealing elites and promote ordered deliberation. This form of ordered constitution-making in turn will help to increase the chances of a successful constitution-making moment.

This Article presents its argument in seven parts. Part II will describe why constitution-making politics should be more popularly engaged and deliberative than ordinary politics. Part III will describe why extraordinary institutions are traditionally seen as better at achieving those goals. Part IV will describe this Article's research methodology. Part V will trace the effects of institutional variation in promoting participation in post-communist constitution-making. Part VI will outline the consequences of institutional variation in ensuring better deliberation in post-communist constitution-making. Part VII will conclude.

## II. THE GOALS OF CONSTITUTION-MAKING: IMPROVED PARTICIPATION AND DELIBERATION

The establishment of a written constitution is widely viewed as a critical step in the transition to democratic governance.[33] The *process* by which this document is drafted and ratified is now viewed as central to maximizing the success of the constitution-making moment.[34] Consequently, United Nations assistance to constitution-making focuses specifically on processes that will encourage "national ownership" through "inclusive, participatory and transparent processes."[35] The European Union's Venice Commission also seeks to ensure that new constitutions are "the result of broad democratic processes with a high degree of legitimacy."[36]

In describing the ideal process, there is broad agreement that constitution-making politics should be different than ordinary politics.[37] The high stakes of constitution-making make this step critical to the future

33. U.N. Secretary-General, *supra* note 2 (describing how constitution-making processes are a "central aspect of democratic transitions").

34. David Landau, *The Importance of Constitution-Making*, 89 DENV. U. L. REV. 611, 613 (2012) (discussing the importance of constitution-making process); Hart, *Democratic Constitution Making*, *supra* note 1, at 4 ("How the constitution is made, as well as what it says, matters.").

35. *Rule of Law*, U.N., http://www.unrol.org/article.aspx?n=Constitution-making ("[T]he term constitution-making covers both the process of drafting and substance of a new constitution, or reforms of an existing constitution.").

36. EUROPEAN COMM'N FOR DEMOCRACY THROUGH LAW (VENICE COMM'N), REPORT ON CONSTITUTIONAL AMENDMENT 25 (Dec. 11–12, 2009) [hereinafter VENICE COMM'N].

37. Ginsburg, Elkins & Blount, *supra* note 4, at 210.

political and legal development of the polity.[38] Consequently, constitution-making should involve a heightened (and more direct) form of popular participation and engagement. It should be a time when the people "go beyond everyday concerns and[ ] grapple with the very nature and future of the polity."[39] It should also involve less self-interested and more rational representative bargaining than ordinary politics. Because constitution-making involves the formulation of entrenched rules of the game, these rules must be created in a far more impartial way than ordinary legislative lawmaking.

This vision of constitution-making politics draws in part on republican critiques of the deficiencies of ordinary politics and legislative lawmaking.[40] This republican approach criticizes ordinary politics for the passive role of the public and formulation of policy through legislative deals and aggregation.[41] Republicanism instead focuses on the same two goals of enhancing citizen participation and improving the quality of elite deliberation. In its vision of politics, all of the "people" should have equal access to the political process without disparities in political influence.[42] This equal participation is important to discipline representatives but also has an intrinsic value itself: to foster dignity, virtue, and feelings of community in the people and their representatives.[43] Furthermore, republicanism calls for publicly minded deliberation.[44] Its purpose is to avoid the mere aggregation of individual preferences and instead encourage discussion to a point that there is a consensus about what is best for the community as a whole (and not just individual preferences).[45] Underlying republicanism is a belief that agreement on the common good is attainable at the end of a period of reasoning and deliberation.[46]

### *A. Popular Participation*

The first—and most widely cited—requirement for constitutional politics focuses on the people. In particular, many argue that constitution-

38. WALTER MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 185 (2007) (describing how "[w]riting constitutional charters" should be a product of a project that seeks to "channel" the chaos that human passions can produce).

39. Jamal Benomar, *Constitution-Making After Conflict: Lessons for Iraq*, 2 J. DEMOCRACY 81, 81 (2004).

40. Sunstein, *supra* note 19, at 1576–1589.

41. Quentin Skinner, *The Republican Ideal of Political Liberty*, *in* MACHIAVELLI AND REPUBLICANISM 293 (Gisela Bock, Quentin Skinner & Maurizio Viroli, eds., 1993).

42. Sunstein, *supra* note 19, at 1552.

43. CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970).

44. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 300–04 (1967); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338 (1987).

45. Sunstein, *supra* note 19, at 1550.

46. POCOCK, *supra* note 19, at 132–136; Sunstein, *supra* note 19, at 1554.

making should involve greater levels of popular engagement and participation than ordinary politics.[47] Critically, previously oppressed groups that have never participated should now play an important role in constitution-making.[48] Following republican theory, this enhanced popular engagement has an intrinsic goal: it allows "the people" to break with the past and participate in the formulation of their new order.[49] This participation, in turn, will foster civic values of self-government and further help ensure the success of a constitutional order.[50]

This enhanced participation also has an instrumental goal: it helps to ensure that the constitution will be "democratically legitimate."[51] In contrast with ordinary lawmaking—which emerges through a legally structured process—*constitution-making* must be an "open" moment of democratic possibility that allows the "people" to exercise their constituent power to transcend the formal constraints of law and institutionalized politics to found a democratic constitution.[52] The symbolism of this direct popular participation in turn helps to stabilize the whole constitutional order against future majorities.[53] In this understanding, the authority of the constitution depends on the "ritual intensity . . . [and] 'sanctity of the founding act.'"[54]

---

47. BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 2 (1991).

48. Angela M. Banks, *Expanding Participation in Constitution Making: Challenges and Opportunities*, 49 WM. & MARY L. REV. 1043, 1047 (2008).

49. Colón-Ríos, *supra* note 14, at 20–21.

50. WALLIS, *supra* note 7, at 346 (discussing how participation can help "encourage individuals to be citizens").

51. Walter F. Murphy, *Consent and Constitutional Change*, *in* HUMAN RIGHTS AND CONSTITUTIONAL LAW: ESSAYS IN HONOUR OF BRIAN WALSH 123 (James O'Reilly ed., 1992).

52. Akhil Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458 (1994) (arguing that the American founding established a legal right for the people to "alter or abolish their government at any time and for any reason, by a peaceful and simple majoritarian process") [hereinafter Amar, *The Consent*]; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) (arguing that a nationwide referendum is sufficient to amend the Constitution); Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENT. 57, 58 (1987) (crediting the illegality of the American constitutional founding "with invest[ing] the Constitution with the power that it still exercises over us . . . ."). This theory of constitution-making is closely linked to constituent power theory, a belief that a constitution is democratically legitimate because it is tied to the sovereign legal power of the people. *See* Martin Loughlin, *The Concept of Constituent Power*, EUR. J. POL. THEORY 1, 16–17 (2013).

53. BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION (1992) (discussing the importance of a constitution as the central symbol of mobilized liberal politics).

54. Lior Barshak, *Constituent Power as Body: Outline of a Constitutional Theology*, 57 U. TORONTO L.J. 185, 198 (2006) (describing how the force of new constitutions, whether written and formal or not, partly depends on the ritual intensity of their inauguration, the "sanctity of the founding act"); *see also* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 780 (1997) (describing how constitution-making politics has roots in the "Semitic religions. Judaism, Christianity, and Islam . . . [which] mobilized followers to achieve a decisive breakthrough of collective meaning") [hereinafter Ackerman, *World Constitutionalism*]; Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 467, 474 (1984) (comparing Constitutional exegesis to the exegesis of the biblical parables); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984) (describing the sacralization of the Constitution); Sanford Levinson, *"The Constitution" in American Civil Religion*, 1979

This founding process helps to overcome the parchment barrier problem, turning the constitution into a "potent political symbol of national identity."[55]

### *B. Elite Deliberation*

A second general requirement for constitution-making politics focuses on the elite. The people themselves cannot bargain over a constitution; they must choose a representative elite to draft the new language.[56] Because constitution-making involves the creation of long-term rules that will structure the political game going forward, theorists argue that constitution-making should include elite decision-making that is less self-interested than ordinary politics.[57] Constitutional rules should not be formulated through bargaining or the simple aggregation of self-interested preferences as in ordinary politics.[58] Instead, constitution-making should involve decision-making that maximizes the use of deliberative and public-minded arguments.[59]

John Rawls has described the procedural conditions that yield this kind of rational elite decision-making.[60] In particular, he argues that a veil of ignorance—where elite decision-makers do not know how they will fare in the new system—will transform individuals into impartial and disinterested decision-makers whose choices are likely to reflect "the most reasonable understanding of the public conception and its political values of justice and public reason."[61]

This more rational process of reasoned deliberation is more likely to yield the *substantive* values that we associate with democratic

---

SUP. CT. REV. 123, 130 (exploring "the implications of religious analogies for understanding the role of the Constitution within American civil religion"). For a parallel argument about the importance of symbolism in the founding moment, *see* ARENDT, *supra* note 32, at 204.

55. ACKERMAN, *supra* note 53, at 47.

56. JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, AGAINST THE ATTACK OF THE M. TURGOT IN HIS LETTER TO DR. PRICE 6–7 (vol. 1, 1797) (discussing the necessity of popular representation).

57. Jon Elster, *Deliberation and Constitution-Making*, *supra* note 10.

58. Elster, *Forces and Mechanisms*, *supra* note 9, at 394.

59. Elster, *Arguing and Bargaining*, *supra* note 12, at 410 (describing how constitution-making should involve publicly minded arguments rather than short-term bargaining).

60. Sunstein, *supra* note 19, at 1567 n.160 (describing how key aspects of Rawls' theory respond to the demands of republican thought).

61. John Rawls, *The Idea of Public Reason*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 93, 112 (James Bohman & William Rehg, eds., 1997). John Rawls was interested in rational elite bargaining, taking the U.S. Supreme Court as "the exemplar of public reason." JOHN RAWLS, POLITICAL LIBERALISM 23 (1993). For more on the veil of ignorance and constitution-making, see Andrew Arato, *Dilemmas Arising from the Power to Create Constitutions in Eastern Europe*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 165, 187 (Michel Rosenfeld ed., 1994) [hereinafter Arato, *Constitutions in Eastern Europe*].

constitutionalism. In fact, drafters who are behind a veil of ignorance and therefore uncertain about their future position in the new system will rationally agree to build forms of political insurance into the constitutional text.[62] These forms of elite insurance include key elements of democratic constitutionalism such as checks and balances, as well as an independent judiciary empowered to protect individual rights.[63]

## III. THE ALLEGED NECESSITY OF EXTRAORDINARY INSTITUTIONAL DESIGN

But what is the best institutional design for a constitution-making process that will enhance popular participation and elite deliberation? The dominant answer holds that extra-parliamentary assemblies and extraordinary referendums are universally better at advancing both goals.[64]

Legal theory and participatory constitution-making scholars link these extraordinary institutions with enhanced expressions of the popular voice.[65] A smaller group of scholars argue that these extraordinary institutions are also more likely to reduce elite self-interest and promote publicly-minded constitutional bargaining.[66] Both of these claims are empirically grounded in the practice of revolutionary constitution-making in the eighteenth century and its legacy in Western developed democracies today.

### *A. Popular Institutions*

Two institutions are viewed as critical to overcoming the problems of ordinary politics and enhancing popular engagement in constitution-making. First, a specialized and extra-parliamentary constitution-making assembly is seen as allowing the people to start fresh in "a gathering of the nation"[67] and therefore is "more consistent with people's sovereignty than a parliament (where sectional interests may dominate)."[68] Joel Colón-Ríos argues that a constituent assembly "triggered at the initiative of the citizenry [through a referendum]" is the most ideal institution for unleashing the

62. *See* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001) ("A veil of ignorance rule . . . is a rule that suppresses self-interested behavior on the part of decisionmakers; it does so by subjecting the decisionmakers to uncertainty about the distribution of benefits and burdens that will result from a decision.").

63. EISGRUBER, *supra* note 11, at 19.

64. ACKERMAN, *supra* note 53; Elster, *Forces and Mechanisms*, *supra* note 9.

65. *See infra* notes 45–72 and accompanying text.

66. Elster, *Arguing and Bargaining*, *supra* note 12, at 410.

67. Yash Ghai, *The Role of Constituent Assemblies in Constitution Making*, INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE 1, 10 http://www.agora-parl.org/sites/default/files/the_role_of_constituent_assemblies_in_constitution_making.pdf.

68. *Id.*

sovereign power of the people.[69] It allows the people to "reactivat[e] [their] constituent power and becom[e] the author[s] of a radically transformed constitutional regime."[70] This institution is a recognition of the people's power over the current order[71] and therefore is most likely to trigger "intense levels of popular participation and democratic openness."[72]

Second, constitutional referendums are viewed as particularly beneficial for constitution-making because they remove constitutional decision-making from ordinary political processes.[73] Instead, constitutional referendums allow the people to circumvent the old institutions of the pre-existing regime. It therefore creates an opportunity for enhanced "popular mobilization."[74] By going beyond (and superseding) representative democracy, referendums return "direct power to the people."[75] Referendums therefore play a highly important role in "the most fundamental acts of constitutional self-definition."[76]

*1. Constituent Power Theorists*

Constituent power theorists have been arguing for centuries that extraordinary institutions help ensure that "the people" break with the past and become the true authors of their new constitutional order. These institutions are a necessary "sign that the legal system has come to a point of discontinuity" and requires "forms of politics beyond law."[77] They also help ensure the "sanctity of the *founding act*" by attributing it to the people and therefore lend the constitution "the authority of the supreme law."[78]

The foundational theorist in this constituent power tradition is the French revolutionary Emmanuel Sieyès. In his famous pamphlet, *What is the Third Estate*, Sieyès attacked the idea that there should be any institutional

69. Joel Colón-Ríos, *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform*, 48 OSGOODE HALL L.J. 199, 240 (2010) (emphasis omitted); *see also* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 173–175 (2006) (arguing that a federal constitutional convention could allow the people to change the constitution).

70. Colón-Ríos, *supra* note 69. at 240.

71. *Id.*

72. *Id.* at 243.

73. Stephen Tierney, *Constitutional Referendums: A Theoretical Enquiry*, 72 MOD. L. REV. 360, 374 (2009); *see also* Amar, *The Consent*, *supra* note 52, at 457 (discussing how the people have a "legal right" to change the U.S. Constitution "via a majoritarian and populist mechanism akin to a national referendum").

74. MARGARET CANOVAN, THE PEOPLE 113–114 (2005).

75. Tierney, *supra* note 73, at 367. For more on dualism and referendums, see *id.* at 366.

76. *Id.* at 366.

77. Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 436, 436, n.13 (1983).

78. Ulrich K. Preuss, *The Political Meaning of Constitutionalism*, *in* CONSTITUTIONALISM, DEMOCRACY, AND SOVEREIGNTY: AMERICAN AND EUROPEAN PERSPECTIVES 21, 21 (Richard Bellamy ed., 1996).

continuity with the past in France's constitutional transition.[79] Instead, he outlined a vision of the people acting in two capacities in a democracy. On one track, the people act within pre-established rules through ordinary institutions (or what he calls "constituted powers"). He explained that in this form of ordinary politics the "ordinary representatives of a nation" operate "under the constitution."[80]

In exceptional situations, however, the people (or "the Nation" as he calls them) exercise their sovereign "constituent power" (*pouvoir constituant*) to repudiate all existing legality and establish a new system of "constituted powers."[81] In this form of extraordinary politics, the people transcend all pre-existing institutions and instead form an extraordinary assembly that "takes the place of the assembly of the nation."[82] Invested with sovereign popular power, this institution is free "from any constitutional forms"[83] and its actions bear the same power as the "common will of the nation itself."[84] Acting without limitation, this extraordinary body can then reshape the institutional apparatus of the state without limitation.[85] Sieyès explained that this extraordinary body is "not subjected to any procedure" but instead "meets and debates as the nation itself."[86] This sovereign process is the only way to ensure an expression of the people's original constituent power (*pouvoir constituant originaire*)—a force that "grounds a constitutional order while remaining irreducible to and heterogeneous from that order."[87]

Sieyès argued that entrusting constitution-making to extraordinary representative bodies is critical in constraining ordinary government action

---

79. EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? 136–39 (S. E. Finer ed., M. Blondel trans., 1963). The American revolutionaries also drew on the concept of popular sovereignty as the basis for new constitutional law. They were, however, more cautious in exercising that power.

80. *Id.* at 130 (emphasis omitted).

81. *Id.* at 136–39.

82. *Id.* at 130.

83. *Id.*

84. *Id.*

85. *Id.* at 124 ("The nation is prior to everything. It is the source of everything. Its will is always legal; indeed it is the law itself. Prior to and above the nation, there is only natural law.") (emphasis omitted).

86. *Id.* at 132. Sieyès further explains how "[a] body of extraordinary representatives takes the place of the assembly of the nation." *Id.* at 130. This extraordinary body is in the "same position as the nation itself in respect of *independence* from any constitutional forms." *Id.* at 131. Sieyès also explains how this body cannot be subject to any pre-existing formal legal rules: "Not only is the nation not subject to a constitution, but it *cannot* and it *must not* be; which is tantamount to saying that it is not." *Id.* at 126.

87. Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 CONSTELLATIONS 223, 226 (2005) (discussing Sieyès). Or as Andrew Arato characterizes this concept: "[W]hen the sovereign returns, it does not do so in an a priori established form. It is in no way bound to the model of a freely elected constitutional assembly, or even to its own prior mode of appearance. This is so because, as the only legitimate source of all legality and institutions, it cannot bind the constituent power (as legibus solutus)." Andrew Arato, *Carl Schmitt and the Revival of the Doctrine of the Constituent Power in the United States*, 21 CARDOZO L. REV. 1739, 1740–41 (2000).

later.[88] These bodies are the only ones that can capture the sovereign voice of the people and therefore create fundamental rules that constrain future majorities.[89] In this way, he explains, obtaining the true will of the people is the only way to ensure that a constitution can limit the power of government and protect individual rights. [90]

The most forceful proponent of this constituent power approach in modern constitutional theory is Bruce Ackerman. He implicitly draws on Sieyès and republican thought in describing the historical roots of dualist democracy in the United States. Ackerman describes how ordinary politics and institutions demonstrate "limited engagement" and provide no particular incentive for the people to engage.[91] He argues that the people operate through legally limited constituted powers in ordinary institutional politics.[92] This form of representation is carried out *indirectly* through private interest groups, bureaucracies, and political parties.[93] In these periods of normal politics, he argues, courts are justified in striking down laws because they "represent the absent People."[94]

During moments of "constitutional politics," by contrast, the people themselves awake and *directly* assert their sovereign rights of constitutional authorship.[95] Ackerman argues that constitution-making must transcend ordinary politics and demands a more engaged and "considered" form of "higher lawmaking."[96] To achieve this higher plane, constitution-making should include "extraordinary institutional forms" that will encourage "Publian appeals to the common good" by deliberative elites and subsequent ratification by a "mobilized" public.[97]

Richard Kay has also drawn on this constituent power emphasis on extraordinary institutional design in his discussions of "constituent authority."[98] Constituent "authority," he explains, is about the way that people perceive historical events.[99] It therefore requires a "determination"

88. Sieyès, *supra* note 79, at 122 (calling this "government by proxy") (emphasis omitted).

89. *Id.* at 124.

90. Carl Schmitt, CONSTITUTIONAL THEORY 109 (Jeffrey Seitzer ed. & trans., 2008) (making the same argument about the need for a constituent will to stabilize constitutional rules).

91. Ackerman, *supra* note 19, at 1034.

92. *Id.* at 1032–34.

93. *Id.* at 1040–41.

94. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 264 (1993).

95. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 461 (1989).

96. ACKERMAN, *supra* note 47, at 6 (describing the need for the people to renew their participation in politics and make "considered judgments").

97. Ackerman, *supra* note 19, at 1022; *see also* ACKERMAN, *supra* note 53, at 53–54 (urging new constitutional drafters to operate through extraordinary institutions like referendums and constituent assemblies).

98. Richard S. Kay, *Constituent Authority,* 59 AM. J. COMP. L. 715, 761 (2011) (discussing the need to use institutions in constitution-making so that one can construct a "historically plausible" story about how the "people" created a constitution).

99. *Id.* at 716.

by the population that the makers of the constitution were sufficiently engaged and mobilized to serve as an "appropriate" source of entrenched constitutional rules.[100] In a democracy, constitution-making institutions must be chosen that ensure "a narrative" that the constitution came from the will of the people.[101] The use of specialized institutions like the constitutional conventions at the American Founding, Kay explains, is critical in leading to the continuing power that the United States Constitution exerts over us.[102]

This constituent power tradition has also exerted a powerful, implicit influence on normative discussions of the best institutions for popular constitutional change in the United States. Drawing on American history, Sanford Levinson argues that a majority of Americans have an inherent right to reframe the American constitutional order through a constitutional convention convened outside of the textual constitutional rules on constitutional change.[103] Similarly, Akhil Amar finds an "unenumerated, constitutional right" in American history for Americans to revise the Constitution through a national referendum.[104]

*2. Participatory Constitution-Making Theorists*

A more recent strand of scholarship—which focuses on "participatory" constitution-making processes—argues that the rise of democratic norms in the wake of the end of the Cold War requires constitutional creation to move beyond elite deals and instead include enhanced levels of popular participation. To achieve the promise of this new democratic "epoch," these theorists argue that constitution-makers must deploy extraordinary institutions.[105]

Many participatory theorists argue that the imperative of "democratic governance" in constitution-making is an emerging norm of international law.[106] They ground this emerging human right to popular participation in

100. *Id.* at 721.

101. *Id.* at 761.

102. Richard S. Kay, *The Illegality of the Constitution*, 4 CONST'L COMM. 57, 58 (1987).

103. LEVINSON, *supra* note 69, at 177 (endorsing the argument that a new convention could declare its handiwork binding if "ratified in a national referendum where each voter had equal power").

104. Amar, *The Consent*, *supra* note 52, at 457, 458–59, 481–87 (arguing that national popular sovereignty gives the people a legal right to alter the Constitution through a majoritarian and populist mechanism like a national referendum); *see also* CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 291 (2009) (arguing that the concept of rule of law is "inconsistent with the notion that a sovereign people could not be bound even by a fundamental law of their own making").

105. Ghai, *supra* note 67, at 1–2.

106. Thomas M. Franck & Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, *in* FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 3 (Laurel E. Miller ed., 2010) (exploring the legal right for popular participation in constitution-making).

the 1966 International Covenant on Civil and Political Rights (ICCPR), which gives every citizen "the right . . . to take part in the conduct of public affairs."[107] In 1996, the United Nations Human Rights Committee explicitly addressed constitution-making, stating that the legal right in Article 25(a) of the ICCPR affords the people the right to "participate directly when they choose or change their constitution."[108] Some have argued that these emerging legal norms of popular participation in constitution-making are on their way to becoming "binding precedents" in international law.[109]

For proponents of participation, specially elected constitution-making assemblies and referendums remain the "two most common modalities" for allowing the people to participate in constitution-making.[110] These institutions help increase popular participation at all stages of the constitution-making process.[111] Theorists see this increased participation as having its own inherent value. Extraordinary institutions allow for a more "open" and revolutionary form of constitution-making and ensure that a constitution is no longer simply "a contract" signed by appropriate representatives but also a command from the people.[112] In particular, a constituent assembly has "greater popular legitimacy" than an ordinary assembly because its members are elected "specifically" to create a new constitution.[113]

Participatory constitution-making theorists also view these institutions as having a more instrumental value by conferring legitimacy on both the process and its outcome.[114] Drawing implicitly on the reasoning of the constituent power legal theorists, they argue that popular participation and inclusion foster a sense of "ownership that comes from sharing authorship"

---

107. International Covenant on Civil and Political Rights art. 25, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368; U.N. Human Rights Comm., Marshall v. Canada, U.N. Doc. CCPRC/43/D/205/1986 at 5.3 (1991), *available at* http://hrlibrary.umn.edu/undocs/html/dec205.htm (adjudicating a Canadian tribal society's claim of exclusion from a Canadian constitution-making process); *Lessons Learned from Constitution-Making: Processes with Broad Based Public Participation, Democracy Reporting International*, DEMOCRACY REPORTING INT'L 1 (Nov. 2011), *available at* http://www.democracy-reporting.org/files/dri_briefingpaper_20.pdf ("The ICCPR establishes minimum obligations for participation in public affairs that are also applicable to constitution-making processes and give citizens an individual right to participate in constitution-making.").

108. Office of the U.N. High Comm'r for Human Rights, *General Comment 25: The Right to Participate in Public Affairs, Voting Rights, and the Right of Equal Access to Public Service*, ¶ 6, CCPR/C/21/Rev.1/Add.7 (1996).

109. 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 20, 44 (2010) [hereinafter Hart, *Constitution Making*].

110. *Id.* at 32.

111. Laurel E. Miller, *Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future*, *in* FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 601, 622 (2010).

112. Hart, *Democratic Constitution Making*, *supra* note 1, at 3.

113. Miller, *supra* note 111, at 612.

114. *Id.* at 622.

and help ensure that the public will "live within the constraints of constitutional government."[115]

### *B. Deliberative Institutions*

A smaller group of scholars argue that these extra-parliamentary mechanisms decrease the likelihood of self-dealing by elite representatives.[116] At the center of this argument is a critique of the deliberative deficiencies in ordinary legislatures that has deep roots in eighteenth-century constitution-making.[117] Legislatures, they argue, are far more likely to be "shaped indirectly by private interest" utilizing normal procedural legislative mechanisms such as "logrolling" and "bargaining."[118] Furthermore, they might still be dominated by old regime interests who will use these ordinary institutions to pursue their own interests and exclude others. Jon Elster points out that the old regime institutions are part of the "problem" that a new and extraordinary constituent assembly is convened to solve.[119] Thus, he argues, there would be no need to have an extraordinary institution "if the regime was not flawed."[120]

Another common argument is that ordinary legislatures will favor legislative power in the constitution-making process.[121] To give the ordinary legislature the ability to draft the constitution would therefore allow "constitution-making parliaments [to] give themselves large powers to amend the constitution."[122] This would in turn produce "soft constitutional norms" that would be too easy for a future parliamentary majority to alter.[123] Elster argues that having ordinary assemblies also serve as constitution-making bodies sets up a conflict of interest because they will be devising the rules for a system that they will also be operating within.[124]

---

115. Hart, *Democratic Constitution Making*, *supra* note 1, at 4 (internal quotations omitted).

116. *See, e.g.*, Jon Elster, *Ways of Constitution-Making*, *in* DEMOCRACY'S VICTORY AND CRISIS 123, 134 (Axel Hadenius ed., 1997) [hereinafter Elster, *Ways of Constitution-Making*]; Ruth Gavison, *Legislatures and the Phases and Components of Constitutionalism*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 198, 206 (Richard W. Bauman & Tsvi Kahana, eds., 2006).

117. *See infra* notes 133–148. I will leave aside the question of whether the French and American traditions of constitution-making are equally revolutionary. The key point for this Article is that they are treated as equally revolutionary by constitution-making theorists.

118. Jon Elster, *Legislatures as Constituent Assemblies*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 181, 191 (Richard W. Bauman & Tsvi Kahana eds., 2006) [hereinafter Elster, *Legislatures as Constituent Assemblies*].

119. Elster, *Forces and Mechanisms*, *supra* note 9, at 375.

120. *Id.*

121. *Id.*

122. *Id.* at 381.

123. ACKERMAN, *supra* note 53, at 63.

124. Elster, *Ways of Constitution-Making*, *supra* note 116.

Extraordinary constitution-making bodies, by contrast, are better suited to reasoned and impartial deliberation. These extraordinary bodies are temporary and will not exist in the new constitutional order. This special nature means that representatives cannot engage in traditional bargaining practices of trading off compromises now for a favor in the future. They can also avoid focusing on current political issues and instead fully concentrate on constitution-making issues, thereby avoiding the "noise" of "regular politics."[125]

Moreover, the norm against self-interested deliberation is likely to be "stronger" in specialized constitution-making assemblies than in ordinary legislatures.[126] Because of strong public scrutiny of these bodies, elite representatives are more likely to present their arguments in language that discusses the "common interest" or the "public good."[127] By producing a deliberation that involves arguments and not bargaining, a specialized body is instead likely to produce a document that would reflect "the predominance of *reason* over *interest*."[128]

Referendums are also seen as enhancing elite deliberation. Broader popular participation—and particularly the ability to reject elite decisions—can encourage representatives to give "public justifications" for their policy choices.[129] Furthermore, referendums can help to limit the deliberative deficiencies of legislatures captured by corrupt special interests.[130] Stephen Tierney's recent work on a republican theory of referendums links the enhanced popular participation of a referendum process with a better form of elite deliberation.[131] To accomplish this, however, referendums must be subjected to careful legal control.[132] Looking to recent examples in Canada and Australia, he argues that this legal regulation can turn referendums into mechanisms that enhance "deliberative decisionmaking" at the elite level as well.[133]

125. Gavison, *supra* note 116, at 206.

126. Elster, *Arguing and Bargaining*, *supra* note 12, at 410.

127. JON ELSTER, CLAUS OFFE & ULRICH K. PREUSS, INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA 77 (1998).

128. Elster, *Legislatures as Constituent Assemblies*, *supra* note 118, at 185.

129. Setälä, *supra* note 26, at 718.

130. Griffin, *supra* note 14, at 563.

131. TIERNEY, *supra* note 17, at 44.

132. *Id.* at 287 (discussing how elites often face legal and political impediments to the control of referendums).

133. *Id.* at 44.

### C. *Empirical Basis for these Findings: Eighteenth-Century United States and France as well as Contemporary Western Practice*

These arguments about the effects of specialized, extra-parliamentary institutions draw much of their empirical support from the received lessons of eighteenth-century revolutionary constitution-making, as well as their legacy in developed Western democracies.[134] As we have seen, the constituent power tradition has its origins in the writings of the French Revolution and looks back to that period for its understanding of democratic legitimacy.[135] More recent descriptions of this revolutionary constitution-making tradition ground their accounts in American history.[136]

One of the leading institutional design scholars, Bruce Ackerman, argues that constitution-makers in the post-communist world can and should draw important "generalizable lessons" from the American and French constitution-making processes.[137] He argues that it is time for theorists to relearn the lessons of liberal revolution that the "totalitarian revolutions" of the twentieth century weakened.[138] This relearning process will show that the post-Cold War period is one of "revolutionary possibility" where the people can transcend the normal malaise of ordinary politics and their representatives can deliberate rationally.[139] The challenges facing the founding Americans were therefore very similar to the challenges "facing Lech Walesa as Solidarity took power in the aftermath of the Polish Revolution."[140] In this appeal to relearn the lessons of the eighteenth century, the institutional example of the extraordinary convention of 1787 in Philadelphia and its ability to galvanize Americans into a mobilized

134. Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2054–56 (1997) (discussing the centrality of the American Founding to dominant theories of democratic constitution-making); Kay, *supra* note 52 (discussing the illegality of the American Founding as critical to a democratic expression of popular sovereignty that ultimately ensured the power that the Constitution exerts over us today); Carlos E. González, *Representational Structures Through Which We the People Ratify Constitutions: The Troubling Original Understanding of the Constitution's Ratification Clauses*, 38 U.C. DAVIS L. REV. 1373 (2005) (grounding his normative theory about democratic constitutional change in a romanticized history of the Founding period); Amar, *The Consent*, *supra* note 52 (basing his argument that the people have a right to act outside of institutions and rules in changing the constitution on the American Founding period); FRITZ, *supra* note 104 (maintaining that the idea of rule of law is "inconsistent with the notion that a sovereign people could not be bound even by a fundamental law of their own making"); JOHN RAWLS, A THEORY OF JUSTICE 196 n.1 (1971) (describing how the American constitution-making process through a constituent assembly approached a veil of ignorance).

135. *See supra* note 79.

136. *See supra* note 134. Whether the American tradition is correctly characterized as part of the revolutionary constitution-making tradition is beyond the scope of this Article. For the purposes of this Article, it is enough to note that scholars see both the American and French constitution-making traditions as similarly revolutionary.

137. ACKERMAN, *supra* note 53, at 47.

138. *Id.* at 50.

139. *Id.*

140. *Id.* at 48.

expression of popular action is important.[141] Furthermore, the French use of referendums, he argues, should also serve as an important lesson in capturing a "democratic mandate from the people" and therefore improving deliberation.[142]

Another scholar, Jon Elster, also relies heavily on the French and American experience in supporting his arguments about the deficiencies of ordinary parliaments and the effects of specialized constitution-making mechanisms. He argues that these eighteenth-century examples—the ones he admits that he knows best—are important because of the "similarities" between eighteenth-century constitution-making and current constitution-making: both were parts of a wave of constitution-making fostered by a "cris[i]s of confidence."[143] He therefore looks back to these models as ways of understanding how to build a deliberative form of constitution-making.[144] Elster explains that the Philadelphia Convention serves as a "model" for the normative conclusion that conventions in a form of unconstrained politics are the best way to reduce scope for "institutional interest."[145] Elster's work—and the work of those he influences—therefore reflects a deep tradition of American suspicion of legislatures, seen perhaps most expressively in Madison's fear that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."[146]

Finally, Tierney's work on referendums explicitly describes constitutional referendums as a way of replicating the "American revolutionary experience."[147] Tierney therefore seeks to understand how referendums can help ensure that these mechanisms live up to the republican conception of "government by the people."[148] He thus explores how careful legal regulation can help referendums advance the republican goals of popular deliberation and better deliberation in constitution-

141. *Id.* at 51 (explaining how by establishing a "convention apart from ordinary organs of government" the American revolutionaries "created new and powerful political incentives for a successful conclusion of the experiment in constitutional formation").

142. *Id.* at 54.

143. Elster, *Arguing and Bargaining*, *supra* note 12, at 346.

144. *Id.*

145. Elster, *Forces and Mechanisms*, supra note 9, at 395. *See also* Landau, *Gone Wrong*, *supra* note 22, at 932 (discussing how Elster sees constraints on specialized constitution-making as "unlikely to work in practice and does not recommend any of these as part of his normative recommendations").

146. THE FEDERALIST NO. 48 (James Madison).

147. Tierney, *supra* note 73, at 365.

148. TIERNEY, *supra* note 17, at 3.

making.[149] To do this, he explores examples in Western democracies that draw on the distinct legacies of eighteenth-century constitution-making.[150]

## IV. POST-COMMUNIST CONSTITUTION-MAKING

This article will test the universality of the revolutionary theory of constitution-making in a more recent context: constitutional transition in the twenty-one post-communist countries in Europe, Asia, and the Caucasus. Previous quantitative work has already yielded important findings on the implications of the institutional design of constitution-making. This research has found that ordinary legislatures are not particularly likely to engage in self-dealing and create constitutions that have strong legislatures.[151] By contrast, this research finds evidence that executives are far more likely to engage in self-dealing in constitutional change.[152]

These quantitative theorists admit, however, that more work needs to be done on whether these specific institutions perform as predicted. Tom Ginsburg admits that additional research is needed on the precise ways that these institutions effect participation and other normative goals.[153] To begin this work, I will examine the process of democratic constitution-making in the twenty-one post-communist countries emerging from one-party communist rule. This includes the six Central and Eastern European states as well as the fifteen successor states to the Soviet Union.[154] Although many studies feature the experience of the former Warsaw Bloc countries, the fifteen former Soviet republics remain an understudied—and important—group for understanding post-communist constitutional change.

My study of this region will seek to trace how institutional variance in these countries affected the two normative goals of constitution-making: 1) enhanced popular participation and 2) impartial elite bargaining. A more complete survey that includes the former Soviet Union is particularly useful for studying this institutional variance because we find variation in

149. *Id.*

150. *Id.* (looking at Canada, Australia, and Northern Ireland); *see also* GEORGE WILLIAMS & DAVID HUME, PEOPLE POWER: THE HISTORY AND FUTURE OF THE REFERENDUM IN AUSTRALIA (2010).

151. Ginsburg, Elkins & Blount, *supra* note 4, at 212-213. Furthermore, some individual cases studies have also found that legislatures are not likely to create overly strong legislatures. Ringa Raudla, *Explaining Constitution-Makers' Preferences: The Cases of Estonia and the United States*, 21 CONST. POL. ECON. 249, 257 (2010) (finding that the existing legislature in Estonia actually sought to increase the power of the presidency).

152. Ginsburg, Elkins & Blount, *supra* note 4, at 212–13.

153. *Id.* at 219.

154. The fifteen post-Soviet successor states include: Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. The six Central and Eastern European countries are: Bulgaria, Czech Republic, Hungary, Poland, Romania, and Slovakia.

institutional design of constitution-making while key temporal, cultural, and economic variables are held constant.[155] In particular, some post-communist countries placed ordinary legislatures at the center of their processes while others used extra-parliamentary institutions, allowing for the study of the effects of institutional design on both popular engagement and elite decision-making using the "most similar cases" approach to case selection.[156]

### *A. Post-Communist Similarities*

The post-communist constitutional transitions share numerous similarities. First, these transitions all took place in the 1990s as part of the "third wave" of post-communist political transformation.[157] Second, each of these countries faced the simultaneous challenges of political, economic, and institutional reform.[158] Finally, and perhaps most importantly for this study, they all shared the same initial institutional conditions: a Leninist institutional structure governed by an all-powerful party and a state system organized by a constitution into a system of legislative supremacy.[159] These Leninist constitutional systems had weak court systems and no power of judicial review.[160] The systems did have, however, legislatures with stable voting rules.[161]

During the communist period, this Leninist constitutional system, however, was simply a "blueprint" for organizing the institutions of state and therefore did very little to limit the power of the ruling Communist Party.[162] The real, unwritten constitution in these countries placed all power in the hands of the party and turned state institutions into transmission belts of party policy.[163] In fact, these systems were controlled and manipulated through the *nomenklatura* system of appointment, whereby the party would

155. Frye, *supra* note 20, at 523–24.

156. Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 153 (2005).

157. *See* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1993).

158. *See* Jon Elster, *The Necessity and Impossibility of Simultaneous Economic and Political Reform*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 267 (Douglas Greenberg et al., eds., 1993).

159. William Partlett, *Separation of Powers Without Checks and Balances: The Failure of Semi-Presidentialism and the Making of the Russian Constitutional System, 1991–1993*, *in* THE LEGAL DIMENSION IN COLD-WAR INTERACTIONS: SOME NOTES FROM THE FIELD 105, 114 (Tatiana Borisova & William B. Simons eds., 2012) [hereinafter Partlett, *Separation of Powers*].

160. For more on this system, see William Partlett & Eric C. Ip, *The Death of Socialist Law*, N.Y.U. J INT'L L. & POL. (forthcoming 2015) (manuscript at 4–9) (draft on file with the author).

161. Partlett, *Separation of Powers*, *supra* note 157, at 114.

162. *Id.*

163. *Id.*

ensure that all members of the party apparatus were placed into key positions of power in the state system.

With the collapse of the communist party across the region in the late 1990s, however, this constitutional system of parliamentary supremacy set the initial conditions for the transition. The legislature emerged as a key area of constitution-making—in fact, under the communist-era constitution, the parliament had a complete monopoly over formal constitutional change.[164] It therefore was initially the central institution in the transformation. In this new system, the actual relationship between decision-making bodies was no longer concealed by the "magic wall" of party secrecy; it had instead "metamorphosed into a form of constitutionalism."[165] The key question was whether these new constitutional rules would impose limits on power or "encourage the exercise of restraint."[166]

### *B. Countries in the Study*

As an initial matter, I will exclude four post-communist countries from this research study. In these countries, the former communist elite seamlessly dominated the new "democratic" institutions of post-communism. Former party leaders controlled both elections and constitutional change in a way that ensured that they would continue to have wide formal powers.[167] The former communist elite simply created "super-presidential" constitutional systems where the presidency became the key institution of power.[168] In these countries, the institutional design of the constitution-making process was largely unimportant—whether created by a legislature or a referendum, the outcome was predetermined to ensure that the former communist strongman remained in power in the new environment.

The two poorest Central Asian countries followed this path. In Uzbekistan, the First Secretary of the Communist Party, Islam Karimov, consolidated his power quickly after the collapse of the Soviet Union by engineering his election as president in late 1991. On December 8, 1992, President Karimov pushed a super-presidentialist constitution through the

164. THE CONSTITUTIONS OF THE USSR AND THE UNION REPUBLICS: ANALYSIS, TEXTS, REPORTS 341–42 (F. J. M. Feldbrugge ed., 1979).

165. ROBERT S. SHARLET, SOVIET CONSTITUTIONAL CRISIS: FROM DE-STALINIZATION TO DISINTEGRATION 98 (1992).

166. *Id.*

167. *See generally* CONFLICT, CLEAVAGE, AND CHANGE IN CENTRAL ASIA AND THE CAUCASUS (Karen Dawisha & Bruce Parrott, eds., 1997).

168. Elgun A. Taghiyev, *Measuring Presidential Power in Post-Soviet Countries*, CEU POL. SCI. J. 11, 16 (2006) (discussing how Presidents enjoy "almost uncontrolled executive powers . . . such as appointing and dismissing the prime minister and other senior officials arbitrarily").

parliament.[169] In Turkmenistan, a similar situation unfolded. The former Communist Party leader, Saparmurat Niyazov, dominated the constitutional transition. After being elected president, Niyazov prepared a constitutional draft that created a super-presidentialist system that was quickly rubber-stamped by a pliant parliament.[170]

A similar scenario unfolded in Tajikistan and Azerbaijan. In Tajikistan, a brief civil war led to the consolidation of power by the old Soviet-era elite led by Imomali Rahmonov.[171] Rahmonov pushed a presidentially-dominated constitution through parliament in 1994.[172] In Azerbaijan, old Soviet elites came to power after a brief period of civil war. With the collapse of the Soviet Union, Azerbaijan was pulled into the chaos of a war with Armenia over Nagorno-Karabakh. Eventually, the former First Party Secretary, Heydar Aliev, was able to seize power, getting himself elected president. After seizing power, Aliev was largely unchallenged in his reassertion of dominance. Constitution-making was largely undisputed and gave the president broad power.[173]

*1. Real Political Competition*

In the remaining eleven newly independent Soviet republics, as well as the six Eastern European countries, however, the collapse of communism led to significant political competition. In many of the countries, this competition led to bitter policy disputes between presidents and parliaments.[174] One of the key political questions involved economic reforms. Those advocating rapid economic reform (privatization and price liberalization) clustered around newly elected presidents.[175] By contrast, those advocating slower, more gradual reforms tended to be located in legislatures (which were often still dominated by reconstituted communist parties).[176]

169. John Anderson, *Constitutional Development in Central Asia*, 16 CEN. ASIAN SURV. 301, 302 (1997).

170. *Id.*

171. Muriel Atkin, *Thwarted Democratization in Tajikistan*, *in* CONFLICT, CLEAVAGE, AND CHANGE IN CENTRAL ASIA AND THE CAUCASUS, *supra* note 1657, at 301–05.

172. *Id.*

173. LEVENT GÖNENÇ, PROSPECTS FOR CONSTITUTIONALISM IN POST-COMMUNIST COUNTRIES 184 (2002).

174. Oleh Protsyk, *Intra-Executive Competition Between President and Prime Minister: Patterns of Institutional Conflict and Cooperation Under Semi-Presidentialism*, 54 POL. STUD. 219, 219 (2006).

175. Kurt Weyland, *Neoliberal Populism in Latin America and Eastern Europe*, 31 COMP. POL. 379 (1999).

176. Leslie Elliott Armijo et al., *The Problems of Simultaneous Transitions*, 5 J. DEMOCRACY 161, 162–64 (1994) (discussing why giving voice to groups through legislative politics can undermine economic reform).

In many of these countries—particularly further east in the former Soviet Union republics—this political competition was not the product of robust institutions or a strong commitment to political competition by all actors. Instead, it was what Lucan Way calls a system of "pluralism by default."[177] In this system, political competition exists because elites are "too fragmented" and the state is "too weak" for one group to impose its political power on society. In these countries, therefore, constitution-making could become a way to begin to institutionalize this pluralism and build a system of politics-as-bargaining. Or it could become an opportunity for one elite group to impose its own power over others.

### *C. Institutional Variation in the Seventeen Post-Communist Countries*

In these countries, the proper institutional basis for constitution-making became highly contentious in the short-term competition for power in these seventeen countries. Two scenarios emerged (see *Figure 1*). In the first, which has come to be called "parliamentary constitution-making," newly elected parliaments were able to defend their position at the center of constitution-making processes under the pre-existing Soviet-era constitutions.[178] In this scenario, negotiating and bargaining within the parliament became a central part of the drafting of new constitutions.

In the second scenario, newly elected presidents—often with formal powers that were far weaker than their informal, charismatic power—were able to successfully bypass existing constitutional provisions giving parliament control of constitution-making by arguing that "the people" should decide on the new constitution and calling for a break with the past through extra-parliamentary institutions. They then drew heavily on extra-parliamentary constitution-making institutions—particularly referendums —to ratify new constitutional orders.

#### *1. Parliamentary Constitution-Making*

Eleven countries in Eastern Europe and the former Soviet Union placed parliaments at the center of their process of constitution-making.[179] In some of these countries, this parliament-centered approach involved key "features held over from the predecessor constitutional regime" including the old constitutional rules which allowed a "negotiated shift[ ]out of authoritarian

177. Lucan A. Way, *Pluralism by Default in Moldova*, 13 J. DEMOCRACY 127 (2002).

178. Andrew Arato, *Parliamentary Constitution Making in Hungary*, 4 E. EUR. CONST. REV. 45 (1995) [hereinafter Arato, *Hungary*].

179. Holmes & Sunstein, *supra* note 21, at 285.

rule."[180] Others chose to restore old parliament-centered constitutions that had existed prior to their period of communist domination.[181]

*Figure 1: Post-Communist Constitutional Transition*

| | **What institution led the process?** | **Referendum?** |
|---|---|---|
| **Central Europe** | | |
| 1. Bulgaria | Parliament (1991) | No |
| 2. Czech Republic | Parliament (1992) | No |
| 3. Hungary | Parliament (2011) | No |
| 4. Poland | Parliament (1997) | Yes (25 May 1997) |
| 5. Romania | Parliament (1991) | Yes (13 Dec. 1991) |
| 6. Slovakia | Parliament (1992) | No |
| **Baltics** | | |
| 7. Latvia | Parliament (1993) | No |
| 8. Lithuania | Parliament (1992) | Yes (25 Oct. 1992) |
| 9. Estonia | Parliament (1992) | Yes (28 June 1992) |
| **Eastern Europe** | | |
| 10. Ukraine | Parliament (1996) | No |
| 11. Moldova | Parliament (1994) | No |
| 12. Russia | President (constituent assembly) (1993) | Yes (12 Dec. 1993) |
| 13. Belarus | President (referendum) (1996) | Yes |
| **Central Asia** | | |
| 14. Kazakhstan | President (referendum) | Yes (30 Aug. 1995) |
| 15. Kyrgyzstan | President (referendum) | Yes |
| **Caucasus** | | |
| 16. Georgia | Parliament | No |
| 17. Armenia | President (referendum) | Yes (5 July 1995) |

In all cases, the process was constrained by pre-existing institutions. As Andrew Arato observed, these constitutional drafters sought to avoid a "state of nature" and utilized in part "already constituted bodies."[182] Eastern European founders did not see the constitution as an "expression of a homogenous and authoritative will . . . but, rather, a compact, in which each citizen promises to recognize all his or her fellow citizens as free and equal

180. Teitel, *supra* note 133, at 2059.
181. *Id.* at 2069–70 (discussing "restoration constitutionalism").
182. ARATO, CIVIL SOCIETY, *supra* note 25, at 39.

beings."[183] In many countries, newly created courts helped ensure the coordination necessary to create a broadly functioning government "that can make and enforce laws, maintain order, foster economic prosperity, and provide public goods."[184]

In this process, bargaining and negotiation took place in ad hoc round tables and newly elected parliaments. After the round tables agreed on the initial rules of the game (in Poland and Lithuania, creating an interim constitution), ordinary parliaments became the loci for both ordinary legislation and constitutional drafting, linking an emerging culture of civil engagement through parliament-based politics with the creation of constitutions.[185] These newly empowered parliaments created commissions consisting of both legal experts and members of parliament to draft the post-communist constitutions under the standing rules set forth in their parliamentary tradition.[186] In some cases, these drafts were only given to the people in *ex post* referendums after parliamentary drafting and passage in accordance with procedures inherited from amended communist-era constitutions.[187] This use of parliamentarian rules to fundamentally reshape the constitutional order meant that "[w]holly new political arrangements" were drafted "by weakly legitimate parliaments, assemblies that are, in turn, fragmented into a chaos of small parties."[188]

The use of ordinary parliamentary bargaining for constitutional drafting was generally successful. All of these constitutional systems emerged as parliamentary or semi-presidential forms of government with constitutional courts. Bulgaria, Czech Republic, Slovakia, Latvia, Poland, and Estonia created strongly parliamentary regimes.[189] Romania, Lithuania, Georgia, and Ukraine created semi-presidential systems with executive power split between an elected president and a government responsible to the parliament.[190] Furthermore, these new constitutional orders helped ensure a

183. ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 125 (1995).

184. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 708 (2011).

185. *See* ARATO, CIVIL SOCIETY, *supra* note 25, at 144. Most communist countries, including China today, have Soviet-style written constitutions that create a system of legislative supremacy. For more on the constitutional structure of the 1977 Soviet Constitution, see Christopher Osakwe, *The Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution*, 127 U. PA. L. REV. 1350, 1411–32 (1979).

186. Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244, 256–57 (2003).

187. Holmes & Sunstein, *supra* note 21, at 280.

188. *Id.* at 286.

189. Jon Elster & Stephen Holmes, *New Constitutions Adopted in Bulgaria and Romania*, 1 E. EUR. CONST. REV. 11, 11 (1992); Dwight Semler & David Franklin, *Constitution Watch*, 1 E. EUR. CONST. REV. 2, 5 (1992).

190. Maurice Duverger, *A New Political System Model: Semi-Presidential Government,* 8 EUR. J. POL. RES. 165, 166 (1980) ("[A] political regime is considered as semi-presidential if the constitution which

transition from a one-party state in the 1980s to a system of politics-as-bargaining where elites compete for power. In fact, ten of these constitutional systems pass the "alternation in office" test for democratic governance and therefore can be regarded as successful constitutional transitions.[191]

Hungary's constitutional transition was the exception. Its main transition during the 1990s took place through constitutional amendment, rather than replacement.[192] This amended constitution helped to set up a constitutional order that allowed the rotation of power and the protection of individual rights. However, Hungary more recently replaced its constitution in 2011. This constitution has been criticized as entrenching power for the party in power in the parliament.[193]

*2. Presidential Constitution-Making*

The remaining five countries of the post-communist world, by contrast, ultimately placed extraordinary institutions at the center of their constitutional drafting and ratification.[194] These countries initially followed the "parliamentary constitution-making" scenario.[195] Taking advantage of their privileged position under the pre-existing rules, parliaments in these countries took the lead in amending the constitution, and in two countries (Belarus and Kazakhstan) they actually adopted the first post-communist constitution.[196]

However, as time went on, elected presidents accumulated informal power and worked to push for more formal power. This push was heightened by the fraught politics of economic transition: presidents demanded broad power to push through rapid, "shock therapy" economic reforms, while the parliaments—often dominated by old regime elements—argued for slower, more gradual reforms.[197] As the struggle for power between these two institutions continued, control of the constitutional order was critical and parliaments sought to use their formal amendment power to limit presidential power. Presidents responded by claiming that these

established it combines three elements: (1) the president of the republic is elected by universal suffrage; (2) he possesses quite considerable powers; (3) he has opposite him, however, a prime minister and ministers who possess executive and governmental power and can stay in office only if the parliament does not show its opposition to them.").

191. Mike Alvarez et al., *Classifying Political Regimes*, 31 STUD. COMP. INT'L DEV. 3, 5 (1996).

192. Arato, *Hungary*, *supra* note 176.

193. Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Disabling the Constitution*, 23 J. DEMOCRACY 138 (2012).

194. These countries consist of Armenia, Belarus, Kazakhstan, Kyrgyzstan, and Russia.

195. Arato, *Hungary*, *supra* note 176.

196. Partlett, *The Dangers*, *supra* note 22, at 226.

197. Weyland, *supra* note 173.

parliaments were ignoring the "separation of powers."[198] Presidential administrations advanced unilaterally-created constitutional drafts that gave the presidency wide power to control the policymaking agenda. These drafts envisioned highly weakened parliamentary and judicial checks on presidential power.[199] In response, parliaments pushed constitutional drafts that included stronger parliamentary checks on presidential power. To control the constitution-making process and ultimately win this struggle, presidents appealed to the people through extra-parliamentary institutions such as popular referendums and specialized constitution-making bodies.[200]

These extraordinary mechanisms ultimately helped presidents to unilaterally remake the constitutional order. Presidents were able to use their control over the extraordinary institutions of constitution-making—and the electoral mandates that came with it—to ignore the opposition and unilaterally draft new constitutions.[201] In all five countries, this process was critical in creating super-presidential regimes with no institutions that could check the power of the president.

The constitutional systems that arose from this extraordinary process have in turn helped to undermine individual rights and political competition. In all of these countries, formal constitutional systems have helped to ensure that there has been no rotation of power in office. In Belarus and Kazakhstan, Presidents Nazarbaev and Lukashenko remain in power to this day.[202] In Russia, the same ruling elite has remained in power, with President Yeltsin transferring power to Vladimir Putin in 2000. In Kyrgyzstan, the constitutional order has seen rotation in power, but not because of constitutionally mandated rules; instead, elites have rotated in power because of revolutionary upheavals.[203] Finally, in Armenia, the constitutional transition helped entrench a "competitive authoritarian" regime in the 1990s.[204]

## V. POST-COMMUNIST EXPERIENCE: POPULAR PARTICIPATION

Given this experience, post-communist constitution-making provides an important laboratory for examining how specific institutions performed

198. Partlett, *The Dangers*, *supra* note 22, at 230.

199. *See infra* notes 194–220.

200. *See id.*

201. *See infra* notes 209–233.

202. Bruce Pannier, *Kazakhstan's Long Term President to Run in Snap Election—Again*, THE GUARDIAN (Mar. 11, 2015), http://www.theguardian.com/world/2015/mar/11/kazakhstan-president-early-election-nursultan-nazarbayev; *Lukashenko Says Military Key to Electoral Success*, THE MOSCOW TIMES (Feb. 23, 2015), http://www.themoscowtimes.com/article.php?id=5-16378.

203. Nartsiss Shukuralieva, *Problems of Constitutionalism in the Republic of Kyrgyzstan*, 48 CENT. ASIA & CAUCASUS 7 (2007).

204. Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13 J. DEMOCRACY 51, 51 (2002).

in affecting the nature of popular engagement in constitution-making. Two main questions emerge: First, did the use of specialized, popular mechanisms enhance popular participation in constitution-making? And, second, did the parliamentary constitution-making approach undermine public participation?

### *A. Extraordinary Institutions and Popular Engagement*

Post-communist constitution-making provides a wealth of information about the role that constitutional referendums can play in constitution-making processes. In five post-communist countries, referendums played a critical role in the drafting of the constitution. The general picture that emerges—demonstrated clearly in Belarus, Armenia, and Kyrgyzstan—is that referendums did little to heighten popular participation. Instead, they were powerful—and in some cases, decisive—political tools of exclusion allowing executives to circumvent parliamentary opposition and legalize their own partisan constitutions.[205]

#### *1. Circumvention Referendums: Belarus and Armenia*

Belarus's initial post-Soviet constitution of 1994 was a product of parliamentary bargaining. After numerous draft versions, the parliament narrowly ratified a compromise on March 15, 1994, which created a separation of powers system with an elected president and parliament as well as a constitutional court.[206] The office of the president was given significant constitutional powers: the president was the head of state and also the head of the executive. But this new constitution made sure to place parliamentary checks on presidential power. The parliament was the "highest representative . . . and sole legislative body of state power" and had the power to elect the judges to the Constitutional Court.[207] Most importantly, the parliament could not be dissolved by the president.[208]

Soon after ratification of the new constitution, Belarus held presidential elections. The newly elected president, Aleksandr Lukashenko, openly stated that political power should be concentrated in the presidency and moved to limit parliamentary power. In a speech, Lukashenko argued that he understood the executive, legislative, and judicial branches of

205. Partlett, *The Dangers*, *supra* note 22 (describing how extra-parliamentary process has given charismatic executives a democratic tool to circumvent parliamentary opposition in Kazakhstan).

206. *Id.* at 226–30.

207. Alexander Lukashuk, *Constitutionalism in Belarus: A False Start*, *in* DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE VOLUME 1: INSTITUTIONAL ENGINEERING 293, 302 (Jan Zielonka ed., 2001).

208. *Id.* at 304.

government growing from "the tree of the presidency."[209] A year after his election, Lukashenko began to push for more formal powers. In the spring of 1995, he asked the Belarusian people in a referendum whether he should have the power to dissolve the parliament if it violated the constitution. In the end, 77.6% of the populace answered yes.[210] This result did not suggest, however, a large degree of popular engagement. Lukashenko had issued very strict media regulations in the months preceding the referendum, leading the Council of Europe to criticize the process for a "critical absence of political debate"[211] and a poorly informed public.

The parliament responded to this by working to check Lukashenko's attempts to increase his constitutional powers, issuing a proclamation that Lukashenko's actions were "damaging the foundations of law and civic stability."[212] In 1996, the parliament helped organize a "Movement in Support of the Constitution," which demanded support for the rule of law and the decisions of the Constitutional Court.[213] The previously disparate political parties in the parliament also began to coalesce in opposition to Lukashenko's desire to rule by decree.

The newly created Constitutional Court also worked alongside the parliament to check President Lukashenko's actions. In 1995, the Court struck down eleven of Lukashenko's fourteen presidential decrees.[214] In response, Lukashenko pledged to ignore Constitutional Court decisions and demanded that the Constitutional Court chairman resign.[215] Several months later, Lukashenko issued a decree commanding all "government and local authorities to carry out all his previous decrees and disregard the rulings of the Constitutional Court."[216]

As the standoff evolved into a constitutional crisis, Lukashenko looked for ways to change the formal rules of the constitutional game. He again called for a referendum to ask the people whether "the Republic of Belarus should adopt as its constitution the version accepted in 1994 but which includes those changes and additions proposed by President Lukashenka?"[217] These amendments included unilaterally drafted constitutional changes that significantly eroded the formal checking power of the judiciary and the parliament. In particular, the amendments granted the president the power to appoint the majority of Constitutional Court

209. *Id.* at 309.
210. GÖNENÇ, *supra* note 171, at 192.
211. *Constitution Watch*, 4 E. EUR. CONST. REV. 3, 4 (1995).
212. Lukashuk, *supra* note 205, at 309–10.
213. *Id.* at 312.
214. *Id.* at 311.
215. DAVID R. MARPLES, BELARUS: A DENATIONALIZED NATION 79 (1999).
216. Lukashuk, *supra* note 205, at 311.
217. *Id.* at 313.

judges and also created a bicameral legislature where the president appointed one-third of the legislators in the upper house.[218] Lukashenko described these changes as a "real separation of powers."[219]

The referendum went ahead in November 1996. The new constitution received support from 56% of Belarus's registered electorate.[220] Again, however, this result did not represent enhanced popular engagement. Lukashenko fired the Chairman of the Central Electoral Committee a few days before the referendum and dominated the media coverage.[221] Furthermore, the referendum included an "unknown" number of ballots and anonymous referendum observers.[222] The referendum therefore was a convenient mechanism for rubber-stamping and legalizing Lukashenko's elimination of checking institutions: Lukashenko used this mandate to concentrate formal powers in the presidency.

A similar scenario unfolded in Armenia. Armenia broke away from the Soviet Union in September 1991 and held presidential elections one month later.[223] In the first presidential elections, Levon Ter-Petrosyan, head of the Armenian National Movement (ANM) and leader of the parliament, was elected president in a competitive election. Soon after his election, the legislature of Armenia passed a law granting itself the sole power to adopt the new constitution.[224]

President Ter-Petrosyan "supported a strong presidential type of system which would have strengthened his position against the parliament which he viewed as obstructionist."[225] He therefore put forward a draft constitution with strong presidential powers. The opposition criticized this draft for placing far too much power in the president, undermining checks and balances, and a unilateral imposition of the ANM. One of the leading opposition members, Ruben Akopyan, asserted that the presidential draft was "the constitution of a dictatorship."[226] Six opposition parties—calling themselves the Council for the National Accord—prepared an alternative draft in response.[227]

---

218. *Id.* at 313.

219. GÖNENÇ, *supra* note 171, at 192.

220. *Constitution Watch*, 5 E. EUR. CONST. REV. 3, 4 (1996).

221. *Id.*

222. *Id.* (In the end, most independent observers were "skeptical" of the outcome.).

223. GÖNENÇ, *supra* note 171, at 179.

224. *Id.* at 179–80.

225. JOSEPH R. MASIH & ROBERT O. KRIKORIAN, ARMENIA: AT THE CROSSROADS 47–48 (1995).

226. GÖNENÇ, *supra* note 171, at 182.

227. *Id.* at 180 (these parties were the Agrarian Democratic Party, the Armenian Democratic Party, the Armenian Revolutionary Federation, the National Democratic Union, and the Union for Constitutional Rights).

As the political struggle between the president and the parliament intensified, economic conditions worsened and industry was "at a standstill."[228] As conditions deteriorated, President Ter-Petrosyan began to lose popularity. Opposition parties were growing in power. A poll in Yerevan demonstrated that only 3% of the population supported the ruling ANM.[229] Furthermore, a high-ranking member of Ter-Petrosyan's government accused the ANM of corruption, abuse of power, and other illegal acts.[230] The chief opposition party in parliament—the Armenian Revolutionary Federation (ARF)—began to try to check presidential power.

In response, the presidential administration fought back. An assassination attempt was carried out on Vladimir Grigoryan, who was responsible for investigating allegations of presidential corruption.[231] Furthermore, President Ter-Petrosyan banned the ARF, arrested its leaders, and closed its offices.[232] Ter-Petrosyan also closed down opposition newspapers.[233] The Supreme Court of Armenia—under significant pressure from the ANM—agreed to extend the ban on the ARF for six months.[234] Furthermore, a number of high-level ARF members were given jail sentences.[235]

With the opposition cowed and the parliament essentially reduced to a rump without ARF representation, Ter-Petrosyan turned to a referendum to push through a presidentially dominated constitution. Ter-Petrosyan argued that if the people rejected his constitutional draft, "Armenia would succumb to civil war and lose its credit as a democratic country at international platforms."[236] Popular engagement was, however, extremely low; a survey carried out before the referendum showed that more than 50% of the people did not have enough information about the constitution.[237]

A bare majority of Armenians ultimately voted to support the new constitution and turnout was low (56%). In sum, only 37% of the total electorate voted to adopt the constitution.[238] The Organization for Security and Cooperation in Europe reported that the ban on the opposition party "cast a shadow over the election and the referendum."[239] Thus, in these

228. MASIH & KRIKORIAN, *supra* note 223, at 46.
229. *Id.* at 49.
230. *Id.* at 50.
231. *Id.* at 51.
232. *Id.* at 53.
233. *Id.* at 52–53.
234. *Id.*
235. *Id.* at 58.
236. GÖNENÇ, *supra* note 171, at 181.
237. *Id.*
238. *Id.*
239. COMM'N ON SEC. & COOPERATION IN EUR., REPORT ON ARMENIA'S PARLIAMENTARY ELECTION AND CONSTITUTIONAL REFERENDUM (1st Sess. 1995) at 1 (quoting MASIH & KRIKORIAN, *supra* note 223, at 55).

conditions of political exclusion, the referendum did not improve popular engagement; instead, it simply gave President Ter-Petrosyan a convenient way to avoid negotiation and legalize the passage of his partisan constitution.[240]

### *B. Parliamentary Constitution-Making and Popular Engagement*

Many other post-communist countries chose to center their constitution-making processes around ordinary legislatures. A critical question remains as to whether this choice of parliamentary constitution-making undermined popular engagement and, if so, whether there was any way of salvaging the symbolic nature of a parliament-led process.

#### *1. Hungary*

The experience of constitution-making in Hungary lends some support to the argument that constitution-making in ordinary institutions can undermine popular engagement and therefore the future stability of the constitutional order. In the wake of the collapse of communist domination, Hungary refused to draw on any extraordinary institutions at all in its process of constitutional politics. This was purposeful. Following the revolutionary rhetoric of the communist period, the Hungarian elite "avoid[ed] the term 'revolution'" and instead preferred to speak of a "peaceful transition."[241]

Consequently, Hungarian constitution-making took place directly at the level of parliamentary debate. The Hungarian Parliament never adopted a new constitution at all, instead choosing to amend 90% of the constitution. The Constitutional Court tried to salvage this lack of symbolism by arguing that the "amendments" to the Communist Constitution of 1949 gave the Hungarian constitutional order "a new quality, fundamentally different from that of the previous regime" and, therefore, they "gave rise to a new Constitution."[242]

Although this amended order helped to provide a pluralistic constitutional order where individual rights were protected, the process of constitution-making through amendment (and without replacement) undermined its long-term stability. Writing in 1993, a scholarly

240. This legitimation was accepted by some of the scholarly community. *See* Elizabeth F. Defeis, *Armenian Constitutional Referendum: Towards a Democratic Process*, 9 TEMP. INT'L & COMP. L.J. 269, 276 (1995) ("[T]he most important aspect of the election was the adoption of the new constitution through popular referendum.").

241. PREUSS, *supra* note 181, at 91.

242. Resolution No. 11/1992 (III.5) AB, 1 J. CONST. L. E. & CENT. EUR. 129, 134 (1994); *see also* Arato, *Constitutions in Eastern Europe*, *supra* note 61, at 676.

commentator suggested that "the ill-matched, non-ceremonial, and bashful way of proclaiming the 1989 Constitution contributed to its lack of widespread respect and support."[243] These words would prove prophetic. In 2010, Viktor Orbán's Fidesz party won a constitutional majority in the Hungarian Parliament. Orbán claimed that there had been a "revolution of the voting booth" and that the new assembly embodied "the will of the people."[244] After the election, he pledged that he would draw on this popular mandate and rewrite Hungary's "communist constitution."[245] In particular, he denied that the existing constitution "had brought about a fundamental constitutional change" and refused to acknowledge that a "legitimate constituent power had been summoned in [the post-communist period]."[246] This was a common argument. Press reports since the early 1990s had challenged the legitimacy of the constitution for being a "Stalinist constitution."[247]

This lack of "constituent authority" ultimately helped Viktor Orbán push through a series of amendments and then a full constitutional replacement in April 2011.[248] This new constitutional order weakened judicial checks on the power of the parliament.[249] The importance of this line of attack on the 1949 Constitution could be seen in the new 2011 Constitution. The 2011 Preamble explicitly states that it does not recognize "the communist constitution of 1949" because it was the "basis for tyrannical rule; therefore we proclaim it to be invalid."[250] Thus, the complete failure to engage the public with extraordinary institutions contributed to a constitution that was subject to large-scale revision.

### *2. Restoration Constitutionalism: Latvia, Lithuania, Czech Republic, Georgia*

Other countries using parliaments to draft new constitutions developed strategies to deepen the symbolic perception of popular participation.[251]

---

243. Péter Paczolay, *Constitutional Transition and Legal Continuity*, 8 CONN. J. INT'L L. 559, 567 (1993).

244. Andrew Arato & Ertuğ Tombuş, *Learning from Success, Learning from Failure: South Africa, Hungary, Turkey and Egypt*, 39 PHIL. & SOC. CRITICISM 427, 433 (2013).

245. Kim Lane Scheppele, *Unconstitutional Constituent Power*, at 29, *available at* https://www.sas.upenn.edu/dcc/sites/www.sas.upenn.edu.dcc/files/uploads/Scheppele_unconstitutional%20constituent%20power.pdf.

246. *Id.*

247. Paczolay, *supra* note 241, at 568.

248. Scheppele, *supra* note 243, at 29.

249. Landau, *supra* note 23, at 209–10.

250. THE FUNDAMENTAL LAW OF HUNGARY [CONSTITUTION] Apr. 25, 2011, *available at* http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf.

251. William Partlett, *Restoration Constitution-Making*, VIENNA J. INT'L CONST. L. (forthcoming 2015) (taking an in-depth look at restoration and explaining how it helped to stabilize constitution-making in ordinary legislatures but also had some problematic effects).

One approach was to tie parliamentary constitution-making with "restored," pre-communist constitutions.[252] These constitutions actually closely approximated the system of parliamentary supremacy in the old Soviet constitutions but were clearly far more symbolically rich in showing a break with the past. This restoration had a "normative pull" that helped to demonstrate that the people were breaking with the communist past.[253]

This practice was particularly common in the Baltic states, which shared a strong nationalist consensus that they had been colonized by the Soviet Union.[254] Two of them therefore chose to bring back their pre-Soviet constitution. Latvia is perhaps the best example of this kind of restoration constitution-making. After independence, Latvia "reinstated portions of its 1922 Constitution and passed a nineteen-point Declaration of Transition."[255] In Lithuania, the parliament declared independence and immediately "restored" the 1938 Constitution.[256] It then passed a temporary constitution that would structure the rest of the constitution-making process. The 1938 Constitution served as a model and played a role in helping to determine that the president should only be popularly elected for the first five-year term.[257]

*3. Ex Post Referendum: Estonia*

Another tactic for actually increasing popular participation in parliamentary constitution-making was to hold highly regulated referendums on the constitution *after* the constitution had been deliberated on and accepted by a super-majority in parliament. Used as a final approval mechanism to approve or disapprove of a draft, this *ex post* referendum approach could help to ensure that the constitution going forward was not purely the actions of a parliamentary elite, but instead had a link to the people.[258] Referendums in this role were also far less likely to become a tool of partisan elite manipulation.

Estonia is a good example. Estonia had pioneered the use of referendums to achieve independence from the Soviet Union. In particular, in the March 3, 1991, referendum, a large percentage (78%) of Estonians voted to become independent of the Soviet Union.[259] Thus, the sixty-member commission drafting the constitution made sure to take steps to

252. *Id.*

253. Teitel, *supra* note 133, at 2070.

254. ARATO, CIVIL SOCIETY, *supra* note 25, at 107.

255. *Constitution Watch*, 2 E. EUR. CONST. REV. 2, 6 (1993).

256. GÖNENÇ, *supra* note 171, at 169.

257. *Id.*

258. Setälä, *supra* note 26, at 718 (exploring the benefits of ex post referendums in encouraging better deliberation).

259. GÖNENÇ, *supra* note 171, at 166.

ensure that the constitution that emerged would be accepted by the people. This included a period of opening the constitution up for public discussion after adoption and a referendum. There was also a series of referendum regulations that sought to ensure that the referendum was truly participatory. Most importantly, the commission decreed that the referendum would only be valid if more than 50% of the voters participated.[260]

In the end, these regulations worked in ensuring a participatory referendum. Campaigning for the constitutional draft was highly competitive—largely because of the stringent turnout requirement.[261] One group—calling itself Restitution—opposed the new constitution, instead arguing that the old 1938 Constitution should be reinstated as originally written.[262] In the end, 91% of the voters approved the final document (with a 66% turnout).[263] This wide participation helped to enhance popular engagement with the new constitution.

*4. Post-Founding Legitimation: Poland*

Finally, the post-communist experience also suggests that a constitution can draw its "legitimacy" by creating a basis for a pluralistic politics-as-bargaining, both during and after the constitution-making period. The Polish Constitution was drafted through a long and arduous process of bargaining centered on its ordinary legislature. Immediately after its ratification through a referendum in 1997, the Polish Constitution was roundly criticized by many for being illegitimate and a failure of popular engagement. One group labeled it "a miserable monstrosity concocted by left-wing groups and the postcommunists in defiance of Poland's history, heritage and traditions."[264] Furthermore, the facts seem to suggest that there was little popular engagement in the process. The ratifying referendum—which was an attempt to salvage some "legitimacy" for the constitution—was not a resounding success. In the end, fewer than 25% of the entire electorate actually approved the constitution. This result led some opposition groups to challenge the constitution's legitimacy in court.[265]

260. *Id.* at 167.
261. *Id.* at 168.
262. *Id.*
263. *Id.*
264. *The Draft Constitution: An Acceptable Compromise?*, POL. NEWS BULL., Feb. 13, 1997, *available in* LEXIS, News Library, Curnws File.
265. Daniel H. Cole, *Symposium on the Constitution of the Republic of Poland—Part II: Poland's 1997 Constitution in its Historical Context*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 1–2 (1998).

Yet, since ratification, the Polish Constitution is now considered to be one of the most stable and successful in Eastern Europe.[266] Constitutional rules have played an important role in peacefully resolving constitutional crises on two occasions and the constitutional court has effectively implemented the new constitution's rights-protecting provisions.[267] This stability is a result of a growing consensus that the negotiations themselves were symbolic of politics-as-bargaining that has carried through into the post-ratification process. Writing in 2010, two prominent Polish commentators argued that the "success" of the Polish Constitution can be traced to the "long time spent on its drafting" and the recognition that "there are certain rules of political process and change."[268] Thus, the process of ordinary politics helped to ensure that elite factions were not able to capture the process of constitution-making and therefore has allowed for the gradual development of citizenship and democratic action in Poland.[269]

### *C. Conclusion: Rethinking Elites, Institutions, and Popular Participation*

The relative success of ordinary institutions and ordinary bargaining in the drafting stage of constitution-making suggests that we need to think more contextually about the link between institutions and the generation of popular participation in constitution-making politics. First, it is a strong reminder that extraordinary institutions need not increase participation when transplanted into contexts where they have few safeguards and are easily manipulated. Across the former Soviet Union, these institutions operated in contexts where legal protections ensuring deliberation and political competition were far weaker than in Western contexts. Thus, extraordinary institutions did not give the people any meaningful say in constitutional drafting. On the contrary, they were little more than "democratic" mechanisms for legalizing partisan and rights-limiting constitutions. They were therefore mechanisms for continuing past cycles of public exclusion and alienation.

Second, and perhaps more importantly, ordinary parliamentary bargaining itself became a different way of generating higher law. The multi-party bargaining that takes place in parliamentary constitution-making can

---

266. Andrew Arato, *Redeeming the Still Redeemable: Post Sovereign Constitution Making*, 22 INT'L J. POL. CULTURE SOC'Y. 427, 428–29 (2009) (arguing that the Polish Constitution should be a model for other constitutional transitions) [hereinafter Arato, *Redeeming the Still Redeemable*].

267. Lech Garlicki & Zofia A. Garlicka, *Constitution Making, Peace Building, and National Reconciliation: The Experience of Poland*, *in* FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 391, 411 (Laurel E. Miller ed., 2010).

268. *Id.*

269. Miroslaw Wyrzykowksi, *Legitimacy: The Price of a Delayed Constitution in Poland*, *in* DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE VOLUME 1: INSTITUTIONAL ENGINEERING 452 (Jan Zielonka ed., 2001).

serve as an important basis for structured participation at the constitutional drafting stage.[270] Parliamentary deliberation helps to overcome previous forms of authoritarian politics that involve imposition and domination by promoting compromise and negotiation. In fact, this process of debate was also an effective way of bringing an atomized and fragmented post-authoritarian public into the constitutional drafting process. The slow and often agonizing disputes of multi-party parliamentary negotiation allow time and space for the people to truly emerge and find their voice through multi-party discussion. Thus this process itself symbolizes a new type of ordered deliberative politics that is at the center of democratic constitutionalism.

Finally, extraordinary institutions like *ex post* referendums can further improve the nature of this parliamentary deliberation by placing important and *direct* public pressure on representatives to give "public justifications" for their policy choices.[271] In the post-communist context, legislative drafting and *ex post* referendums helped ensure an expression of the voice of the people while still maintaining elite parliamentary constraints.[272]

This experience of parliament-centered constitution-making can in turn serve as the basis for a different conception of legitimacy.[273] Hanna Arendt argued that real popular participation does not emerge from a single moment of dramatic popular action. Instead, the popular engagement required in constitution-making is more likely to emerge from a longer process of mediated filtration and deliberative consent where "the People" are "a working reality, the *organized* multitude whose power was exerted in accordance with laws and limited by them."[274] In this form of structured deliberation, she argues that opinions are tested in "a process of exchange of opinion against opinion."[275] Arendt explains that this prolonged and legally structured period of elite deliberation actually preserves and builds legitimate power by avoiding a system where one group seeks to eliminate another. This design allows diverse groups to reach a consensus, providing not only "a guarantee against the monopolization of power" but also "a kind of mechanism . . . through which new power is constantly generated, without, however, being able to overgrow and expand to the detriment of other centres or sources of power."[276] This brand of constitution-making legitimacy is therefore grounded in structured popular consent "with its overtones of deliberate choice and considered opinion."[277]

---

270. Jackson, *supra* note 24, at 1271 (stressing that "democratic legitimacy can emerge through a range of processes").

271. Setälä, *supra* note 26, at 718.

272. *Id.*

273. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1502 (1988).

274. ARENDT, *supra* note 32, at 166.

275. *Id.* at 227.

276. *Id.* at 152.

277. *Id.* at 76.

## VI. POST-COMMUNIST EXPERIENCE: ELITE DELIBERATION

Post-communist institutional variation also provides an important laboratory for testing whether specific institutions acted as predicted in promoting less self-interested elite deliberation. In particular, two main questions should be asked in the post-communist context. First, did the use of specialized, extraordinary institutions help create a deliberative setting that increased the quality of arguing and therefore the constitutional order? And, second, did the parliamentary constitution-making approach worsen elite deliberation?

### *A. Specialized Mechanisms and Deliberation*

Post-communist experience provides scant evidence on whether specially elected constitution-making bodies promote more deliberative constitution-making. In fact, there were no *elected* constitution-making bodies across post-communist Europe. The post-communist experience does, however, feature one example of an extraordinary constitution-making body. In Russia, President Yeltsin convened an appointed constitution-making assembly in the wake of a vote of confidence for Boris Yeltsin in a referendum.[278] Yeltsin was then able to argue that this institution represented popular will at the time.

This specialized Russian constitution-making assembly was the result of a power struggle between President Yeltsin and the parliament. As in other post-communist systems, the elected Russian Parliament exercised a monopoly over constitutional replacement under the old Soviet-era Russian Constitution. The Russian Parliament created a Constitutional Commission under the leadership of Oleg Rumiantsev. Rumiantsev was a leading Russian westernizer: he had been a supporter of Gorbachev's westernizing reforms and had convened a discussion group, Democratic Perestroika, which was one of Moscow's many such small, informal political discussion groups.[279] As a result, he was highly influenced by western constitutional models and ultimately sought to create a western-style semi-presidential system in Russia.[280]

By the end of 1992, Yeltsin and the parliament increasingly came into conflict. The parliament refused to extend his emergency powers. To circumvent this opposition and to avoid compromise, President Yeltsin argued that the Russian people had a legal right to draft a new constitution

278. Partlett, *The Dangers*, *supra* note 22, at 218–19.

279. Peter Pavilionis, *A New Constitution for Russia,* THE EURASIA CTR., *available at* http://www.eurasiacenter.org/archive/1990-1999/1991a_new_constitution_for_russia_by.htm.

280. *Id.*

outside of the existing order. To exercise this right, he called for a referendum that would ask the people if they had confidence in him or in the parliament.[281] After a majority of Russian voters affirmed that they had "confidence" in President Yeltsin, Yeltsin claimed that he was the extraordinary representative of the people and therefore had the legal power to completely reshape the institutional apparatus of the Russian state.[282] He then convened an appointed constitutional convention to approve his own self-dealing constitutional draft.[283]

Yeltsin went to great lengths to claim that this constitutional convention represented the people and therefore had superior legal power to the constituted powers in Russia.[284] He then used his control of this institution to unilaterally draft a constitution that pushed significant power to the Russian President and weakened parliament.[285] In fact, debate at the Constitutional Convention was tightly controlled by a cadre of Yeltsin supporters.[286] Attempts by parliamentary drafters to take part in the debates were blocked. In a subsequent decree dissolving all legislative bodies in Russia, Yeltsin cited his support in the referendum and the actions of the constitutional convention, which had the "highest possible legal force across the entire Russian nation."[287] This body ultimately produced a document that entrenched Yeltsin's powers as president and weakened the formal checking powers of the Constitutional Court and the parliament.

Extra-parliamentary constitution-making in Russia therefore did not improve elite deliberation by increasing the chances of formulating a constitution behind a veil of ignorance. Instead, the availability of extra-parliamentary process enabled Yeltsin's partisan constitution-making; without this extra-parliamentary institution he would have had little choice but to operate through the parliament. Thus, in the Russian context, an extra-parliamentary drafting body became a tool, not of a new and improved form of deliberative constitution-making, but of a return to the old Soviet-era tradition of unilateral and partisan manipulation of constitution-making.

Kyrgyzstan demonstrates how another extra-parliamentary mechanism—the constitutional referendum—also emerged as a key strategy for enabling elite self-dealing in constitution-making. Kyrgyzstan was much like the other post-Soviet republics: it featured a struggle for power between the president and the parliament in the early post-communist period. At the heart of this dispute was economic reform: the Kyrgyz President, Askar

281. Partlett, *The Dangers*, *supra* note 22, at 217.
282. *Id.* at 217–18.
283. *Id.* at 219.
284. *Id.* at 219–23.
285. Partlett, *Separation of Powers*, *supra* note 157, at 105–10.
286. Partlett, *The Dangers*, *supra* note 22, at 219.
287. Partlett, *Separation of Powers*, *supra* note 157, at 131.

Akayev, favored faster reform while the parliament favored slower reform.[288] Constitution-making became wrapped up in this political dispute. Parliament prepared a draft constitution that threatened to strip presidential powers. In response, Akayev threatened to circumvent the parliament through a constitutional convention.[289] Ultimately, the parliament passed a compromise constitution on May 5, 1993.[290]

Akayev, however, saw this compromise as only a temporary setback. After winning a subsequent presidential election, he complained that "he was little more than a figurehead and compared himself to Queen Elizabeth."[291] Ignoring a constitutional provision that stated that constitutional referendums must be approved by parliament,[292] he then went on to convene a series of referendums that granted him additional powers. He used a number of different methods to manipulate these mechanisms. In many cases, he formulated the language of the ballot in a way that benefited him. In others, he severely curtailed debate to ensure a favorable result, often by limiting debate to one month.[293] He also made sure that he controlled the membership of the Central Election Commission.[294] With this control in place, Akayev made wide use of administrative resources and also covered up significant fraud in the way that the referendum was carried out.[295] In particular, people were allowed to vote on behalf of their relatives and a "great number of ballot papers were placed in ballot boxes on the pretext they contained proxy votes."[296] Akayev would continue to use this strategy going forward. In a 1995 referendum, over fifty amendments were made to the constitution "which granted more powers to the executive."[297]

Much as in Russia, the extra-parliamentary institutions of a referendum did not lead to improved elite deliberation. Instead, it proved critical in President Akayev's self-interested process of constitution-making, allowing the president to increase his formal constitutional powers and weaken those of the parliament.

---

288. GÖNENÇ, *supra* note 171, at 199.
289. *Id.* at 200.
290. *Id.* at 201.
291. *Id.*
292. Shukuralieva, *supra* note 201, at 13.
293. *Id.*
294. *Id.*
295. MARK CLARENCE WALKER, THE STRATEGIC USE OF REFERENDUMS: POWER, LEGITIMACY, AND DEMOCRACY 99 (2003).
296. *Id.* at 102–03.
297. GÖNENÇ, *supra* note 171, at 201.

### *B. Did Parliamentary Involvement in Constitution-Making Lead to More Self-Interested Constitution-Making?*

Another argument made in the literature is that the use of parliaments will lead to a process of constitution-making dominated by self-interest and short-term bargaining.[298] This raises a series of questions. First, did the parliaments protect their interests by creating strongly parliamentary republics with "soft" constitutional norms? Second, did parliamentary bargaining lead to short-term and self-interested bargaining?

#### *1. Protective Constitution-Making? Romania and Bulgaria*

Romania and Bulgaria help us better understand self-interest in parliamentary constitution-making: these countries were the first two post-communist countries to adopt new constitutions. They did so not out of an attempt to enter into a publicly minded deliberation on constitutional creation, but rather because old communist party elites in these parliaments moved quickly to pass a new constitution before the democratic opposition had time to organize.[299] Seeking to take advantage of their power, they self-interestedly moved to quickly push through new constitutions that would protect them from any future retribution.

In Bulgaria, the old communist party—renaming itself the Bulgarian Socialist Party—won a majority of seats and rushed through a new constitution with little or no popular involvement.[300] The Socialist Party rejected a constitutional referendum because they were worried that the opposition parties would unite to defeat it.[301] A similar story occurred in Romania after the fall of Nicolae Ceauşescu. The revamped communist party—calling themselves the National Salvation Front (NSF)—won elections to a new parliament and immediately drafted and ratified a constitution.[302]

This form of protective constitution-making allowed old elites to create constitutional systems with strong parliaments and constitutional courts.[303] These new constitutional orders, however, also created presidents with significant powers.[304] In both systems, the presidents are commanders-in-

298. *See, e.g.*, Steven M. Griffin, *California Constitutionalism: Trust in Government and Direct Democracy*, 11 U. PA. J. CONST. L. 551, 563–64 (2009).

299. Elster & Holmes, *supra* note 187, at 11.

300. Thomas M. Franck & Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, *in* FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 3, 12 (Laurel E. Miller ed., 2010).

301. Semler & Franklin, *supra* note 187, at 4.

302. GÖNENÇ, *supra* note 171, at 150.

303. Elster & Holmes, *supra* note 187, at 12.

304. *Id.* at 11–12.

chief of the armed forces, have vaguely defined decree powers, and can also determine the length of states of emergency once called (with parliamentary approval).[305] The Romanian system goes further in providing a powerful president, granting him the formal power to institute popular referendums and to preside over cabinet meetings when national defense is discussed.[306]

How did the "least liberal leadership in the region" end up being the first to create liberal constitutional frameworks?[307] The answer lies in the fact that these parliaments faced electoral uncertainty.[308] Relying on legal continuity with the inherited system of parliamentary supremacy, they did not have the wide scope to reshape the legal order in their interests that executives did in extraordinary politics. Without this power, they were therefore forced to face the prospect of electoral defeat. This uncertainty meant their decision-making closely approximated a Rawlsian veil of ignorance. Realizing (correctly) that they would likely be losers in future elections, these old communist elites therefore built constitutional orders that would insulate electoral losers.[309] This therefore suggests that even self-interested legislatures can succeed in constitution-making, if operating under conditions of electoral uncertainty. Uncertainty is critical in forcing legislators to think more clearly about the long-term effects of their constitutional deliberations.

*2. Negotiated Constitution-Making: Poland and Ukraine*

In many of the other post-communist parliaments, however, old regime elements were forced to negotiate with better-organized, anti-communist opposition parties to create new constitutions. In this scenario, ordinary parliaments were the site of long and often arduous elite deliberation, including bargaining aimed at ensuring the consent required for a super-majority in parliament. Underpinning this deliberation were the stable rules of parliamentary procedure.

Poland emerged into the post-communist world with a well-developed anti-communist party, the Solidarity movement. The Solidarity party's leader, Lech Wałęsa, was elected president in 1990. He immediately faced opposition in a newly elected parliament, however, as his first prime minister choice was rejected.[310] Because "the drafting process took place in the lion's den of daily politics," the constitutional draft was the subject of intense

305. *Id.*

306. Robert Elgie, *Heads of State in European Politics*, *in* ROUTLEDGE HANDBOOK OF EUROPEAN POLITICS 321 (José M. Magone ed., 2015) (third strongest president in Europe).

307. Elster & Holmes, *supra* note 187, at 11.

308. *Id.*

309. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 64 (2003).

310. GÖNENÇ, *supra* note 171, at 130.

compromise and negotiation.[311] As the process moved along, it was criticized as being far too slow and messy.[312]

When the final draft was prepared, it was clearly the result of intense and prolonged elite compromise. In this process, no single party got what it wanted and parties on both the left and the right of Polish politics made significant concessions. The effect of this "torturous" process meant that large supermajorities supported the draft.[313] In the end, 45 out of 48 voted for the constitution in the Commission and 451 voted for the new constitution (and only 40 against) in the legislature.[314] The resulting constitutional draft has been seen as a success in regulating Polish politics.[315]

Ukraine presents another example of parliamentary bargaining. In post-Soviet Ukraine, bitter power struggles quickly erupted between the president and the parliament. But, throughout the deliberation, both sides showed significant willingness to work through the parliament. After his election in 1994, President Kuchma moved to formalize his powers over the executive by attempting to pass a law that would have further increased his power.[316] The parliament blocked this attempt. In response, Kuchma threatened to issue a decree calling for a referendum to judge the public's trust. He ultimately did not go ahead with this unilaterally, however, and instead chose to negotiate with the parliamentary opposition, eventually signing a Constitutional Accord.[317]

This accord, however, did not immediately solve the dispute. The Parliamentary Commission prepared a constitutional draft, but it became clear that there was significant disagreement between the president and the parliament. President Kuchma again threatened to circumvent parliament through a referendum.[318] Under pressure, the parliament compromised and passed a bill giving more powers to the presidency.[319] The parliament, however, placed a time limitation on some of these powers and was able to keep a unicameral structure and power over the Procuracy. In the end, the parliament adopted a compromise constitution on June 28, 1996, that was

311. Wiktor Osiatynski, *A Brief History of the Constitution*, 6 E. EUR. CONST. REV. 66, 66 (1997).

312. Ackerman, *World Constitutionalism*, *supra* note 54, at 784 (criticizing Polish drafters for failing to turn "the Solidarity movement into a constituent assembly").

313. Osiatynski, *supra* note 311, at 67.

314. *Constitution Watch*, 6 E. EUR. CONST. REV. 1, 20 (1997).

315. Garlicki & Garlicka, *supra* note 265, at 411.

316. Charles R. Wise & Trevor L. Brown, *The Separation of Powers in Ukraine*, 32 COMMUNIST & POST-COMMUNIST STUD. 23, 29–30 (1999).

317. Serhiy Kudelia*, If Tomorrow Comes: Power Balance and Time Horizons in Ukraine's Constitutional Politics*, 21 DEMOKRATIZATSIYA: J. POST-SOVIET DEMOCRATIZATION 151, 159–161 (2013).

318. *Id.* at 163.

319. *Id.* at 163 ("He now gained the power to veto any adopted legislation and could stall the implementation of unwanted bills by refusing to sign them. Additional temporary provisions lasting three years gave the president the power to issue decrees on economic policies without the parliament's approval.").

"welcomed by all major political forces."[320] This constitution created a strong president but ultimately was one that ensured that the parliament retained some key meaningful checks on presidential power. Once again, ordered deliberation in an ordinary legislature had led to near consensus.

### *C. Conclusion*

The post-communist experience helps us better understand the effect of institutional design on elite deliberation at the drafting stage. It is clear that extraordinary institutions like constituent assemblies and referendums in the post-communist context did not improve elite deliberation in constitutional drafting. On the contrary, these extraordinary institutions provided strong incentives for elites to abandon deliberation altogether and instead play the politics-as-war game. In particular, it gave elites an opportunity to claim to represent the people, abandon any attempts at compromise, and legitimize their own self-interested constitutional projects in the name of the people. This ability to circumvent elite deliberation, in turn, ultimately undermined a mediated form of popular engagement in the drafting process. Hanna Arendt describes these types of appeals to the homogenous collective popular will as ones that inevitably "exclude[] all processes of exchange of opinions and an eventual agreement between them."[321] In this way, referendums emerged as Bonapartist mechanisms of elite manipulation and exclusion.[322]

These extraordinary institutions were the tools of elite manipulation in the post-communist context because of the instability of legal regulation. In the legal vacuum of extraordinary constitution-making, executives were able to issue law-making decrees that altered the legal framework underpinning referendums in a way that ultimately undermined the ability for a reasoned, measured, and deliberative process. This manipulation is an important reminder that we cannot judge whether a referendum is a positive institution in constitution-making until we understand the legal structure of the referendum and the specific particularities of the "constitutional environment" in which it operates.[323] Given the general weakness of legal control in many post-authoritarian regimes, it seems advisable to avoid extraordinary institutions altogether at the drafting stage. Extraordinary institutions are much more effective as *ex post* mechanisms for allowing the people to ratify or reject a "worked out agreement."[324]

320. GÖNENÇ, *supra* note 171, at 178.
321. ARENDT, *supra* note 32, at 76.
322. TIERNEY, *supra* note 17, at 100.
323. *Id.* at 287.
324. *Id.* at 297.

Ordinary parliamentary constitution-making, by contrast, forced deliberation at the drafting stage. With the stable procedural and super-majoritarian voting rules in place from the communist period, it was difficult for any one elite group to dominate these bodies. Legislative voting rules forced elites to see decisional outcomes as a positive sum game or a "politics-as-bargaining" game, rather than a zero-sum or "politics-as-war" game.[325] Legislatures therefore became the center of elite pacts—agreements that were able "to define (or, better, to redefine) rules governing the exercise of power on the basis of mutual guarantees for the 'vital interests' of those entering into it."[326] Democratic constitutions emerged as the capstone in a process of "restrained partisanship" where all parts of the elite play by the rules of the game.[327] In this search for such an "elite settlement," popular participation also could play a more productive and less easily manipulated role.[328] In particular, mass popular support establishes "fields of opportunity and constraint to which elites must respond."[329]

Finally, because no single factional elite could dominate the constitution-making process, this bargaining process helped to increase uncertainty about the distribution of political power in the new constitutional order.[330] This increased the chances that constitutional drafting would take place behind a Rawlsian veil of ignorance where drafters would engage in long-term and more publicly minded deliberations about constitutions.[331] This, in turn, ultimately helped to increase the chances of the creation of constitutions containing impartial, unbiased institutions like courts and separated powers that protect rights and enforce political competition.

## VII. CONCLUSION

Post-communist experience provides important lessons about the universality of revolutionary constitution-making and its prioritization of extraordinary institutions. First, it suggests that extraordinary institutions are

325. SARTORI, *supra* note 31, at 224.

326. O'DONNELL & SCHMITTER, *supra* note 9, at 37. This insight therefore helps provide more detail on why quantitative research has shown that parliaments are less likely to engage in self-dealing in constitution-making.

327. GIUSEPPE DI PALMA, THE STUDY OF CONFLICT IN WESTERN SOCIETY: A CRITIQUE OF THE END OF IDEOLOGY 11 (1973).

328. Higley & Burton, *supra* note 9, at 21.

329. *Id.* at 22.

330. *See* Benomar, *supra* note 39, at 86 (discussing the need to "prevent[] any one group from dominating the process").

331. EISGRUBER, *supra* note 11, at 19 (explaining that to qualify as "democratic," a governmental structure must respond to the interests and opinions of all the people).

dangerous at the drafting stage of constitution-making. Constitutional transition is best understood not as a single, monolithic process. Instead, it is a multi-stage process involving at least two distinct stages: drafting and ratification.[332] In the post-communist context, ordinary institutions like parliaments were far more effective institutions for improving elite deliberation at the constitutional drafting stage. They helped to block the elite threat to constitution-making and served as a foundation for an improved version of constitution-making politics.[333] Extraordinary institutions like *ex post* referendums were far more likely to succeed when used as *ex post* institutions for ratifying or rejecting a constitution drafted through ordinary parliamentary process.

Second, the post-communist solution to the elite threat to constitutional transition holds important lessons for other post-authoritarian contexts.[334] Elite self-dealing and its pathologies are not just limited to post-communist constitution-making. Similar abuse of constitution-making has occurred across Asia, South America, and the Middle East. In Venezuela, Hugo Chavez was able to capture an electoral majority in a constituent assembly and then push through a partisan constitution.[335] In East Timor, the Fretilin Party dominated the constituent assembly elections and then proceeded to draft a constitution in their own interests.[336] Similarly, in Egypt, both the 2012 and 2014 constitutions reflected the self-interest of the group dominating constitution-making. In the 2012 constitution, the dominant Freedom and Justice Party used constitutional provisions to weaken the judiciary.[337] In 2014, the dominant military forces pushed through a new constitution that entrenched their formal power.[338]

---

332. Saunders, *supra* note 29 (describing the stages of constitution-making).

333. Arato, *Redeeming the Still Redeemable*, *supra* note 264 at 428 (describing a post-sovereign approach to constitution-making where the process is brought under legal rules); ROSENFELD, THE IDENTITY, *supra* note 25, at 129–31 (discussing the overall trend toward legalized constitution-making that started with Spain in the late 1970s and that has continued).

334. Partlett & Ip, *supra* note 158. The Leninist model of the one-party state remains a very common institutional form of authoritarian government. Remaining party-state institutional arrangements are particularly common in Asia, including China, Laos, Vietnam, and North Korea.

335. Allan R. Brewer-Carías, *The 1999 Venezuelan Constitution-Making Process as an Instrument for Framing the Development of an Authoritarian Political Regime*, *in* FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 505, 512 (Laurel E. Miller ed., 2010).

336. DAMIEN KINGSBURY, EAST TIMOR: THE PRICE OF LIBERTY 101 (2009); Louis Aucoin & Michele Brandt, *East Timor's Constitutional Passage to Independence*, *in* FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 245, 270 (Laurel E. Miller ed., 2010).

337. Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNT'L L. 285, 300 (2015).

338. Ellis Goldberg, *A New Political Dilemma for Egypt's Ruling Military*, WASH. POST (June 2, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/06/02/a-new-political-dilemma-for-egypts-ruling-military (explaining that this provision was aimed at safeguarding the military from a "charismatically empowered officer who sought personal power over the state, including the military").

These persistent problems of elite self-dealing in post-authoritarian contexts suggest that a critical question in the design of constitutional transition is how to constrain elite unilateralism and encourage elite negotiation and consensus at the drafting stage. The post-communist solution of seeking to combine inherited legislatures "redeemed" through elections with *ex post* referendums was highly effective. Some theorists have been eager to generalize this post-communist experience into a new model of institutional design for constitution-making. For instance, Andrew Arato's work on post-sovereign constitution-making seeks to place legal continuity and a redeemed legislature at the heart of a new post-sovereign constitution-making model.[339] Supra-governmental organizations have also been tempted by the success of this model. The Venice Commission commented that it "strongly endorses" the process whereby "even new constitutions should be adopted following the prescribed amendment procedures in the old one."[340] This approach, the Venice Commission argued, is important in "strengthening the stability, legality and legitimacy of the new system."[341]

Such attempts to generalize a universal institutional design from post-communist experience, however, should be treated with as much caution as those generalizing from the Western legacy of eighteenth-century revolutionary constitution-making. Many post-authoritarian countries drafting new constitutions do not have a recoverable form of stable and impartial legality or an institutional legacy of parliamentary assemblies already in place as the post-communist countries did. Libya is a good example: it has embarked on a constitution-making process with very few working institutions at all.[342] In these countries, other solutions must be found. One possibility is to delay final and entrenched constitution-making until ordinary institutions with stable rules are working effectively. This could be achieved through a temporary constitution that creates the basis for the ordinary electoral politics and multi-party legislative bargaining.[343]

---

339. Arato, *Redeeming the Still Redeemable*, *supra* note 264, at 430–35; Andrew Arato, *Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-making*, 1 GLOBAL CONSTITUTIONALISM 173 (2012); HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM, AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION (2000); ARATO, CIVIL SOCIETY, *supra* note 25; *see also* William Partlett, *The Legality of Liberal Revolution*, 38 REV. CENT. & E. EUR. L. 217 (2013) (discussing the importance of mixing ordinary and extraordinary institutions in constitution-making).

340. VENICE COMM'N, *supra* note 36, at 15.

341. *Id.*

342. David D. Kirkpatrick, *Wider Chaos Threatens as Fighters Seize Branch of Libya's Central Bank*, N.Y. TIMES (Jan. 22, 2015), http://www.nytimes.com/2015/01/23/world/africa/libyan-fighters-seize-benghazi-branch-of-central-bank.html?_r=0.

343. Ozan O. Varol, *Temporary Constitutions*, 102 CAL. L. REV. 409 (2014).

This can then serve as the basis for a better form of constitution-making politics.

Finally, whatever the solution, post-communist experience shows that an important area of future research is how to impose stable and impartial rules on post-authoritarian constitutional transitions that face serious threats of elite self-dealing. A solution requires delinking constitutional transition from broad normative conceptions of revolutionary breaks with the past and considering the value of ordinary institutions, rules, and pluralism to constitutional transition.[344] This anti-revolutionary research project of ordered constitution-making can then help achieve the normative goals for constitutional politics. In particular, it can improve elite deliberation and therefore enhance the quality of popular engagement at the drafting stage by "refin[ing] and enlarg[ing] the public views."[345] This research will in turn play an important role in increasing the chances of "jurisgenerative" forms of politics that will allow for more successful constitutional transitions.[346]

344. Colón-Ríos, *supra* note 14, at 21.

345. THE FEDERALIST NO. 10 (James Madison); ARENDT, *supra* note 32, at 227 (arguing that a pluralistic process best encourages consensus by allowing "a process of exchange of opinion against opinion, their differences can be mediated only by passing them through the medium of a body of men, chosen for the purpose"); *see also* Bohman, *supra* note 32 (discussing the importance of institutional pluralism in Jürgen Habermas's Arendtian-influenced theory of democratic deliberation and consensus building). Recent empirical evidence also supports the argument that pluralism leads to democratic constitutionalism. Carey, *supra* note 32, at 155.

346. Michelman, *supra* note 271, at 1502.

* * *