WHY RATIFICATION?
Questioning the Unexamined Constitution-making Procedure

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ABSTRACT

Why Ratification? 
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My dissertation focuses on ratification—the submission of a draft constitution to the people for their approval in an up or down vote—and has two central aims. First, it explores the mechanics, current usage, and possible effects of ratification and argues that despite its intuitive nature and ubiquity, it is in need of justification. Ratification is increasingly common and regularly included within the framing recommendations given by consultants, NGOs, transnational institutions, and the like. In addition, the procedure has significant effects: it can influence the behavior of framers, subsequently alter the contents of what they produce, is expensive to implement, and can lead to costly constitutional rejections. Despite this, both practitioners and scholars treat ratification as a given and provide no explanation or justification for its use. I argue that this is a mistake.

Second, the primary aim of my dissertation is to ask what justifies the use of ratification, i.e. what reasons constitution-makers might have for implementing the procedure. Drawing from the history of ratification and the empirical and theoretical literature on constitution-making, I explore a series of possible justifications for the procedure, each of which connects to a central topic or theme in democratic theory. First, I ask whether ratification plays a role in a representative process ongoing during constitution-making, and whether the importance of
fostering representation justifies its use. Second, I examine whether the need for ratification stems from its function as a moment of constituent power, an instance where the people manifest and exercise their will to make a constitution their own. Third, I explore whether ratification helps legitimize constitutions; this entails articulating a three-part theory of legitimacy corresponding to the concept’s legal, moral, and sociological manifestations, and analyzing the role of ratification within this scheme. I test these potential justifications by looking at their theoretical coherence, applicability to cases of constitution-making from the 18th century to the present, and their compatibility with the actual dynamics and mechanisms of the constitution-making process.

The results of my analysis are as follows. I argue that the only role ratification might play in a representative process is as an accountability mechanism, but that the possible divergence between how a voter evaluates a draft constitution and the behavior of his or her representative framer makes the procedure unable to take on this role. I find that theories of constituent power only justify ratification if the procedure is the sole moment during constitution-making in which the people take direct action on the constitution. This limits the justification to ratification procedures involving referenda, and requires that voters make a meaningful choice on the proposed constitution, i.e. they must choose whether to accept or reject a constitution on the basis of their understanding of its contents and the likely result of its rejection. However, this standard of meaningful choice, which requires a far greater level of voter informedness than ordinary instances of direct democracy, is unlikely to be met because voters cannot be expected to possess or obtain the sort of highly technical and specialized information such constitutional evaluation requires. Finally, I show that legal legitimacy collapses into sociologi-
cal legitimacy when it comes to new constitutions and that ratification might produce socio-
logical and moral legitimacy by making the contents of a constitution more likely to fall within
the bounds of actual or perceived legitimacy, or by procedurally legitimating the outcome re-
gardless of its substance. However, each of these pathways has considerable explanatory weak-
nesses and do not in themselves justify ratification.

Thus, I ultimately conclude that there seems to be no convincing general justification
available for ratification. The initially compelling arguments in favor of the procedure apply
only occasionally, ignore differences between constitutional and ordinary lawmaking, contra-
dict some of our central theories and assumptions about constitutionalism and democracy, or
assume the prior existence of robust democratic norms. This does not amount to a wholesale
rejection of ratification, for contextual variables might produce reasons for its implementation
and I explore what these might be, but it does give reason to question the automatic applica-
tion of this procedure, as well as the similar treatment of other peripheral components of con-
stitutional and institutional design processes the merits of which are assumed rather than crit-
ically evaluated.
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LIST OF ABBREVIATIONS

CPJ  Constituent Power Justification
PP   “Pittsfield Petitions”
RJ   Representation Justification
SB   “Statement of Berkshire County Representatives”
SMJ  Single Moment Justification
TT   Two Treatises of Government
V    “A Vindication of the County of Birkshire”
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DEDICATION

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1.

RATIFICATION:
Overlooked, Unexplained

“Can the citizens give an assembly the power to establish a constitution or to accept one on their behalf without retaining the right to ratify it themselves, or should they retain this power?”

Marquis de Condorcet

“As soon as the new constitution has been ratified by referendum, Syria will have accomplished the key step of laying down the legal and constitutional foundations necessary for the country to begin a new era of cooperation among all in society.”

President Basher Al-Assad

From the very beginning, ratification has been an essential component of democratic constitution-making. The Massachusetts constituent legislature of 1778, the first body popularly elected to serve as a constituent authority, submitted its draft constitutions to the people for ratification. This practice caught on, and today ratification procedures are ubiquitous. In the United States, a norm developed whereby all new state constitutions must be approved by a majority of the people through a referendum before enactment. Thus, only forty-five of the 146 constitutions adopted by the states between 1776 and 2005 became effective without ratification.

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2 “Rejecting the Referendum,” Al-Ahram Weekly Online, 23-29 February 2011.
fication and all but three of these cases took place in the 18th century. Moreover, there has been an increasing trend of popular ratification worldwide; since 1975, about forty percent of all new constitutions came into effect only after a successful referendum, and many others were enacted following ratification procedures of a different form. In addition, constitutional consultants, NGOs, international lawyers, and the like now include ratification procedures amongst their framing recommendations and constitution-making best practices manuals.

In each instance of its use, ratification can influence the behavior of framers and subsequently alter the contents of what they produce. Further, ratification can lead to the rejection of a constitution, regardless of its political and social significance, the length and expense of its drafting process, the perceived legitimacy of its drafters, or the level of publicity surrounding its creation. Ratification is thus an influential and highly risky process, which suggests the question—why should constitutions be ratified? What reasons are there for using ratification procedures at all? These are the central questions addressed by this dissertation. In answering these, I seek to uncover the theoretical significance and institutional role played by ratification and the reasons that constitution-makers might have for deciding to implement the procedure.

The main thesis of this project is that despite its popularity, and despite its apparent democratic credentials, there is no clear general justification for including ratification procedures

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within a constitution-making process. The best arguments for the procedure rely on just the sort of “everybody is doing it” reasoning that we are told never to use by our parents. These are not good reasons when it comes to personal life choices and, I argue, they are not good reasons when it comes to the design of constitution-making processes as well. To test my thesis I explore a series of interrelated potential justifications. This is made difficult because ratification is rarely discussed let alone justified, and because it is impossible to address every potential argument in favor of implementing the procedure. In response, drawing from the history of ratification, the limited empirical and theoretical literature on constitution-making, and several currents in democratic theory, I develop and analyze several of the most plausible arguments for the procedure. These relate to representation, constituent power, and legitimacy.

Specifically, I ask whether ratification plays a role in a representative process ongoing during constitution-making, and whether the importance of fostering representation justifies its use. I then examine whether the need for ratification stems from its function as a moment of constituent power, an instance where the people manifest and exercise their will to make a constitution their own. Finally, I explore whether ratification helps legitimize constitutions and constitution-making procedures. This entails articulating a three-part theory of legitimacy corresponding to the concept’s legal, moral, and sociological manifestations, and analyzing the role of ratification within this scheme. Ultimately, as I explain below, I find none of these arguments persuasive. This does not mean that ratification is always a mistake, but rather that the procedure should be used with care and its likely effects and intended goal considered in each instance of potential usage.
In the remainder of this chapter I do the following: first, I define ratification, explain its types, and situate it within the various stages of constitution-making. Second, I argue that ratification demands justification. This involves noting the increasing literature on the importance of constitution-making processes, the complete neglect of ratification within it, and describing the effects that the procedure can have. Third, I explain what it is I mean by justifying ratification, and what sort of explanations and arguments I am not addressing. Fourth and finally, I sketch out the remaining chapters.

1. WHAT IS RATIFICATION?

This project focuses on ratification procedures used in the process of democratic constitution-making for sovereign states. By constitution-making, I mean the attempt to write a new body of higher law that specifies the organization and structural features of a state, enumerates the rights of citizens, and limits government organs and actors. This excludes cases in which states seek to amend or moderately revise an existing constitution, as well as all constitutions created through organic, evolutionary, or cumulative processes. By ‘democratic’ constitution-making I refer to processes meant to create a working democratic constitution. This distinction is meant to exclude from consideration instances in which authoritarian or autocratic re-

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5 By sovereign states, I mean states that are not part of a larger national political system. In other words, this project is not primarily focused on provincial constitution-making within Federal systems such as the United States, Germany, and Canada. However, it is also not focused on constitution-making for transnational political entities such as the EU.

6 For a discussion of the difficulties in defining exactly what a constitution is using traditional designations such as a body of law that is harder to change, a document that addresses fundamental issues, or the legal code referred to as ‘the constitution,’ see Jon Elster, "Forces and mechanisms in the Constitution-making process," Duke Law Review 45(1995): 264-367.

7 The most famous examples of organic constitutions are the British and Israeli bodies of higher law. For a discussion of organic constitutions, see John Alexander Jameson, The Constitutional Convention; Its History, Powers, and Modes of Proceeding (New York: Charles Scribner and Company, 1867), 76.
gimes create sham constitutions meant to entrench their rule or serve as democratic window-dressing. Usually, but not always, a portion of a democratic constitution-making process is transparent or public. Ratification, as I explain below, is the final step used to create a constitution.

Modern constitution-making processes divide roughly into five stages: initiation, drafting, debating, approval, and ratification. In the initiation stage, existing or new power holders decide to create a constitution and then plan the process. Initiation sometimes involves establishing constitutional commissions, creating interim constitutions, holding round table talks, and adopting guiding principles. In post-conflict contexts, the initiation stage often evolves from or is part of a prior peace-making process. This stage ends with the convocation or designation of the constitution-making bodies.

The first draft constitution is written in the drafting stage. Its authors are usually a designated constituent body such as a constitutional convention, constitutional commission, or constituent legislature, or a subsidiary body they or the existing government appoints. Drafters often seek the assistance of international lawyers, constitutional experts, and NGO or IGO consultants. On occasion, political parties or civil society organizations develop a rival draft in tandem. The debating stage follows drafting; here, the draft constitution and any alternatives are discussed, combined, and amended. Actors can include the initial drafters, a newly created

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8 For an interesting analysis of such sham constitutions, see David S. Law and Mila Versteeg, "Sham Constitutions," California Law Review 101 (forthcoming)(2013). On the subject of sham constitutions, it is worth noting that this is one main reason to be skeptical about the Comparative Constitutions Project run by Melton, Elkins, and Blount, in which all constitutions from 1775 to the present have been coded according to substance and design-making procedures. They include many constitutions, such as those written by Soviet states, which were never intended to function or constrain a government. Elster makes a similar point in Jon Elster, "Securities Against Misrule: Juries, Assemblies, Elections," (Forthcoming at Cambridge University Press2012), 338f842.
constitution-making body, existing governmental organs, special meetings with party, ethnic, or religious leaders, and even the people themselves through workshops, town meetings, comment solicitation mechanisms, or consultative referenda. In the approval stage a final version of the constitution-making text is settled upon. This is usually done by the main constitution-making body in response to the outcome of the prior stage.

Ratification procedures are used in the ratification stage. I define ratification as follows:

Ratification: the submission of a constitution to an agent or group for their approval before final enactment, provided that: the ratifier is neither identical to nor controlled by the drafters; plausibly claims to act for or in the name of the people; and does nothing more than approve or reject the constitution.

The first condition excludes the final vote of a constituent assembly from counting as ratification, the second excludes instances of autocrats deciding whether a constitution is to their liking, and the third distinguishes ratification from particular procedures within the debating and approving stages during which the constitution is amended and approved by agents distinct from the initial drafters. We can distinguish between five different types of ratification based on the identity of the ratifying agent: (R1) ratification referendum; (R2) ratification convention.

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9 Such a referenda was held very recently on October 20, 2012 in Iceland, when voters were asked their thoughts on a draft constitution in a non-binding referendum consisting of six constitution-related questions. These questions related to issues such as natural resources, the role of the state church, and the use of referenda in the future.

10 Note that the term ‘ratification’ is sometimes used differently. Widner for example counts the last vote in the body responsible for preparing the final draft as ratification when no referendum occurs. Etymologically, this is a misuse of the term, for ratification was originally a common law concept meaning to adopt an action that was done on one's behalf and treating that action as if it had been authorized before it occurred. This is represented in the oft quoted second law of agency: omnis ratihabitio retrotrahitur et mandato priori aequiparatur (every ratification relates back to and is taken to be equal of prior authority). Philip Mechern, “The Rationale of Ratification,” University of Pennsylvania Law Review 100, no. 5 (1952); W. W. Buckland, Arnold D. McNair, and F. H. Lawson, Roman Law & Common Law: A Comparison in Outline, 2nd ed. (Cambridge: Cambridge University Press, 1952).
tion; (R3) provincial ratification conventions; (R4) ratification by government body; and (R5) ratification by provincial assemblies.¹¹

Ratification by referendum, is the most common type, and involves the constitution-making body or sitting government submitting the constitution to the people for their explicit approval or rejection. The people, more precisely those with suffrage, serve as the ratifying agent. Ratification referenda have been increasingly popular since the late 20th century; recent examples include referenda held in Kenya, Niger, and Madagascar in 2010, Kyrgyzstan and Thailand in 2007, and Iraq and Burundi in 2005.¹² Most ratification referenda use a simple majority threshold, though exceptions do exist. The 2010 Kenyan constitutional referendum required both an overall majority of all those voting and at least 25 percent approval in five out of eight provinces. All Australian constitutional referenda require a double majority consisting of a majority of all those voting as well as a majority within four out of six states. Even more complicated, the Iraqi ratification referendum required the approval of a simple majority of all those voting, as well as approval by more than one third of all registered voters in sixteen out of eighteen governorates.¹³

¹¹ Sometimes a ratification procedure will be a combination of these types. For instance, the ratification processes in Estonia in 1992 and Rwanda in 2003 made use of referendum and existing governmental organs.


R2 entails the submission of a constitution to a national body elected for the sole purpose of ratifying the constitution. The Assemblée Nationale briefly considered this procedure before dissolving. More recently, both the Ethiopian constitution-making process in 1994 and the Somali constitution-making process in 2012 made use of this ratification type. Voters chose members to the Ethiopian Constituent Assembly in a national election, while 135 tribal leaders chose delegates to the Somali National Constituent Assembly. R3 is similar to R2, but involves each province of a larger state calling its own ratification convention, with the approval of a majority or supermajority of these conventions needed for successful ratification. To my knowledge, the ratification of the U.S. constitution is the only example of this type.

The final two types of ratification involve the submission of a constitution to existing governmental bodies for approval. R5 makes use of an existing organ of a national government, and is most common in instances where the existing governmental bodies are provisional, such as during an internationally controlled peace process or secession effort. For example, the Transitional National Assembly created by the Arusha Peace Accords ratified the Rwandan Constitution, and a constituent assembly consisting of the transitional government and the

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14 Condorcet, ‘On the Need for the Citizens to Ratify the Constitution.’


16 In a working paper, Axel Domeyer and I argue that ratification by constitutional convention is probably the best means of creating a future constitution for Europe. A version of this appears as chapter 5 of Axel Domeyer, “Toward a European Bund: The Constitutionalism Deficit of Integration and How to Fix It,” (Columbia University 2013).
Bougainville People’s Congress ratified the constitution of Bougainville following the country’s partial secession from Papua New Guinea in 2002. R4 involves provincial legislative bodies or assemblies assuming the role of ratifying agent. Article XIII of the Articles of Confederation called for version of this procedure, albeit an extreme one using a unanimity requirement, but the Federal Convention used R3 instead. However, in 1949, the Parlamentarischer Rat, wanting to make clear the provisional nature of any constitution created during occupation within their divided country, ignored the Allied request for R1 and instead submitted the Grundgesetz to the West German Landtage (state parliaments).

For the most part, this project focuses on justifications for the implementation of R1, but many of the arguments also address R2 and R3. I intentionally de-emphasize R4 and R5 for two reasons. First, both ratification types require that an existing government or government...
ments be somewhat legitimate, still standing, and not in complete control of the constitution-making process. This is a rare occurrence to say the least. Second, both R4 and R5 are generally undesirable for the same reason that Madison gave for refusing to submit the U.S. constitution to the state legislatures. Namely, constitutional change will necessarily make “inroads” on existing political authorities. Perhaps Randolph, another member of the convention, explained this reason best when he claimed: “Whose opposition will most likely be excited against the System? That of the local demagogues who will be degraded by it from the importance they hold. …It is of great importance therefore that the consideration of the subject [ratification] should be transferred from the Legislatures where this class of men, have their full influence to a field in which their efforts can be less mischievous.” Assuming, as I do, that the primary purpose of constitution-making is to create a constitution that is conducive to the public good, that benefits as much as possible all of the inhabitants of a given state, and not to assist standing political authorities, there is no good general argument for recommending a ratification procedure which necessarily introduces institutional bias and control into the process.

2. WHY CARE ABOUT RATIFICATION?

Almost two decades ago, Jon Elster lamented that “Surprisingly, there is no body of literature that deals with the constitution-making process in a positive, explanatory perspective” and that

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21 At times, a government in power might only agree to a constitution-making process if one of its organs has the final say through ratification, and unlike Louis XVI and state legislatures, actually have the power to enforce this demand. This was likely the case in Fiji in 1998 and Mongolia in 1992. In such instances ratification by R4 or R5 might be unavoidable. In circumstances such as these there is no point in discussing which ratification procedure is best, let alone whether ratification should occur.
there “is the absence of normative discussions of the constitution-making process” as well.\textsuperscript{22} Elster’s contributions on constitution-making brought attention to the topic and things slowly changed. Today, scholars increasingly recognize that process matters in the creation of constitutions. Choices concerning the institutions and methods used to make decisions when creating and implementing a constitution help determine its content and affect both the perception and reception of the process and the constitution itself. There is now a wealth of detailed process-oriented comparative case studies of constitution-making events, a growing body of empirical work on how procedural design choices affect the contents and durability of constitutions, and an entire field dedicated to applying formal economic methods to the study of constitutional change. In addition, various NGOs, academic centers, and transnational bodies regularly publish constitution-making reports, best practices manuals, and guidebooks meant to assist those engaged in constitution-making.\textsuperscript{23}

\textsuperscript{22} Elster, "Forces and mechanisms in the Constitution-making process," 364.

Amidst this and older constitutional literature, ratification is an overlooked subject of analysis; it is treated as epiphenomenal and ignored completed, reduced to a strategic device, seen as a vestige of previous constitutional or political authority, or simply accepted without serious explanation. At the height of the French Revolution in 1789, almost a year after New Hampshire became the ninth state to ratify the U.S. constitution, Condorcet wrote an essay to the members of the Assembleé Nationale discussing whether it might be useful to have the upcoming French constitution ratified. His short essay, a combination of rigorous social science and Enlightenment idealism, was not only the first serious reflection on the procedure of ratification, but also the last. In short, the state of the literature on the purpose of constitutional ratification is more or less nonexistent.

To my knowledge, two significant recorded discussions of constitutional ratification took place before Condorcet’s essay. First, a group of political dissidents known as the Berkshire Constitutionalists invented the procedure and called for it in the years preceding the creation of the Massachusetts Constitution of 1780. Though I believe a theory of ratification predicated on contractualism and a conception of constituent power can be worked out from their pamphlets and speeches, in fact I devote chapter four to doing just that, the Constitutionalists did not seem to engage in any sustained analysis of the procedure. Second, by my calculation, the framers of the U.S. Constitution discussed ratification on thirteen different days during the Federal Convention. However, all of their discussions, as recorded by Madison, assumed that ratification had to take place and focused not on the merits of the procedure, but rather on the best form it should take. Madison, The Writings of James Madison: 1787-1790, 4.

Some exceptions exist. Richards discusses the meaning of ratification following the Philadelphia Convention extensively, but his account focuses solely on one particular instance of ratification, and reaches conclusions that are not in any way generalizable. Riker and like-minded political scientists focus on how instances of ratification were “won,” but this assumes the existence of or overlooks the reasons for implementation in the first place. Recently, scholars associated with the Comparative Constitutions Project have included referendums as a variable in their empirical work, but thus far have done little to explain the reasons for and against the procedure beyond vague references to the importance of participation and legitimacy. B. A. Richards, Foundations of American Constitutionalism (Oxford: Oxford University Press, 1989). 139-42; William H. Riker, “The Lessons of 1787,” Public Choice 55(1987); Denise L. Anthony, Douglas D. Heckathorn, and Steven Maser, “Rational Rhetoric in Politics: The Debate Over Ratifying the U.S. Constitution,” Rationality and Society 6(1994); Zachary Elkins, Tom Ginsburg, and James Melton, “The Lifespan of Written Constitutions,” in World Justice Forum (ViennaJuly 2-5, 2008); Carey, “Does it matter how a constitution is created?,”; Tom Ginsburg, Zachary
This project presumes that this oversight is problematic. Ratification does not come from nowhere. Constitution-makers and the designers of constitution-making processes that incorporate ratification procedures choose to do so. The process is optional; constitutions can and have been made without ever undergoing formal ratification. For example, the creation of the South Africa constitution in 1996, arguably the most influential and lauded constitution-making process in a century, did not make use of a ratification procedure. Ratification is thus an overlooked and optional procedure that constitution-makers are increasingly deciding to use, and this in itself gives reason to ask whether or not such decisions are made for good reasons.

Perhaps we would not need to inquire about ratification procedures if they had little or no effect. If ratification simply rubber stamped the work of drafters—if it were a mere formality, historical remnant, of superficially symbolic process—than its oversight in the literature might be understandable. However, this reasoning is deficient, for ratification can have several concrete effects on constitution-making. First, by definition, it can lead to the rejection of constitutions; sometimes the people or their delegate ratifiers say ‘No.’ In the United States, where 233 constitutional conventions have produced only 146 different constitutions, rejection by ratification is somewhat of a regular occurrence. Other examples of ratification outside the United States exist. In 1946, voters in France overwhelmingly rejected a constitution crafted by a left-assembly, perhaps because it gave too much power to the parliament.26 In 1999, de-

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spite a vigorous government-led campaign to promote it, voters in Zimbabwe rejected a draft constitution by 54 percent.\textsuperscript{27} Other examples of rejection include Switzerland in 1872, Estonia in 1992, Albania in 1994, Australia in 1998, and Kenya in 2005. While such occurrences are relatively infrequent worldwide, ratification has and continues to lead to rejected constitutions.\textsuperscript{28}

The rejection of a constitution in a ratification process has two subsidiary effects. On the one hand, in more cases than not, it puts an end to the constitution-making process, regardless of its length, importance, or the margin of defeat. On the other hand, rejections can be quite costly. These costs might include the resources and time consumed by future constitution-making attempts, an increase in the difficulty of successfully creating a constitution in the future, the continued persistence of a state of anarchy or an outdated and harmful constitution and regime, and even an influx or resumption of violence in areas prone to conflict. Both Zimbabwe and Kenya saw a massive increase of violence seemingly related to the rejection of constitutions in referenda. In the former case, Mugabe encouraged supporters to invade white-owned farms and attack members of the Movement for Democratic Change (MDC), the rival party to the President’s own party. In the latter, the rejection of the referendum in 2005 com-


\textsuperscript{28} I do not mean to imply that the rejection of a constitution, or the termination of a constitution-making process, is necessarily a bad or a good thing. Good and bad constitutions, insofar as such evaluations are even possible, are both rejected and accepted during ratification. My point is that rejections can occur, that this is a possible effect from a procedural choice, and that therefore we need reasons for making that choice.
bined with contested presidential elections soon after led to a wave of violence in which 1,000 were killed and 500,000 displaced.29

Second, ratification likely affects the text of a constitution by altering constitution-makers’ goals. Framers will downgrade or restrict their goal constitution to a range they believe is acceptable, or can be made acceptable, to the designated authorities.30 As Elster explains, “the knowledge of that possibility [rejection] will keep framers within designated limits. Not wanting to be overruled, they will anticipate and feel constrained by the possible censure.”31 This holds true regardless of what motivates a framer or what kind of constitution she wants to create. A framer only interested in pursuing her self-interest must heed the limits set by the ratifying authority as much as a framer purely interested in contributing to the public good. For both of them, success only comes from an approved constitution, and therefore what the ratifying authority will accept, or what they believe the ratifying authority will accept, becomes critical.32

Third, ratification also influences the behavior of framers and the text they produce in a more indirect manner, for the sort of provisions they can write when ratification is on the


30 Alternatively, framers might simply decide to forego ratification altogether or else designate a new ratifiers.


32 Framers have reason to learn the preferences of their ratifiers and make a constitution that will be acceptable to them. It is thus quite that so many constitutions are rejected in the United States, specifically in the 1970s and 1980s. I discuss, and other aspects of state constitution-making, in Jeffrey A. Lenowitz, "Rejected by the People: Failed U.S. State Constitutional Conventions in the 1960s and 1970s," in *Western Political Science Association Annual Meeting* (Vancouver, BC2009). See also Elster, "Securities Against Misrule: Juries, Assemblies, Elections," 384-85.
horizon are limited by the existing norms of appropriate reasoning or argument in the given context. If constitution-making occurs in a state in which norms of impartiality surround the drafting process, meaning that the constitution is envisioned as an impartial document meant to structure the future operation of the state in a fair and equal manner, framers will be forced to shroud their proposals, and their arguments if the drafting is public, in the language of neutrality. In other words, if the public or their ratifiers believe that constitutional choices are only valid if they can be explained in a public forum using impartial arguments, this restricts framers to a set of possible constitutions that admit to such public justification. These and other normative expectations regarding how constitutional provisions can be defended will act as a filter on the text even before ratification occurs.³³ Again, this mechanism would function regardless of what a framer actually believes or wants; framers do not need to actually want to make an impartial constitution for their behavior to be altered by it.³⁴

Fourth, ratification procedures, even those that are successful, are costly. They extend the time period of constitution-making, and in the case of ratification referenda and conventions, the procedure can require a considerable amount of money and resources. Fifth, ratification might have a variety of contextual effects. Previous civic education efforts, increasingly present in recent cases of participatory constitution-making, are regularly undone by the divisive and

³³ [Elster Explaining@406-407; Elster 1998@109-11. See also Tim Groseclose and Nolan McCarty, “The Politics of Blame: Bargaining before an Audience,” 100-119, in which the authors argue that for bargaining problems involving two negotiators who send signals to a third party, the third party influences the proposals that the negotiators offer and their decisions to accept or reject proposals.

³⁴ Elster seems to assume that norms of impartiality are the only such norms that will affect decision-making in this way. In chapter 6, I suggest that this might not be the case, thereby casting doubt on the idea that ratification pushes framers to create more impartial or neutral constitutions.
distortive campaigns that accompany ratification, particular for referenda.\textsuperscript{35} More generally, ratification can turn a process designed and meant to promote consensus, ease conflict, and establish a new beginning, into something resembling a normal political competition.

3. WHAT KIND OF JUSTIFICATION?

Ratification is an optional procedure with significant effects, a procedure that is recommended by constitutional consultants and increasingly used in constitution-making process across the globe. Because of this, I argue, ratification is in need of justification. I use the loaded term ‘justification’ to make clear that what we are after is not explanation in the classically social scientific sense. Seeking explanations for ratification in particular instances is a perfectly valid exercise. Such an investigation would focus on the actors responsible for implementing the procedure and their motivations and expectations, and then attempt to describe the various causal pathways that led to the ratification moment. For example, one might inquire why, after a four-year closed drafting process, Emir Sheik Hamad bin Khalifa al-Thani decided to submit the final draft constitution of Qatar to the people in a referendum when neither the 1972 provisional constitution or the people demanded it.\textsuperscript{36}

Similarly, one might conduct a comparative study of several constitution-making processes and generalize about the various strategic reasons particular actors might have for pushing for ratification procedures of a certain type. For instance, a self-interested member of an ethnic group commanding a large majority of the population of a particular state might push for ratification via referendum with a simple majority threshold, while a member of a minority group

\textsuperscript{35} I discuss this occurrence in chapter 5.

\textsuperscript{36} Widner, "Constitution Writing and Conflict Resolution Project".
in command of the legislature might seek legislative ratification. The development of Iraq’s
odd referendum threshold, mentioned above, demonstrates such strategic logic. The stipula-
tion that the constitution would only come into force if, among other requirements, there was
no more than two governorates in which two-thirds or more registered voters rejected the con-
stitution, was specifically designed to give Kurds influence in the process. 37

These sorts of explanations for ratification, while interesting lines of inquiry, are not my
focus here. Instead, I am seeking context-independent justification for incorporating ratifica-
tion procedures in the beginning of a constitution-making process. Such a justification would
appeal to values, and uses these values to produce defeasible reasons for implementing ratifica-
tion. Context-specific circumstances might override these reasons, just as they might produce
reasons for using ratification procedures unrelated to the more general justification.

Jon Elster’s discussion of the optimal design of a constituent assembly is an example of the
sort of justification I am looking for, though he did not use the term. This work is an exten-
sion of his larger project on the various ways in which self-interest and irrationality (passion,
prejudice, and bias) can pollute collective decision-making, and how procedures can be de-
dsigned to prevent this as much as possible. 38 Elster emphasizes the importance of such a focus

37 Brandt et al., Constitution-making and Reform: Options for the Process. 299; Andrew Arato, Constitution making
under occupation : the politics of imposed revolution in Iraq, Columbia studies in political thought/political
history. (New York: Columbia University Press, 2009), Book; U.S. Institute of Peace, "Iraq's Constitutional
Process: Shaping a Vision for the Country's Future."Of course, this backfired, for it almost led to Sunni reje-
tion of the text and was one of the contributing factors to the violence that arouse during and after the referen-
dum process.

38 Jon Elster, "Constitution-making in Eastern Europe: Rebuilding the boat in the open sea," Public
Administration 71(1993); Elster, "Constitutional Bootstrapping in Philadelphia and Paris.; Elster, "Forces and
mechanisms in the Constitution-making process.; Jon Elster, "The Role of Institutional Interest in East
European Constitution-making," East European Constitutional Review 5, no. 1 (1996); Jon Elster, "Arguing and
Bargaining in Two Constituent Assemblies," University of Pennsylvania Journal of Constitutional Law 354(1999-
2000); Jon Elster, "Legislatures as Constituent Assemblies," in The Least Examined Branch: The Role of
because of the frequent double-indeterminacy that plagues institutional evaluation from the standpoint of good outcomes. To evaluate an institution by its outcome we need, on the one hand, a normative theory that tells us what a good outcome is, and on the other hand, a causal theory that tells us if an institution is likely to lead to this desired outcome. A chief problem is that there are competing plausible normative and causal theories, and little agreed upon way to choose between them. In response, Elster suggests that we should shift our focus to the procedures likely to lead to good design, i.e. procedures that diminish partiality and irrationality from decision-making.\(^{39}\)

Applied to constitutional design, this line of thinking emphasizes the importance of focusing on the constitution-making process, rather than simply dwelling on what an ideal constitution might look like.\(^{40}\) Given that there is no independent criterion that tells us exactly what a good constitution is for a particular polity, Elster suggests, the best we can do is design a constitution-making process that eliminates biases and other sources of irrationality and partiality. In pursuit of this goal, Elster outlines a series of procedures and conditions for constitution-making designed to amplify the collective wisdom of framers, defined as “impartial motivation conjoined with rational beliefs.”\(^{41}\) For example, he explains that ensuring that the assembly is not too small, instituting time limits, and separating the constitution-making body

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\(^{40}\) Elster’s suggestions were and remain quite influential, launching a virtual cottage industry on constitution-making design, of which this dissertation seeks to be a part. For a general review see Ginsburg, Elkins, and Blount, “Does the Process of Constitution-Making Matter?.

\(^{41}\) Elster, "The Optimal Design of a Constituent Assembly," 151.
from the legislature reduces the effects of partial self or group interest. Locating the constituent assembly away from major cities and cloaking the proceedings in full or partial secrecy tempers passions such as fear and vanity. In addition, designing selection mechanisms to an assembly in a way that encourages diversity and representativeness increases epistemic quality by facilitating optimal information gathering.

Each of the arguments Elster makes for his constitution-making suggestions are general and appeal to values—mainly the elimination of bias and other sources of irrationality—to produce reasons in support of his recommendations. My goal in this project is to investigate whether similar ex ante justifications can be found in favor of implementing ratification. In other words, I ask: why should constitution-makers use ratification?

4. CHAPTER OVERVIEW

Ratification is likely used without explanation because on its face it is entirely intuitive. In many ways, submitting a constitution to ratification just seems like the proper thing to do. Everyone in a polity cannot create their constitution, so by necessity they are created by some sort of elites. Since this is the case, ratification seems like a necessary means of holding them accountable. In addition, if we are committed to creating a constitutional democracy, why should the ultimate basis for governmental authority not be approved through the ultimate democratic or representative act? Democratic constitutions are meant to rest on popular authority, this is why so many of them contain a variant of ‘We the People,’ and ratification seems like a surefire way to accomplish this. Finally, the entire point of constitution-making is
to create not just a mere constitution, but also a legitimate constitution, and ratification seems like an excellent way to foster legitimacy.

These intuitions appeal to what appear to be the most plausible sources of justification for ratification: the value of representation, the necessity of constituent power constitution-making, and the importance of legitimacy. In the chapters that follow I test these justificatory sources and intuitions by constructing and analyzing arguments based on them. In the process, I sometimes take seriously arguments that no one has made and that no one is likely to ever make. My goal in these instances is not to construct straw men that I can easily knock down, but instead to show that fuzzy intuitions about normative democratic concepts are much harder to use to justify political decisions and institutions than they are normally believed to be.

CHAPTER 2: HOLDING FRAMERS TO ACCOUNT

In this chapter I investigate whether ratification receives its justification from the role it plays in a constitution-making representative process. Specifically, I develop and analyze a representation justification of ratification (RJR), which consists of three propositions: (1) constitution-makers can be representatives; (2) framers should be representatives; and (3) ratification procedures enable constitution-makers to be representatives. Briefly put, I argue that an accountability mechanism is a necessary institutional feature of any plausible account of political representation, that constitution-makers can be representatives only if such a mechanism exists, that ratification is the only existing procedure that might serve this purpose, and that this is the only role that ratification might play in a constitutional representative process. I then show that ratification cannot serve as an accountability mechanism because of the potential diver-
gence between how a principle evaluates his representative and a draft constitution. This means that RJR fails because ratification cannot be an accountability mechanism. In addition, it suggests that framers are not representatives. I end the chapter exploring the possibility of creating an accountability mechanism for constitution-makers, but questioning the underlying assumption that constitution-makers should be conceptualized as representatives at all.

CHAPTER 3: THE CONSTITUENT POWER SPEAKS

This chapter is the first of three to analyze the justificatory force of the concept and theory of constituent power for ratification. First, I begin by exploring the theoretical background of the theory and drawing out its chief characteristics. Constituent power theory extends the distinction between extraordinary and ordinary law to the political realm, positing the existence of an ultimate source of authority that creates the constitution and thereby legitimizes the state. This constituent power, identified solely with the people, legitimizes itself, cannot be constrained by external authority, and remains independent from the constituted powers it produces. Second, I explain how constituent power might justify ratification. A constituent power justification (CPJ) claims that the people must create the constitution and justifies ratification by identifying it as a moment in constitution-making process where the people can manifest and take action.

Third, starting from a discussion of Sieyès’ attempt to explain how the people can write a constitution when a mass assembly is impossible, I posit three possible CPJs: a multiple moments justification claims that ratification serves as one of several essential moments of constituent power in the constitution-making process; the ameliorative function justification de-
fends ratification by characterizing it as a moment of constituent power made necessary by prior deficiencies in the constitution-making process; and a multiple attempts justification portrays ratification as one of several imperfect attempts at creating, manifesting, and enabling constituent power to act. I conclude the chapter explaining how each of these justifications fail in different ways, but how the deficiencies of each push us towards a final CPJ that characterizes ratification as the single moment of constituent power in the constitution-making process.

**Chapter 4: The Single Moment of Constituent Power**

This chapter develops the single moment justification (SMJ) pointed to by the conclusions of the prior chapter. I argue that such a justification actually exists within the constitutional theory of the Berkshire Constitutionalists, a political faction in Western Massachusetts that successfully prevented the local courts of law from sitting in Berkshire County and the surrounding towns from 1774 to 1780. In the course of their battle with the provisional state authorities, the Constitutionalists articulated a version of SMJ to explain why a constitution should be ratified, and their writings remain the most extensive and powerful theoretical discussion of ratification to date. Put simply, the Berkshire Constitutionalists argue that the exercise of constituent power is unalienable, emerging solely during ratification and never penetrating the drafting process. This chapter introduces the Berkshire Constitutionalists, explains their role in Massachusetts constitutional, reconstructs their theory of constituent power and the sole moment justification, and shows how it avoids the problems of incoherence and redundancy faced by Sieyès' theory and the other constituent power justification.
Concluding the discussion of constituent power justification, this chapter argues that the sole moment justification fails to justify ratification. I first explain how SMJ is premised on the idea that constituent power is inalienable, and therefore only applies to ratification by referenda. Second, I argue that in order for a referendum vote to serve as a site of constituent action, individual voters must make what I call a ‘meaningful choice’ on the constitution. That is, they must choose whether to accept a proposed constitution on the basis of their understanding of the document and the likely results of rejection. Third, I argue that the standard of meaningful choice is unlikely to be met in constitutional ratification referenda, for voters will almost certainly be too ignorant to make the necessary evaluation. I explain that this has nothing to do with the stupidity of voters, but stems from the fact that the information needed to evaluate a constitution is technical, hard to obtain, and without value for the average citizen in any other circumstance. I also explain why this is not an anti-democratic argument, for the standard of meaningful choice only applies to ratification referenda because of the particular nature of SMJ. Fourth, I rebut a series of likely objection to my dismissal of SMJ on the basis of ignorance. These include the claim that the standard of meaningful choice is so high that constitution-makers will not even meet it, that information shortcuts enable voters to make informed ratification choices even if they are ignorant, and that education campaigns can combat voter ignorance. I conclude the chapter explaining why, in the end, constituent power does not provide a reason for implementing ratification.
CHAPTER 6: RATIFICATION & LEGITIMACY

In chapter six, I examine a justification for ratification based on legitimacy. Such an argument claims that ratification should be implemented because it helps create a legitimate constitution. First, however, I break down the concept of legitimacy into three interrelated types: something is morally legitimate if there is an acceptable moral justification for its claim to authority; sociologically legitimate is a significant portion of the relevant population believes it to be morally legitimate; and legally legitimate if it is lawful according to the legal system of which it is a part. I then apply these types of legitimacy to constitutions, and argue that when it comes to constitution-making, legal legitimacy is either irrelevant or collapses into sociological legitimacy. Next, I explain that a procedure might affect the legitimacy of an outcome, in this case the legitimacy of a constitution, in one of two ways: it can serve as a normative criterion itself and validate its own outcome (procedural effect); or it can affect the substance of the outcome such that it meets or comes closer to meeting some independent normative criterion (substantive effect). Combined with the two relevant types of legitimacy, this distinction produces four pathways through which ratification might legitimate a constitution: procedural moral legitimation; procedural sociological legitimation; substantive moral legitimation; and substantive sociological legitimation. In the remainder of this chapter I sketch out and examine arguments that fit into each one of these pathways. I conclude that more work needs to be done on examining whether ratification helps legitimate a constitution, but that upon initial analysis legitimacy does not produce strong reasons to implement the procedure.
CONCLUSION:

The conclusion examines the implications of my analysis. I begin suggesting that there is no generally applicable justification for submitting constitutions to ratification, but that this is necessarily a preliminary conclusion since it is impossible to demonstrate that all possible arguments fail to provide good reasons for the procedure. Of the justifications I analyzed, those pertaining to legitimacy seem most persuasive. Specifically, the claims that ratification might involve procedural social legitimation or substantive social legitimation (by constraining framers) are plausible, but both effects might be accomplished through the implementation of other constitution-making procedures that heighten the publicity and inclusiveness of the constitution-making process without letting a possibly arbitrary voting outcome decide the fate of the constitution. In addition, both effects may be contingent on a particular nexus of political values absent in certain contexts. I end by examining the other implications of the project, specifically the potential difficulties associated with conceptualizing framers as representatives and the limitations of founding moment and procedural accounts of constitutional legitimacy.
2.

HOLDING FRAMERS TO ACCOUNT:
Ratification within Representation

“[T]he most balanced system of electoral representation does not, in itself, ensure continuing accountability to the public throughout a [constitution] drafting process, which can be expected to throw up new problems, solutions, and compromises along the way. The constitution-making body may be entrusted to act as it sees fit, required to return to public scrutiny during its proceedings, or required to subject the draft constitution to parliamentary, judicial, or electoral review before promulgation. Whatever the chosen mechanism, the principle of the accountability of decision makers does require that the ‘process is made receptive’ and that the public be ‘regularly informed at every reasonable stage about the progress of the constitutional process.’”

_Vivien Hart_

This chapter asks whether ratification can be justified by the role it plays in maintaining a representative relationship between framers and their constituents. This might seem counterintuitive at first. An instance in the constitution-making process in which citizens or their delegates directly vote the constitution up or down seems to be a primary site of action itself, one in which ratifiers serve as central actors, and not merely a mechanism or element in a larger representative process. In this sense, ratification seems as likely to play a role in constitution-making representation as citizen referendums play in the normal workings of contemporary representative democracies.

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43 I thank Bernard Manin for pointing this out.
However, several connections between ratification and representation challenge this skepticism. The conceptual and terminological history of ratification is the first. Ratification has been associated with representation since its inception in Roman law, where it served as a retroactive means of creating a relationship very much like representation. According to the Digest of Justinian, debtors could only pay off their debts directly to the creditor or to a mandated procurator. However, for certain matters, payment given to an unauthorized agent released the debtor if the creditor later ratified the transaction, for “ratification is likened to mandate.”

This conception of ratification migrated via canon law to English and American contract and tort law, where it became the second legal maxim of agency: ‘every ratification relates back, and is equivalent to a prior authority.’ As with its Roman formulation, this maxim makes possible situations in which “an alleged principal by adopting an act which was unlawful when done can make it lawful.” In other words, ratification transforms an unauthorized action taken on an absent person’s behalf into an authorized one, causing “the transaction to be treated as if there had been authority in the first place,” and thus serves as an ex post means of creating something like representation.

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47 Mechem, “The Rationale of Ratification,” 650. Perhaps the American founders used this ex post legitimating conception of ratification when implementing the procedure following the Philadelphia Convention, in that they saw ratification as an after the fact means of transforming their illegal or unsanctioned actions—for as Wilson said they had the “power to conclude nothing”—into those of properly authorized actors. Max Farrand, ed. The Records of the Federal Convention of 1787, 3 vols. (New Haven: Yale University Press, 1911), I.266.
collective bargaining, ratification combines with authorization to complete a representative relationship, rather than serving as a corrective. For example, elected union leaders negotiate contracts with employers, but must get member approval before any contract goes into effect.48

Second, constitution-makers are often identified as representatives. The popular imagination and news media certainly depict framers as such. For instance, The Ottawa Citizen explained to its readers that the constituent assembly proposed by a government task force in 1991 was “a specially selected body of representatives... chosen to meet for the sole purpose of drafting the terms of a new constitution.”49 Academics and scholars writing on constitution-making, both theorists and empiricists, describe framers similarly. Sieyès famously claimed that only “a number of genuinely extraordinary representatives” could “determine the constitution,” and Friedman and Stokes, in one of the few empirical studies about the behavior of framers, assume that they are representatives without discussion.50 Moreover, organizations assisting in contemporary constitution-making also portray framers as representatives. Consider the UNDP’s involvement in Nepal’s ongoing efforts to create a constitution; they distributed workbooks to the 2008 Constituent Assembly describing it as “a body of representa-

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tives chosen by the people to manage the transition process,” and offered an “Effective Repr
esentation” workshop.51

Third, ratification is sometimes treated as an essential component of a constitution-
making representative process. In the above epigraph, Hart implies as much, for she includes
ratification procedures amidst a list of potential accountability mechanisms for framers, later
concluding: “a referendum can be a means of holding representatives to account and creating
legitimacy for the constitution.”52 Similarly, in her analysis of constitution-making amidst con-
flict, Widner treats ratification via referendum as a factor in measuring the level of representa-
tion and participation.53

The central task of this chapter is to probe the association suggested by these observations,
to see whether framers are representatives, whether ratification plays some sort of role in a
constitutional representative process, and whether this role might serve as a source for justifi-
cation. To do this, I develop and analyze what I call the representation justification for ratifi-
cation (RJ), which is the general form of an argument justifying or giving reasons for imple-
menting ratification based on its contribution to representation. RJ consists of four central
propositions:

51 See “Participatory Constitution Making Process,” in Participatory Constitution Building in Nepal Booklet Series
(Kathmandu: Centre for Constitutional Dialogue, 2009), 1; “Support to Constitution Building: Introductory
Workshops/Interaction Programmes,” United Nations Development Programme, Nepal,


P1 Framers can be representatives
P2 Framers should be representatives
P3 Ratification procedures enable framers to be representatives.
P4 One should implement ratification procedures.

P4 follows from the previous propositions, and for the purposes of this analysis, I assume that P2 follows from P1. There are numerous arguments one could make supporting P2—perhaps representative framers increase the perceived legitimacy of the constitution-making process and/or are uniquely able to foster the widespread deliberation and discussion needed for proper constitutional education—but for the moment these do not concern us.54

This leaves P1 and P2, which I examine in the following manner. First, I sketch out a general outline of democratic political representation. Second, after explaining ratification’s necessarily procedural role in the representative process, I define an accountability mechanism and claim that P3 can only be true if ratification serves as one. Third, I argue that an accountability mechanism is a necessary component of any representative process, and that as a result RJ produces an extremely strong justification for ratification if P3 is true. Fourth, I show that ratification is the only component of constitution-making that might serve as an accountability mechanism, but conclude that it cannot because of the potential divergence between how a principle evaluates his representative framer and the draft constitution. Fifth, I summarize my two main findings: RJ fails because ratification cannot be an accountability mechanism and that constitution-makers are unlikely to be democratic political representatives as a result. I

conclude exploring the possibility of creating an accountability mechanism for framers, yet questioning the underlying impetus to conceptualize framers as representatives at all.

1. REPRESENTATION & ACCOUNTABILITY MECHANISMS

Examining RJ requires some working conception of representation, specifically political representation in its democratic form. I restrict the scope to politics because this is the core subject matter—what representation means in a court room or an Olympic playing field is of little concern—and I specify its democratic form because I am only interested in democratic constitution-making. Here, as discussed in the introduction, ‘democratic’ simply means aligned with the norm that those affected by collective decisions should have an opportunity to influence their outcome. Any other form of political representation would invalidate P2.

1.1 REPRESENTATION & THE REPRESENTATIVE PROCESS

Most generally, political representation is an institutionalized relationship in which representatives mediate between citizens and political decision-making. It involves an agent $a$, who

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55 This means my discussion of representation has normative elements, in that it concerns what it means to be a legitimate representative in a particular normative context, rather than a representative in general. As Rehfeld demonstrates this imposes limitations, for it renders my account unable to conceptualize illegitimate representation or understand representation outside democracy or traditional politics. However, while he makes a strong case for needing a non-normative descriptive account of representation, the limitations he details do not apply here. We are only interest in legitimate forms of representation, for illegitimate ones will not justify implementing ratification, and as already noted we are only concerns with politics and democratic forms of constitution-making. Andrew Rehfeld, "Towards a General Theory of Political Representation," *The Journal of Politics* 68, no. 1 (2006).


57 This excludes any non-relational uses of representation. For example, in "Democracy in Iraq: Representation through Ratification," the authors define representation as getting what one wants, claiming that during Iraq’s Constitutional Convention the numerically disadvantaged Kurds and Sunnis secured representation by extract-
represents a constituency \( b \) for an audience \( c \), for the purpose of some activity \( d \), and is characterized by \( a \) acting for or on behalf of \( b \) (\( x \)-ing) during \( d \). In the constitution-making setting, \( a \) would be a framer, \( b \) the soon-to-be-governed populace or a portion of it, \( c \) the other framers and perhaps the members of their constituencies, and \( d \) the act of creating a constitution.\(^{58}\)

Specifying political representation further than this quickly becomes complicated, for the concept has been mired in theoretical and interpretive controversy since its inception over two millennia ago. Today, representation stands for something more than a pragmatic solution to large states or the inevitable application of the division of labor to government, but exactly what this might be remains open to debate.\(^{59}\) Pitkin’s *The Concept of Representation* rejuvenated and gave shape to subsequent discussion, but while her claim that political representation is a particular form of acting for others is generally accepted, this description—as even she admitted—is broad and can mean any number of things.\(^{60}\) Thus, representation continues to be the subject of several on-going discussions in democratic theory, with scholars clashing over details such as appropriate representative behavior, representation’s ability to foster inclusion and exclusion, the compatibility of representation with democracy, and how existing theories

\(^{58}\) As I discuss below, \( x \) varies depending upon which robust conception of representation one endorses. For a discussion of the importance of audience in a general definition of representation, something frequently overlooked, see Rehfeld, "Towards a General Theory," 4-11; David Runciman and Monica Brito Vieira, *Representation* (Cambridge: Polity Press, 2008). 69-70.


can accommodate new political forms. As Brennan and Hamlin tersely explain, “Ideas of representation in political theory are notoriously diffuse and recalcitrant.”

Fortunately, examining RJ does not require wading too far into this debate, much of which concerns the nature of the representative relationship and the proper activity of representatives (x). We can sidestep many of these and related discussions because our direct focus is on the potential role of a particular procedure in inducing representation, not representative behavior itself. Instead, we are concerned with the representative process, the combination of those institutions, procedures, and mechanisms that structure and foster representation. Moreover, the contents of the representative process are relatively uncontroversial and historically stable. As Manin, Przeworski, and Stokes point out, “what has been in contention since the establishment of representative government concerns primarily the nature of the activity of rep-


63 The mechanisms and procedures I describe are ancillary to representation and not part of it. To think otherwise is, as Pitkin famously claimed, to endorse a flawed and formalistic account of representation. Pitkin, The Concept of Representation: chapter 3.
resenting, not the procedures and institutional relationship that induce political representation.”

These procedures usually include at least the following: a popular selection or authorization mechanism; some avenue through which principals can make demands of and communicate with representatives; and an accountability mechanism. Each of these occurs at particular temporal moments in the representative process. For instance, selection mechanisms operate at the beginning because representatives do not exist and cannot act until chosen by their constituents. Among these three procedures and other less common components of representation, only accountability mechanisms occur after d. Since ratification necessarily follows the creation of a constitution, for the people cannot accept or reject a constitution until it is written, the only procedural role in a representative process that ratification can play is as an accountability mechanism. In fact, ratification is conceptualized as an accountability mechanism in the few existing discussions of the procedure. For instance, Elster notes “it is certainly desirable that self-created constituent legislatures should be held accountable in some way, either by reelection or by downstream ratification of the constitution.” Thus, P3 transforms into

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66 This is not to say that accountability mechanisms solely operate after d, but rather that they are the only procedures that can. For instance, the ability of constituent to hold recall elections serves as an accountability mechanism that can operate during rather than after the representative activity.

“Ratification procedures enable constitution-makers to be representatives by serving as accountability mechanisms” and necessitates a discussion of the nature of this mechanism.

1.2 ACCOUNTABILITY MECHANISMS

An accountability mechanism is a procedure or set of procedures that gives principals the ex post ability to sanction and reward their agents on the basis of their performance, which in turn gives these principals incentives to justify and explain their actions. Of course, not every ex post action that evaluates representative behavior counts as an accountability mechanism. For example, the shouts and threats of violence from the streets of Paris and the galleries of the Estates-Generale in 1789 were public evaluative responses, but the ad-hoc, uncontrollable, and violent nature of such practices makes them too unpredictable to institute or plan for. Thus, when we refer to accountability mechanisms, particularly from an institutional design perspective, we mean those integrated into the representative process, and ad-hoc responses to unfavorable actions taken by representatives cannot be so integrated.

Accountability has roughly three interrelated dimensions: an explanatory dimension in which a representative explains his actions to his constituents, an evaluative dimension in which constituents form a judgment, and a sanctioning dimension in which constituents sanction (or

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68 The increasing tendency to use ‘accountability’ to stand for a myriad of concepts unrelated to holding an agent to account has diluted the meaning and force of the concept. See Richard Mulgan, "Accountability: An Ever-Expanding Concept," Public Administration 78, no. 3 (2000). One example can be seen in the CHRI’s constitution-making recommendations, which reduce accountability to a combination of transparency and public education. See Hassen Ebrahim, Kayode Fayemi, and Stephanie Loomis, "Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa: Recommendations to Commonwealth Heads of Government," (Commonwealth Human Rights Initiative, 1999), 16.

reward) their representative in accordance with this judgment. All three of these dimensions are important, and distorted conceptions of accountability arise from overemphasizing or ignoring one of them. For instance, recent strains of deliberative democratic theory have ignored sanctioning and overemphasized the explanatory dimension of accountability, focusing on the importance of representatives giving reasons for their decisions and the institutions that foster this occurrence. The resulting conception of accountability is insufficient, for an unelected autocrat immune from sanctioning might explain every detail of her decision-making process yet remain accountable to no one but herself. Accountability requires that constituents have power, and solely concentrating on the explanatory dimension deprives them of this.

Two additional features of accountability mechanisms are worth noting. First, as Grant and Keohane explain, accountability “implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.” In other words, accountability mechanisms require the existence of some standard of conduct for representatives to follow. Usually this standard of evaluation is , which might include such variables as the proper aims of , the means through which defines these aims,

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72 Rehfeld makes a similar point, when he explains how a representative who stole money from constituents unable to sanction cannot claim to be accountable simply because she explains that she used the money to buy a new car. Rehfeld, The Concept of Constituency: 189.

and the source of judgment $a$ is to use when trying to reach them.\textsuperscript{74} For instance, in a theory claiming that representatives should use their own personal judgment to maximize the public good as their constituents define it, constituents should base their evaluations of the actions and explanations of their representatives in accordance with how far they believe the representatives adhered or deviated from this standard.\textsuperscript{75}

Second, accountability mechanisms must target particular representatives.\textsuperscript{76} Constituents use accountability mechanisms to evaluate the actions and behaviors of those acting for them. Such particularity is important, for the presence of multiple representatives in democratic settings is predicated on the existence or constant possibility of pluralism, meaning that the actions needed to represent one constituency might be different than those needed to represent another.\textsuperscript{77} Thus, since representatives may act differently than one another even in perfect conditions, for their constituencies might make divergent demands, they should be evaluated independently. In a sense, accountability mechanisms would be unable to achieve their own purpose if their subject was the general behavior of all representatives or the outcome of the

\textsuperscript{74} This is a modified version of the 3 distinctions Rehfeld finds in the trustee/delegate debate. Andrew Rehfeld, "Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy," \textit{American Political Science Review} 103, no. 2 (May 2009): 215.

\textsuperscript{75} Thus, Fearon defines accountability as the following: “We say that one person, $A$, is accountable to another, $B$, if two conditions are met. First, there is an understanding that $A$ is obliged to act in some way on behalf of $B$. Second, $B$ is empowered by some formal institutional or perhaps informal rules to sanction or reward $A$ for her activities or performance in this capacity.” James D. Fearon, "Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance," in \textit{Democracy, Accountability, and Representation}, ed. Adam Przeworski, Bernard Manin, and Susan C. Stokes (Cambridge: Cambridge University Press, 1999), 55.

\textsuperscript{76} However, note that this does not exclude accountability mechanisms from applying to more than one person, as they do in systems of party-list proportional representation. In these instances, the particularity of the accountability remains, for except in extreme instances, a party only populates a proportion of the total number of all representatives.

representative process, rather than particular representatives, insofar as this would sever the bond between any particular constituency and their representative, and treat all representatives equally even when their behavior differed.\textsuperscript{78}

2. THE NECESSITY OF ACCOUNTABILITY MECHANISMS

The importance of accountability mechanisms for political representation is one of the key factors in determining the strength of RJ. If, for example, accountability mechanisms are helpful but inessential, if a functioning representative process is made easier with accountability mechanisms but can occur in their absence, then the most RJ will produce is a weak justification for ratification. However, such worries are misguided here, for RJ has the potential to show that ratification is a necessary component of any constitution-making process. This stems from the fact that, as I argue in this section, accountability mechanisms are necessary for any instance of political representation.

Admittedly, despite my previous reservations, explaining why this is so requires commenting further on the activity of political representation. In order to minimize the number of theories that my argument excludes because of the conception of representation that I endorse, I only lay out what I assume to be a few standard features of any plausible comprehensive account of democratic political representation. This allows me to determine that a particular re-

\textsuperscript{78} Admittedly, principals often refer to the outcomes of collective decision-making bodies when evaluating their participant representatives, but this is for heuristical purposes and the subject of their sanctions and rewards remain a particular representative. I discuss this point further in §3.3.
relationship or institutional set-up is not or cannot foster political representation, without being forced to create or endorse any one specific comprehensive account.\footnote{Thomas Pogge uses a similar strategy, which he calls a ‘modest criterion,’ when he attempts to bypass disagreements about the full content of justice by putting forth two minimal conditions that any plausible conception of justice might include. Thomas Pogge, \textit{World Poverty and Human Rights}, 2nd ed. (Cambridge: Polity Press, 2008). 43-44. Manin, et al. and Rehfeld claim to use a similar approach. See Manin, Przeworski, and Stokes, "Introduction," 2; Rehfeld, \textit{The Concept of Constituency}: 80.}

2.1 ACCOUNTABILITY AS A MEANS OF CONTROL

Why are accountability mechanisms necessary for political representation? The most popular explanation is representative control, the idea being that accountability mechanisms are one of the few ways that individuals can influence their representatives to behave in a desired way, i.e. to $x$.\footnote{Some scholars even claim that accountability mechanisms are only about control. See Maloy, \textit{The Colonial American Origins of Modern Democratic Thought}: 7; Terry Macdonald and Kate Macdonald, "Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry," \textit{The European Journal of International Law} 17, no. 1 (2006).} “Though they always operate \textit{ex post},” Grant and Keohane explain, “accountability mechanism can exert effects \textit{ex ante}, since the anticipation of sanctions may deter the powerful from abusing their positions in the first place.”\footnote{Grant and Keohane, "Accountability and Abuses of Power in World Politics," 30.} Here, the assumption is that representatives, if left to their own devices, might shirk their responsibility and not $x$.\footnote{For discussions of shirking, seeJames B. Kau and Paul H. Rubin, "Ideology, voting, and shirking," \textit{Public Choice} 76(May 1993); Joseph P. Kalt and Mark A. Zupan, "The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions," \textit{Journal of Law and Economics} 33, no. 1 (1990).} Thus, constituents dole out sanctions and rewards based on the degree to which their representatives $x$, with the intention of incentivizing their representatives to act in the desired manner. Specifically, the hope is that representatives will $x$ because of their natural predilection to do what their constituents want, and because they are concerned about the retrospective judgments they anticipate their
constituents will make when deciding whether to sanction or reward. Though this explanation is both intuitive and commonplace, control suffers from two debilitating problems when used as a justification for the necessity of accountability mechanisms for representation.

On the one hand, the point of control is to get representatives to act, and accountability mechanisms are not necessary to secure this outcome. As Fearon has argued, if voters are able to choose candidates that already want to act like the voters want them to act—this involves identifying a candidate with similar issue preferences, personal integrity, and the ability to discern and implement optimal policies—, then the chosen representatives are likely to act without the presence of an accountability mechanism. Fearon writes: “If voters are able to distinguish politicians along these three dimensions, then this lack of accountability need not imply that the public will not get what it wants. The conclusion: Electoral accountability is not in principle necessary for elections to produce responsive public policy.”

Mansbridge articulates a similar point in her concept of gyroscopic representation, in which citizens gain influence in the political arena by selecting a representative who resembles them in a meaningful way. The idea is that such a representative “looks within…to a contextually derived understanding of interests, interpretive schemes (‘common sense’), conscience, and principles,” and takes a course of action that meets voter approval not because of accountabil-

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84 Fearon, "Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance," 59.
ity mechanisms, but because of shared background, values, and experiences. Thus, for example, a person who believes that political decisions should be made on the basis of their religion would want their political representative to feel the same way, and by choosing such a person, they might end up with a representative that x’s with or without an accountability mechanism.

Besides not being necessary, accountability mechanisms are also not sufficient to induce representatives to x. For instance, if x involves assessing the preferences of constituents, representatives might fail to x for several reasons. The preferences of constituents might change over time, be based on inaccurate or incomplete information, be partially formed or nonexistent on some issues, or simply communicated ineffectively. When representing a group, some individuals might communicate their preferences more loudly than others, making it difficult to assess the majority opinion. Constituents might have preferences regarding both paths of actions and outcomes that only the representative knows are contradictory. These and similar problems can lead a representative to fail to x, regardless of how much motivation ex post sanctions and rewards provide. My senator might be driven by an intense desire to please her constituents and get reelected, but if misinformed about what we want, her actions will not be appropriately responsive. In addition, representatives might not x because voter myopia or ignorance causes a divergence between what actions constituents believe x-ing demands and

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85 Mansbridge, “Rethinking Representation,” 520-21. See also Dovi, The Good Representative: 158.

what the representative knows x-ing actually entails. Problems such as these plague almost any possible configuration of x.

Some theorists argue that the above arguments only apply when elections are used as accountability mechanisms. For instance, Maloy claims that the overreliance on elections, which are more apt for securing popular consent than control, leads to a lack of accountability in contemporary democratic politics. In their place, Maloy proposes something like the special inquest mechanism suggested by the Levelers, in which constituents investigate their representative through special commissions equipped with impeachment powers and the ability to levy fines. However, while alternative mechanisms might avoid some of the reasons why elections fail to make representatives x, they cannot overcome the inherent difficulty faced by a representative trying to assess what constituents want or what may be in their best interest, or eliminate the effects of the inevitable informational asymmetries between the two. Thus, for these and other reasons, accountability mechanisms are neither necessary nor sufficient for inducing representatives to x and some additional explanation is needed to explain their necessity.

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87 Sometimes voter myopia drives politicians to influence rather than respond to public opinion: “Politicians might think that if their policies adhere to the ex ante configuration of preferences that are temporally inconsistent, they may pay the costs later on, when the long-term negative consequences emerge.” Jose Maria Maravall, “Accountability and Manipulation,” in Democracy, Accountability, and Representation, ed. Bernard Manin, Adam Przeworski, and Susan C. Stokes (Cambridge: Cambridge University Press, 1999), 156.


89 For instance, midterm impeachment might be a greater deterrent than not being reelected, unscheduled inquests might prevent representatives from grouping popular and unpopular actions to evade electoral responsibility, and targeted investigations might make it more difficult for representatives to play voters against one another. See ibid., chapter 2; John Ferejohn, “Accountability and Authority: Toward a Political Theory of Accountability,” in Democracy, Accountability, and Representation, ed. Bernard Manin, Adam Przeworski, and Susan C. Stokes (Cambridge: Cambridge University Press, 1999), 132.
2.2 PRESENCE AND REPRESENTATION

A second reason for the necessity of accountability mechanisms is more complicated but ultimately more persuasive: accountability mechanisms are necessary because they serve as the procedural means through which the paradox of representation is transcended by principles gaining non-physical presence in the actions of their partially independent representatives.90

The ‘paradox of representation’ refers to Hannah Pitkin’s claim that the modern conception of representation demands “the making present in some sense of something which is nevertheless not present literally or in fact.”91

The basic idea behind this claim is the following: representation involves one agent acting for (x-ing) another agent who is physically absent from the action in question, i.e. the represented is not literally present.92 However, this description applies to many relationships that are not representative in character. A person I hire to water my plant is not my representative,

90 My reliance on presence as an explanation for the necessity of accountability mechanisms was inspired by a discussion in David Runciman’s article “The Paradox of Representation,” in which he argues that the possibility and ‘occurrence’ of non-objection is a crucial aspect of how Pitkin understood political representation and resolved its paradox. Runciman goes on to adapt this non-objection criterion to the representation of groups in order to apply Pitkin’s theory to the institutional arrangements of contemporary democracies. For the discussion relevant to my argument, see David Runciman, “The Paradox of Political Representation,” The Journal of Political Philosophy 15, no. 1 (2007): 93-99.


92 One response to this discussion might be that presence does not lead to a paradox at all, but rather a problem or a puzzle, and that Pitkin was somehow confused in thinking that representation involved “a philosophical paradox.” However, as David Runciman points out, Pitkin’s point was that a paradox exists, but that it is linguistic, not simply formal or logical; “re-presentation’ implies that something must be present in order to be represented but also absent in order to be ‘re-presented’”. This feature of presence in representation is why, as I elaborate below, the mandate/independence controversy resists any conclusive resolution. As Pitkin writes, “It may be, as the notion of paradox in the meaning of representation suggests, that the issue is usually formulated in such a way that it cannot be answered and will not allow a consistent response.” See Pitkin, “Commentary: The Paradox of Representation,” 41-42; Runciman, “The Paradox of Political Representation,” 94-95.
nor is a friend who picks up my prescriptions when I am sick. In the political arena, a bureaucrat who negotiates a favorable trade agreement for me and all other citizens of my country is not my representative either. Representation is unique because, among other things, the actions taken by my representative implicate me; in some way they are meant to be actions taken by me that I am responsible for. The actions of the plant caretaker, my friend, and the bureaucrat do not have this effect. It is in this way, by implicating the represented and giving him a stake in the action, by granting a kind of artificial yet felt presence, that representation makes the non-present present. As Vieira and Runciman note, “It is my presence in the action of someone else—the fact that another person is not merely trying to help me but is acting for me—that allows me to call that person my representative.”

Examining the mandate/independence debate clarifies the meaning of non-physical presence and the type of representative that makes it possible. The two extremes of this somewhat staged debate are familiar. Mandate theorists claim that representation involves mandated delegates following the explicit instructions of their constituents, while independence theorists claim that it involves independent trustees making decisions using only their own judgment. As Pitkin suggests, both positions derive from misinterpreting the paradox of representation in opposite yet equally flawed ways.

91 Runciman and Vieira, Representation: 68.
94 For a brief discussion of the history of this debate, see Refeld, The Concept of Constituency: 217.
Practical problems aside, the system of representation favored by mandate theorists hardly looks like representation at all. Constituents using imperative mandates deprive their delegates of autonomy and rule themselves; they take political action and their delegates merely serve as passive tools of execution. In this setup, nothing is absent, there is nothing to represent, and thus no representation takes place. Thus, a theory of mandated delegates overemphasizes presence to such an extent that representation ceases to be a possibility, for delegates unable to make independent decisions cannot take actions for and be in a relationship with the constituents that control them completely.

Representation as independent trusteeship is deficient for the opposite reason: a lack of constituent presence and an emphasis on absence. Constituents empower trustees to take actions on their behalf using their own judgment, but while this grants a needed flexibility absent for mandated delegates, it also means that representatives can repeatedly deviate from without formal consequence. As Pitkin notes, “if the situation is such that we can no longer see the constituents as present there is no representation, and if the man habitually votes the opposite

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96 For some theorists, this is exactly what actual representation must entail. For instance, Hans Kelsen claims that “in order to establish a true relationship of representation...it is necessary that the representative be legally obliged to execute the will of the represented, and that the fulfillment of this obligation be legally guaranteed.” A similar idea is expressed by Rousseau, when he reluctantly outlines a system of representation with imperative mandates for Poland. In addition, during the French Revolution, Francois Robert applied this conception of representation to constitution-making, arguing “that the deputies to the national assembly [France, 1790] must have imperative mandates.” See Hans Kelsen, General Theory of Law and State (New Brunswick: Transaction Publishers, 2006). 289-92; Francois Robert, “Republicanism Adapted to France,” in Social and Political Thought of the French Revolution, 1788-1797: An Anthology of Original Texts, ed. Marc Allan Goldstein (New York: Peter Lang, 1997), 214; Jean Jacques Rousseau, The Government of Poland, trans. Willmoore Kendall (Indianapolis: Hackett Publishing Company, Inc., 1985). 36-37.


98 Pitkin, The Concept of Representation: 151.
of their wishes we can no longer see them as present in his voting."99 In other words, independent trustees can repeatedly take actions contrary to what their constituency wants, which makes it both impossible to conceive of the constituency as present in their actions and intuitively farfetched to describe them as representatives. This problem is exacerbated by the fact that theories of trusteeship are silent when it comes to proper representative behavior, that they contain nothing about what it means to x or how it can be evaluated. This suggests, “that there is no such thing as not representing a person as one should” and that representatives always x as a result.100 Besides depriving presence of any real meaning, this further weakens trusteeship as a mode of representation because whatever the appropriate conception of representation may be, “It implies standards for, or limits on, the conduct of the representative.”101

Neither of these positions conforms to the general concept of representation sketched above nor grants non-physical presence. Mandated delegates do not act on behalf of anyone, for they take no relevant action. Constituents do not have presence in the actions of fully constrained delegates, because they act themselves. Independent trustees do not x, because they act in the absence of any guidelines. Constituents do not have presence in trustees, for these representatives can act however they want and constituents cannot formally complain or point to standards being violated. Nonetheless, as Pitkin notes, “insofar as the mandate-independence controversy contains a conceptual dispute based on the meaning of representation, both sides are right. … The representative must really act, be independent; yet the repre-

99 Ibid., 153.
100 Ibid., 55.
101 Ibid., 33.
sented must be in some sense acting through him.”102 What is needed is an account, to use Manin’s term, of “partially independent” representatives, i.e. representatives occupying the middle ground between fully instructed automatons directly following the explicit orders of their constituents, and completely free actors making decisions and taking actions completely unconstrained from the will of those they represent.103 Only such partially independent representatives are capable of giving non-physical presence to literally absent constituents.104

2.3 The Link Between Presence & Accountability

Accountability mechanisms are necessary because they are the procedural means through which partially independent representatives become possible and constituents transcend the paradox of representation by being both absent and present. Pitkin’s claim that “the substance of the activity of representing seems to consist in promoting the interests of the represented, in a context where the latter is conceived as capable of action and judgment, but in such a way that he does not object to what is done in his name,” hints at how this occurs.105 Put simply, accountability mechanisms give principals the opportunity to publicly declare whether or not they were present in the actions of their representatives, and to do so through the distribution of rewards or sanctions. This in turn motivates principals to evaluate their agents, which compels agents to align with and explain their actions in terms of $x$, and both of these effects combine to help foster and ensure a continual relationship between the repre-

102 Ibid., 154.


104 This description of representation is meant to sketch the conceptual boundaries of what counts as plausible political representation, i.e. it "only sets outer limits, within which there remains room for a wide range of views." Pitkin, The Concept of Representation: 146.

105 Ibid., 155.
sentative and the represented that avoids explicit instructions yet resists the equation of representative action to constituent will. As Manin claims, “In representative government, the electorate judges ex post facto the initiatives taken in a relative autonomous manner by those it has placed in power. Through their retrospective judgment, the people enjoy genuinely sovereign power.”

We know that the represented have presence, that they have a stake in and a partial responsibility for the actions of their representatives, when they reward or refrain from sanctioning their representatives during the moment of accountability. On the other hand, we know that political representation, in the relational sense, did not occur—for the represented were not present in the actions and behavior of their purported representatives—when constituents voice their objections through sanction. This absence of representation, the deterioration of the relationship of presence, is always a possibility, for as mentioned above no institutional set-up or accountability mechanism can guarantee that delegates will behave appropriately, for many of the numerous factors that might lead representative to fail at x-ing are unstoppable or unpredictable. Thus, accountability mechanisms merely give constituents the chance to formally declare that their formal representatives did or did not represent them, and it is this attribute, and not the degree to which representatives x, that differentiates proper accounts of

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107 Of course, this may be put too strongly, in that even if individuals always reelect their representatives when they see themselves as having presence in their actions, all instances of reelection do not necessarily signal presence; i.e. other factors might lead to reelection. This is probably one of the reasons that Runciman concentrates on the “non-objection criterion”, the negative account of what constitutes the activity of representation, such that “representation takes place when there is no objection to what someone does on behalf of someone else.” Runciman, “The Paradox of Political Representation,” 95.
representation from those inspired by authorization or mandate theories, and explains the necessity of accountability for representation.

To summarize, the concept of presence, in which absent constituents are nonetheless present and implicated in their representatives’ actions, serves as one component of the conceptual boundaries of acceptable theories of representation. Examining the mandate/independence controversy helps make clear what this concept of presence means by, among other things, bringing to light the sort of conceptualizations of representation that we wish to avoid. Mandate theorists emphasize the importance of representatives x-ing, yet their reliance on explicit instructions to ensure that this occurs turns representation into direct self-governance. Independence theorists introduce the ideas of proper authorization and reliance on representative judgment, but run the risk of implying that the actions of authorized representatives define the proper behavior of representatives by virtue of their authorization, i.e. that there is no external standard of behavior that can be used to evaluate representatives and that there is no pattern of action which would make a representative no longer representative. An acceptable concept of representation must lie between these extreme positions, incorporating a conception of presence in which authorized representatives are supposed to x without explicit instructions yet remain connected to their constituents in some robust way. The concept of presence is made possible by, and thus demands, an accountability mechanism, for it uniquely gives constituents the ability to announce and determine if they were present in the actions of their des-
ignated representatives and simultaneously provides motivation for the cultivation of an ongo-
ing relationship between representative and represented.\textsuperscript{108}

3. ACCOUNTABILITY IN CONSTITUTION-MAKING

We can now examine whether RJ justifies ratification. As previously stated, representation in a
constitution-making setting is a relationship that involves a framer representing a portion of
the soon-to-be-governed populace for an audience composed of the other framers and their
constituents, and is characterized by the framer acting for or on behalf of his constituency for
the purposes of creating a constitution. At this point, we can restate RJ as the following: P1
Framers can be representatives; P2 framers should be representatives; P3 ratification proce-
dures enable constitution-makers to be representatives by serving as accountability mecha-
isms; and therefore P4 one should implement ratification.

3.1 CAN FRAMERS BE POLITICAL REPRESENTATIVES?

For now, let’s focus on P1. Is it possible for constitution writers to be political representa-
tives?\textsuperscript{109} This question seems to demand the consideration of several variables relevant to rep-
resentation as they occur in the constitution-making context. These variables are not only con-

\textsuperscript{108} Note that my claim that accountability mechanisms are necessary for democratic political representation is not
akin to endorsing those theories of representation, referred to by Pitkin as ‘accountability views,’ which reduce
representation to any principal-agent relationship in which the principal holds the agent to account. Such ac-
counts endorse accountability mechanisms as a means to their desired end, representatives x-ing in a certain
way, but fail like all formalistic theories because while they hope to give a complete account of representation,
“their defining criterion…lies outside the activity of representing itself—before it begins or after it ends” and
there cannot “tell us anything about what goes on during representation.” Pitkin, \textit{The Concept of Representation:}
55-59. My claim is different insofar as I am simply designating an accountability mechanism as a necessary con-
dition for a particular type of representation, rather than as a sufficient one. See ibid., 55, 57, 58, 59.

\textsuperscript{109} In this section, I am not addressing the Sieyesian argument that the will of the nation transforms into the will
of extraordinary representatives, allowing these framers to exercise the otherwise inalienable constituent power
of the people. This argument has more to do with constituent power than representation, and will be addressed
troversial themselves, but also quickly push one towards the laborious process of parsing out and considering all the different types of constitution-making procedures. For example, one such variable would be the sort of authorization demanded by representation. Can framers be authorized in the appropriate way? Are types of constitution-making processes excluded on the grounds of authorization? Are legislative bodies that transform themselves into constituent assemblies therefore unrepresentative? What about instances of multi-stepped constitution-making, where numerous authorities such as a legislative assembly, a panel of experts, and an executive cabinet, revisit and revise the constitution? Do all of these agents count as representatives, or only a select few?

Our findings in the previous sections, however, allow us to bypass these sorts of complications, for we know that framers can only be representatives if they are subject to some sort of accountability mechanism. Is there or can there be an accountability mechanism in a constitution-making procedure? This would have to be an ex-post mechanism by which framers are rewarded or sanctioned on the basis of their performance drafting the constitution. Independent institutional mechanisms designed to serve this purpose have never been used in previous instances of constitution-making.\footnote{To my knowledge. [At this point I am still figuring out how to cite such a claim]} In other words, there are no known instances in which framers are subjected to institutionalized procedures that serve the sole purpose of holding them to account for their actions during framing. However, two mechanisms common to constitution-making might take on this additional role: elections and ratification.\footnote{As cited earlier, Elster identifies elections and accountability mechanisms as the means of holding framers accountable. Elster, "Securities Against Misrule: Juries, Assemblies, Elections," 345.}
As we know from the previous section, ratification not only might serve as an accountability mechanism, but doing so is the procedures’ only means of serving as a component of the representative process. This is why we reformulated P3. However, because the strength of RJ will vary depending on whether or not alternative procedures can serve as accountability mechanisms as well, it is worth examining elections in constitution-making before moving on to ratification.

Elections, as is well known, are the most common accountability mechanism currently in use in representative systems of government.\textsuperscript{112} They serve the dual purpose of selecting new representatives and punishing/rewarding the old ones by rejection/reelection.\textsuperscript{113} Representative legislators are elected to take part in the repeated game of legislation, which involves the ongoing participation and completion of a constant series of discrete tasks. This gives constituents the opportunity to hold their representatives accountable by deciding whether or not they should continue to be participants, that is, continue to be part of the ongoing activity/game of legislation. If they are happy with their representatives, if they see themselves as present in their actions, individuals are likely to reelect (reward) their legislators. If they are not happy, if they did not see themselves present in the actions of their legislators and there-

\textsuperscript{112} As Urbinati writes, “Elections, when associated with the right to call on new elections, are not simply meant to designate new representatives but to check over their representativity.”

fore not represented, individuals will likely vote for someone else (sanction). Elections may be the prototypical accountability mechanism in ordinary representative processes, but they cannot play the same role during framing because writing a constitution is a one-shot game. Constitution-making ends as soon as the constitution is written and implemented, and thus there is no opportunity for constituents to signal whether they were or were not properly represented by reelecting or ejecting their representatives post constitution-making, for there is no further job to complete and thus no position for framers to gain or lose.

A constitution-making process in which framers are subject to periodic elections would not avoid this conclusion. Consider a constitutional convention with \( n \) elections. Delegates involved in the convention would either be: (1) those elected in the \( n \)th election, (2) those that did not participate in the final drafting session due to losing reelection; and (3) those delegates who never lost a reelection. Type 1 delegates never faced reelection and thus were never sub-

\[114\] Admittedly, one implication of my conception of representation and the necessity of accountability is that single or final term elected representatives are not in a relationship of political representation with their constituents unless some other *ex post* accountability mechanism is present. For example, if retiring legislators were subject to a form of *euthynai*, those in their final term would be accountable and therefore remain political representatives. However, such alternative mechanisms of accountability are quite rare, and thus most single and final term representatives are not representatives at all. Despite the counterintuitive nature of this claim, I endorse it. Perhaps other means exist that hold one or final term delegates accountable; for example, reputation and future job opportunities might prevent a delegate from shirking in the final term and provide constituents with a means to articulate their presence in the actions of their delegates. Nonetheless, such incentive structure are unpredictable and not institutionalized, and therefore do not transform delegates into political representatives as I define them.

In addition, note that Fearon’s finding that unaccountable final term officials do not dramatically change their behavior does not weaken my argument, for control is only a partial reason why accountability mechanisms are necessary for representation. Moreover, recent work contradicts Fearon’s claims by showing that some final term legislators in the US do act differently. See Fearon, “Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance,” 63; Lawrence S. Rothenberg and Mitchell S. Sanders, “Lame-Duck Politics: Impending Departure and the Votes on Impeachment,” *Political Research Quarterly* 3(September 2000); Charles Tien, “Representation, Voluntary Retirement, and Shirking in the Last Term,” *Public Choice* 106, no. 1-2 (2001).

\[115\] I thank Melissa Schwartzberg for raising this objection.
ject to an accountability mechanism, and type 2 delegates were rejected, suggesting that at some point their constituents ceased seeing them as political representatives. Type 3 delegates were subject to accountability mechanisms, which proved that they gave presence to their constituents and served as political representatives between each election, but were not representatives in the final period—between the last election and the conclusion of the framing process—for they were not held accountable for their behavior at this time. Moreover, in this final period their powers enlarged, for they obtained the ability to have the final say on the constitution. This means that the constitution was finalized by a group of unaccountable elected officials with powers of revision, some of who had been representatives in the past but were no longer in such a relationship with their constituents. Thus, even in this stylized example, the determinate framers, those whom uniquely possessed the power to determine the contents of

In one sense, the claim that constituents sanction their agents when they fail to represent them is absurd, for the fact that a legislator loses reelection does not mean that he was not a representative, but rather that he was a bad representative, or thought to be so by his constituents. My account seems to ignore such designations as ‘bad representative’, and perhaps make them impossible, by treating representation as something to which the law of the excluded middle applies, i.e. implying that someone is either a representative or not a representative, rather than allowing for differentiations in the quality of representation.

Two clarifications are in order. First, a representative ejected from office is still a representative in the formal or technical sense, in that he held the position of representative. I do not mean to suggest otherwise. However, his rejection does suggest that a significant number of his constituents did not have presence in his actions, which means that, as a representative, he failed to represent his constituency. This sort of confusion is simply the result of linguistic ambiguity. Second, my approach to representation is constructed as a means of justifying RJ, for accountability is the sole role that ratification can play in a representative process, and its necessity would therefore provide a strong justification for ratification. The normative force of RJ stems from (ii), the claim that framers should be representatives, any substantiation of which would draw from a value attributed to the occurrence or possibility of good or legitimate representation. This means that for the purposes of RJ, bad representation is akin to no representation. So, in this sense, I am not interested in exploring the aspects of representation that function as continuous variables, leading to evaluations of representatives as better or worse, or more or less legitimate. Representatives clearly differ along such continua, which will vary from one full account of representation to the next, but we do not address these directly. I thank David Johnston for pointing these objections out.

116 In one sense, the claim that constituents sanction their agents when they fail to represent them is absurd, for the fact that a legislator loses reelection does not mean that he was not a representative, but rather that he was a bad representative, or thought to be so by his constituents. My account seems to ignore such designations as ‘bad representative’, and perhaps make them impossible, by treating representation as something to which the law of the excluded middle applies, i.e. implying that someone is either a representative or not a representative, rather than allowing for differentiations in the quality of representation.
the constitution by virtue of being the final drafters, are not subject to an accountability mechanism and are therefore not representatives.117

One additional objection to this dismissal of elections is the following: elections serve as accountability mechanisms for members of constituent legislatures—bodies with both legislative and constituent powers—for though constitution-making might be a one shot event, the same is not true for legislation, and thus constituent legislators will be subject to reelection for the next legislative term.118 However, even if we accept this claim, these accountability elections only occur if constitution-makers fail to create a new constitution, for only then would the normal electoral schedule continue as usual. If the constituent assembly actually created a constitution it would initiate a new system of government, and though members of the constituent legislature might decide to run for a position within it, this would be an election to an entirely new post, and therefore not a moment of institutionalized accountability within an ongoing process of legislating. Therefore, this objection falters, elections cannot serve as accountability mechanisms for members of constituent legislatures, for an accountability mecha-

117 Another way, perhaps, of reaching the same conclusion is to consider a complex political decision-making process that necessarily ends with the decision of an unaccountable entity with full revision and veto powers, and ask what can be done or added to such a procedure that would make it representative. The answer is nothing; as long as an unaccountable entity has the final decision and powers of alteration, the process can only approach but never become representative in nature. For example, imagine a country with a legislative process in which an elected assembly creates bills and submits them to a lifetime autocrat who can rewrite, eliminate, or put them into effect immediately. Clearly, this is not a representative legislative process, for the presence of the autocrat negates the representativeness of the delegates, turning them into mere consultants. This would be true even if the autocrat participated in the assembly before assuming his position as final arbiter. Thus, adding elected representative framers earlier in the process, increasing citizen exposure, and other such procedures might make framing participatory or responsive, but never fully representative.

118 The Beaudoin Edwards Report in Canada suggested that such constituent legislatures were preferable to specially elected conventions, for framers would be held accountable in the next term. See Hon. Gerald Beaudoin and Jim Edwards, "The Process for Amending the Constitution of Canada: The Report of the Special Joint Committee of the Senate and the House of Commons," (Canada June 20, 1991), 46, 49; Elster, "The Optimal Design of a Constituent Assembly," section III.
nism’s occurrence cannot depend upon the actions of those it is supposed to hold accountable.

3.2 Ratification as an Accountability Mechanism

If elections cannot serve as an accountability mechanism for framers in the constitution-making process, we are left with ratification. As already noted, this procedure is an ex post institutionalized evaluation of the product of the framers’ work. It therefore occurs at the correct moment in the constitution-making process, avoids the unpredictability and imprecision of informal mechanisms, and is carried out directly or indirectly by the people who are to live under the constitution, i.e. the very people that representative framers would purportedly represent. Moreover, as discussed, this is the only way in which ratification might enable constitution-makers to be representatives, which is proposition P3 of RJ. If the implementation of ratification is to be justified by its role in representation, this role must be as an accountability mechanism.

As discussed previously, there are two main reasons why an accountability mechanism is a minimum criterion for representation: to control representatives and to facilitate the presence of constituents in the actions of their agents. On its face, ratification seems poised to serve both of these functions. The procedure gives constituents control over their framers by serving as a downstream constraint to the constitution-making process, for the framers’ knowledge

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119 Though representative control is ultimately an unconvincing justification for the necessity of accountability (see the beginning of §2), its popularity in justifying the importance of accountability in general warrants its consideration when assessing ratification’s accountability credentials.
that their work must be approved by a final authority should influence the decisions that the
make within the drafting process.\textsuperscript{120} We can think of two ways this influence operates.\textsuperscript{121}

First, ratification procedures \textit{directly} affect framers by causing them to alter their goal con-
stitution—the constitution each framer would like the drafting process to produce—to one
they believe is acceptable, or can be made acceptable, to the ratifying authorities.\textsuperscript{122} Such alter-
ations might include granting constitutional status to matters that would otherwise be left to
ordinary legislative procedures, altering the contents of specific provisions, or specifying and
entrenching assumed governing principles.\textsuperscript{123} This direct effect applies regardless of a framer’s
motivation. A framer solely interested in creating a constitution that will forward his self-

\begin{quote}
\textsuperscript{120} For a more extended discussion of the direct and indirect effects of ratification, see chapter 1.
\end{quote}

\begin{quote}
\textsuperscript{121} For a discussion of upstream versus downstream constraints, see Elster, "Forces and mechanisms in the
Constitution-making process," 373-74; Lenowitz, "Rejected by the People: Failed U.S. State Constitutional
As Founder: Public Participation in Constitutional Approval," \textit{Temple Law Review} 81, no. 2 (Summer 2008):
378.
\end{quote}

Of course, sometimes framers do not consider the need for ratificatory approval when drafting the constitution,
or only realize it near the end of the proceedings. The latter occurred in Iraq, when Sunni support was solicited
at the last moment and rejection almost occurred as a result. See Yash Ghai, "The Role of Constituent
Assemblies in Constitution Making," (Institute for Democracy and Electoral Assistance, 2007), 35. Also,
sometimes the presence of additional upstream authorities may decrease the effect of ratification on framers.
For example, members of the Estonian Constitutional Assembly were more likely concerned with pleasing the
Supreme Court, which had to approve the constitution before submission to the people through referendum.
See Ringa Raudla, "Explaining Constitution-makers' preferences: the cases of Estonia and the United States,"

\begin{quote}
\textsuperscript{122} This is in addition to the constraint imposed by the expected preferences of other constitution-makers.
\end{quote}

\begin{quote}
\textsuperscript{123} Elkins, Ginsburg, and Blount suggest that popular ratification of constitutions is associated with "higher num-
ber of elected offices and greater use of referenda in ongoing governance," with the implication that these insti-
tutional features were placed into the constitution by framers in order to ensure ratificatory success. Elkins,
Ginsburg, and Blount, "The Citizen As Founder: Public Participation in Constitutional Approval." Similarly,
Voigt hypothesizes that "if the citizens are the ultimate deciders on accepting the constitution, members of the
constitutional assembly have more incentives to take the preferences of the citizens explicitly into account."
Stefan Voigt, "The Consequences of Popular Participation in Constitutional Choice: Towards a Comparative
Analysis," in \textit{Deliberation and Decision: Economics, Constitutional Theory, and Deliberative Democracy},
ed. Anne van Aaken, Christian List, and Christoph Luetge (New York: Ashgate Publishing, Ltd, 2004), 200. The Unit-
ed States Bill of Rights is an example of assumed principles of government constitutionally codified because, at
least partially, of ratification needs.
interest has to confine himself to provisions that he believes are acceptable to the ratifying authority, and the same is true of a framer motivated by his duty to x and his desire to create the best constitution possible.\textsuperscript{124}

Second, ratification has an \textit{indirect} effect on framers, in that the high level of public exposure and attention paid to the framing, which frequently accompanies constitution-making processes that are known to be followed by ratification, shapes the nature of the arguing and bargaining of the participants.\textsuperscript{125} The need for public approval, the likely transparency of at least some of the drafting procedures, and the need to explain decisions to constituents ratchet up norms of impartiality, and delegates whom desire to advance self-interested constitutional provisions and depart from x become even more likely to worry about sounding impartial as a result. Elster describes such a process as the ‘civilizing force of hypocrisy,’ ‘in which the effect of an audience is to replace the language of interest by the language of reason’ and make ‘it especially hard to appear motivated by self-interest.’\textsuperscript{126} This in turn filters what framers can argue and what provisions they can write, for certain things would be impossible to advocate.

\textsuperscript{124} Of course, this assumes away the presence of constitution-wreckers and the possibility that framers might want to intentionally create a constitution that will be rejected. Ratification would still directly affect these framers, for they would use the expected preferences of the ratifying authority to ensure that the constitution they produce will get rejected, but not in a way that would grant constituents control. See Lenowitz, "Rejected by the People: Failed U.S. State Constitutional Conventions in the 1960s and 1970s," 15-16.

\textsuperscript{125} This indirect effect is similar to one of the effects of signaling incentives described by Groseclose and McCarty. In the context of two-party negotiations in front of an outside audience, they found that the need to send signals to the third party influenced their decisions to accept or reject proposals. See Tim Groseclose and Nolan McCarty, "The Politics of Blame: Bargaining before an Audience," \textit{American Journal of Political Science} 45, no. 1 (Jan. 2001).

on the grounds of public interest or \( x \). These direct and indirect effects seem to impart some level of control over the behavior of representatives to the constituents.

Can ratification help create the conditions necessary for constituents to have and express their presence in the actions of their representatives? Again, on its face, ratification seems like an apt procedure. Ratifiers signal that they were present in the actions of their representatives by approving the constitution, and that they were absent by rejecting the constitution. This appears to be a moment of accountability that encourages framers to \( x \) without explicit instruction, fosters two-way communication, and ultimately establishes presence and allows for the transcendence of Pitkin’s paradox of representation. Note that using ratification for this purpose links accountability to a discrete task of the representative. This would be problematic in most instances of ordinary representation, for representatives are frequently responsible for a variety of decisions and actions, and thus institutionally hitching their accountability to a particular task would mistakenly formalize an evaluative distortion. However, this distortion does not occur for representative framers, for their sole task (as a representative) is to write a new constitution.

If the above arguments are true, RJ consists in something like the following: ‘the value of self-governance is not confined to the operation of an existing government, but also applies to the creation of a new government. Though direct participation is impossible, the people should still have as much of a say in the actual set-up of their future collective decision-making

\[127\] Note that it might be mistaken to assume that the civilizing force of hypocrisy, or other effects that stem from high degrees of transparency, are indubitably good. For instance, Prat argues that an agent might be driven towards conformism (acting according to how an able agent is expected to act a priori) when his or her actions, rather than simply the consequences of those actions, are placed under scrutiny. See Andrea Prat, "The Wrong Kind of Transparency," *The American Economic Review* 95, no. 3 (June 2005).
process as they will within it. Therefore, as much as possible, constitution-makers should be representatives of those to whom a new constitution will apply. Representation requires the operation of an accountability mechanism, ratification is the procedure most or solely suited to this task, and therefore the procedure should or must be included in the constitution-making process. This is a powerful justification for ratification, in that the value of representation is more or less unquestioned, as is the importance of maximizing congruence between decision-making during constitutional creation and decision-making in the government being set-up.

3.3 NO ACCOUNTABILITY—THE PROBLEM OF DOUBLE DUTY

Despite the above-mentioned strengths, RJ ultimately fails because ratification cannot serve as an accountability mechanism. There are several minor reasons for this; for example, it assumes that that all framers will see a rejected constitution as a personal sanction and an approved constitution as a reward and thereby dismisses the possibility that a framer unhappy with a draft constitution might welcome its rejection or recoil at its acceptance. In addition, RJ also overlooks the possibility that a framer might not translate the ratification vote into an evaluation of his or her behavior. Putting these ancillary objections aside, however, I want to consider...
centrate on one central reason why ratification can never be a source of accountability: it would make the procedure responsible for two separate and possibly different evaluations. Let us call this problem *evaluative divergence*. Consider the following two situations, both of which occur in a framing process that includes a constitutional convention composed of elected delegates followed by ratification via public referendum:

*Ex1*: My delegate tries to create a constitutional provision that prohibits people of my ethnic background from holding political office and voting. Despite his best efforts, my delegate fails. At all other times during the convention, he acts just like I would want my representative to act (he x’s). I prefer the resultant constitution to the expected results of constitutional rejection.

*Ex2*: My delegate acts like the delegate in Ex1, except he tries to prevent the creation of the provision excluding my ethnic group from political participation. Despite his best efforts, my delegate fails in his attempt, and the constitution presented to me for ratification is identical to the constitution in Ex1, except it includes the exclusionary provision. This is reason enough for me to reject the constitution.

In both of these examples, there is a critical asymmetry in my evaluation of the ‘representative’ and the constitution. In Ex1, I would vote in favor of the constitution because I prefer it to the status quo or what I expect a rejection might lead to. However, if ratification serves as an accountability mechanism, by approving the constitution I simultaneously reward my representative delegate. This is problematic because, assuming that acting to exclude me from the political process violates x, I could not see myself present in the actions of such a representative. I am thus rewarding my representative for not being my representative.\(^\text{131}\) The opposite

\(^{131}\) This also assumes that my delegate in Ex1 prefers the constitution to the status quo as well, despite failing to add the exclusionary provision, and therefore sees ratification failure as a sanction and ratification success as a reward. This creates a potential problem to the viability of ratification to serve as an accountability mechanism, but it is a relatively minor one.
problem emerges in Ex2, for I would vote against this constitution, yet in doing so sanction a representative that gave me real presence in the constitution-making process. I am thus sanctioning my representative for representing.

These two examples show the central deficiency of using ratification as an accountability mechanism: there is no necessarily correlation between a voter’s evaluation of a draft constitution and his evaluation of his constitutional representative, yet the ratification vote is supposed to signal both. This incongruence does not stem from there being other tasks that need to be taken into consideration when evaluating a framer, for there are none, but rather from several factors, the most influential of which is the fact that the outcome of a collective decision-making process is not determined by the behavior of any single participant.\(^{132}\) The actions of other participants affect collective outcomes. This is evident in both of the above examples, where my constitutional delegate fails in regards to the exclusionary provision because of the actions of his fellow framers. Thus, because of the intervention of other framers, how a voter’s constitutional representative behaves will not fully determine the contents of the proposed constitution, and therefore evaluative divergence becomes possible because the voter’s assessment of the latter may differ from his assessment of the former.

If the ratification process serves as both an accountability mechanism and a means to approve or reject a constitution, voters are in an odd situation when transitioning from the evaluative to the sanctioning dimension of accountability.\(^ {133}\) They can use three basic strategies to

\(^{132}\) Evaluating a representative solely on the basis of one of his many representative actions, rather the sum total of them, is relatively common in ordinary instances of political representation. I discuss the relevancy of this observation, as well as another factor that leads to evaluative divergence, below.

\(^{133}\) See §1.2 for a discussion of these three dimensions of accountability
make their decision. First, a voter might give primacy to the constitutional choice, meaning that their vote solely reflects whether they prefer the proposed constitution to the expected results of rejection. However, the voter would fail to hold his representative accountable, or at least inaccurately hold him accountable, whenever his evaluation of the constitution and the representative diverged. Second, a voter might do the reverse and give primacy to representative accountability, therefore perversely making a decision about the future organization of his polity for reasons unrelated to constitutional content. In this instance, evaluative divergence would cause the voter to reject a constitution he likes or accept a constitution he dislikes. Third, a voter might somehow make his decision on the basis of both the behavior of his representative and the proposed constitution, perhaps taking preference or evaluative intensity into account. Nonetheless, the voter would eventually make a decision, and if his evaluations diverged he would either fail to hold his representative accountable or inaccurately express his opinion on the proposed constitution, regardless of how he weighted the two. None of these outcomes are acceptable; ratification cannot function as an accountability mechanism, for doing so collapses two different critical decisions into one action that becomes inadequate whenever they diverge.

At this point, an objector might make the following argument: in representative governments, voters frequently rely on their evaluations of the outcomes of the legislative process—bills and policies—when holding their individual representative accountable.\(^\text{134}\) Sometimes

\(^{134}\) For instance, the foundational texts in the empirical literature on retrospective voting claim that voters use the state of the economy, an outcome, to evaluate political incumbents. See Anthony Downs, *An Economic Theory of Democracy* (New York: Harper and Row, 1957); Fiorina, *Retrospective Voting in American National Elections*; V.O. Key, *The Responsible Electorate* (New York: Vintage, 1966). Admittedly, recent studies question the generalizability of this model by showing its inapplicability to local rather than state and national elec-
voters use outcomes as one of many inputs, other times they serve as the sole evaluative criteria. Outcomes might be used in this manner when more detailed information about the specific behavior of individual representatives is unavailable, when voters are unwilling or unable to accept the costs associated with a closer evaluation, or when voters make evaluative mistakes out of ignorance, passion, manipulation, and the like. Regardless of the cause, voters frequently use collective decision-making outcomes to evaluate individual representatives, and according to the above argument this means that ordinary accountability mechanisms are deficient, and that representation is not present or not possible in most representative governments. If we want to resist this conclusion, than the above argument against ratification’s function as an accountability mechanism must be rejected.

This objection challenges the critique of using ratification as an accountability mechanism by showing that constituents frequently rely on evaluations of outcomes during the operation of normal accountability mechanisms. The hypothetical objector thus assumes that the crux of our argument is the assertion that using one’s evaluation of a draft constitution is an imprecise or distortive means of judging the behavior of a representative. However, this misconstrues the critique, the central claim of which is that ratification cannot serve as an accountability mechanism because this makes one action (voting yes or no to a proposed constitution) responsible for two tasks (holding framers accountable and accepting or rejecting a constitution) that might demand different responses because of evaluative divergence. In these instances, when representative behavior and the draft constitution demand opposite responses, it becomes im-
possible for a constituent to meet both through the one action available to him. If he holds his representatives accountable, he destroys ratification’s function as a means to accept or reject a constitution; if he votes on the constitution itself, then ratification ceases to be an accountability mechanism.

In normal electoral accountability mechanisms, constituents might use outcomes to help them decide whether to keep their representative in office (reward) or replace him with someone else (sanction), but this does not make the election vote responsible for choosing legislation in addition to evaluating representatives. If a representative acts perfectly yet the legislative outcomes are undesirable, this does not make it impossible for voters to fulfill all of their responsibilities when voting. They are not expected to make a decision about the outcomes of previous legislative processes when they choose a person to be their representative. In other words, regardless of the degree to which outcomes inform a voter’s decision, they do not vote on the outcomes directly and their vote will not affect the fate of previous legislative decisions. The hypothetical objector’s argument only seems plausible because the central reason that outcomes of collective decision-making processes are sometimes a bad means of judging the actions of a single participant is the same reason that a framer’s behavior and a draft constitution might warrant different responses—the behavior of one participant does not fully determine the outcome of a collective decision-making process.

135 Similarly, retrospective voters solely interested in their economic welfare do not vote directly on the economy, but simply use it to make their decision.
4. CONCLUSION

Whether taken to be an institutional innovation designed to guarantee popular sovereignty, an instrumental substitute for stronger forms of democracy inconsonant with modern times, a means of securing a human right to participation demanded by international law, or something else entirely, representation occupies a central place within democratic theory today and is more or less unanimously treated as something worth institutionalizing in contemporary states. For this reason, a possible connection between representation and ratification, which is suggested by the frequent conceptualization of framers as representatives and the long-standing association of ratification with representation, should be of interest to anyone looking for a possible source of justification for the latter. In this chapter I followed this intuition by sketching out a limited approach to representation, and then constructing and interrogating RJ, a justification for ratification based upon its relationship with political representation. RJ claims that ratification is justified because: (P1) framers can be representatives; (P2) and should be representatives; and (P3) ratification plays a crucial role in enabling this to happen.

For examples of the first two arguments, see Nadia Urbinati, Representative Democracy: Principles and Genealogy (Chicago: University of Chicago Press, 2008); Benjamin Barber, Strong Democracy: Participatory Politics for New Age (Los Angeles: University of California Press, 1984). Brennan and Hamlin usefully categorize arguments such as Urbinati and Barber’s as first-best arguments and second-best arguments respectively; first-best arguments see representation as a politically superior alternative to the imperfections of direct democracy, and second-best arguments see representation as a practicable means of achieving an approximation of the unobtainable ideal of direct democracy. Brennan and Hamlin, “On Political Representation,” 111.

Ratification is an *ex post* procedure that occurs after the writing of the constitution, the would-be task of representative framers. This means that ratification’s role in a constitutional representative process must be similarly *ex post*. Out of the numerous mechanisms and procedures that might contribute to institutionalizing political representation, an accountability mechanism is the only one that meets this criterion. This transforms P3 into: ratification plays an essential role in constitution-making by serving as an accountability mechanism. Moreover, an accountability mechanism is a necessary feature of any reasonable conception of political representation, primarily because it transcends the paradox of representation by giving constituents the ability to formally declare whether or not they were present in the actions of their principals. This means that if ratification functions as an accountability mechanism, RJ provides a strong justification for its implementation.

However, upon analysis, ratification is not up for this role. Despite its initial appearance as a viable means to secure representative control and make presence a possibility, ratification cannot serve as an accountability mechanism because it is unable to complete both of the tasks this would demand of it. If ratification serves as an accountability mechanism, a voter has one vote to signal his acceptance or rejection of a proposed constitution, and reward or sanction his representative framer. However, these two tasks might demand different actions, particularly because constitutions usually stem from collective decision-making processes, such that the behavior of a single representative may not correlate with the final constitution. A voter might want to accept the constitution yet sanction his representative, or reject a constitution yet reward his representative. Such a divergence is always possible, and when it occurs ratification must fail at one of its given tasks. Thus, the first main conclusion of this chapter is that RJ fails
because ratification cannot serve as an accountability mechanism, and therefore does not serve a necessary function in a representation process. To put this in the terms of the formulation used earlier, even if P1 and P2 are correct, RJ fails because P3 is false.

In the process of evaluating RJ by examining P3, P1 came under scrutiny as well. As argued, any reasonable concept of political representation requires an accountability mechanism. Therefore, if framers are political representatives, an accountability mechanism must be present within the constitution-making process. These mechanisms come in a variety of forms, but actual instances of constitution-making only include one possible mechanism other than ratification that might be used to hold framers accountable: elections. However, the one-shot nature of constitution-making, the fact that constitution-making is a discrete task with a definite end, means that framers are not reelected and thus not held accountable by elections.\textsuperscript{137} Attempting to introduce periodic elections within the drafting process does not help matters, for the final drafters lack accountability nonetheless. The fact that “there is no chance for the public to punish representatives who fail to fulfill their mandate” does not expose a “weakness of accountability” as one scholar suggests, but rather points to its complete absence.\textsuperscript{138} Thus, assuming that accountability mechanisms are necessary for representation, constitution-makers have likely never been political representatives when drafting a constitution. This is the second main conclusion of this chapter, and it implies that historians, developmental scholars, and others are either mistaken in their attempts to portray and conceptualize framers as politi-

\textsuperscript{137} As Urbinati writes, "Delegates in the constitutional assembly... cannot be (and are not) electorally accountable (they are not subject to reelection)..." Urbinati, Representative Democracy: 57.

\textsuperscript{138} Hart, "Constitution Making and the Right to Take Part in a Public Affair," 34.
cal representatives, or else using a concept of ‘representation’ that differs from the ones appropriate to the normative political connotations they are often attempting to bring forth.

Of course, there are two limitations to this finding. First, in some instances of framing, informal accountability mechanisms likely functioned and had the same effects as institutionalized accountability mechanisms. For instance, if a framer elected by a geographically defined constituency creates a constitution that provides for a legislative body consisting of representatives elected by the same constituencies, then the first legislative election might serve as an accountability mechanism for the framer if he chooses to run for office. He might alter his behavior during the constituent assembly because of his expectation of this election, and voters might consider his actions during framing when deciding how to cast their vote. To varying degrees, such informal mechanisms of accountability that rely on things such as reputation and political aspirations undoubtedly occur, making the claim that framers have never been representatives slightly overstated. Nonetheless, note that these informal mechanisms cannot be relied upon or planned through institutional design, for they rely on specific desires of the framers, the production of predictable constitutions, and voters seeing the next election as an accountability mechanism.

Second, this finding does not mean that it is impossible to design a representative constitution-making process with an accountability mechanism, but rather that this has yet to occur. What would such a mechanism look like? Like all accountability mechanisms, it would take place ex post to the representative action and provide principals with some means of sanctioning and rewarding their delegates. Several procedures would fit this description. After the drafting of constitution, each constituency might hold a referendum with the specific purpose
of punishing or rewarding their framer. Or, an independent commission might convene to re-
view the behavior and actions of each framer and levy the appropriate rewards or punishments.
This latter possibility would be similar to the Athenian euthynai, which the Greeks used to
hold retiring magistrates to account. In both of these mechanisms, the awards and punish-
ments could be anything from monetary rewards or fines to the commission or denial of politi-
cal positions.

Such accountability mechanisms are theoretically possible, though the constitution-
making setting is bound to create complications not found in ordinary settings. For instance, it
is unclear what evaluative criteria would be appropriate for judging the actions of framers, and
the infrequency of constitution-making would prevent principals or members of a special
commission from answering this question from experience. In addition, the legal authority of
an accountability mechanism for framers is ambiguous, for on the one hand the implementa-
tion of a new constitution overrides previous institutional prescriptions, and on the other hand
is it unlikely that framers would include a mechanism that might be used to punish them into
the constitution that they write. This means that a constitutional accountability mechanism
would likely have to operate between the drafting of the constitution and its implementation,
which might cause undesirable and potentially fatal delays to the conclusion of the framing

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139 In this procedure, ten inspectors (logistai) and ten advocates (synegoroi) evaluated the accounts of the magis-
trate. The magistrate was next brought before a court of 501, where the auditors presented their findings and
brought up any accusations. In the last two stages of the process, any citizen could bring up charges of bribery
or embezzlement, or any changes of misconduct at all. Jon Elster, "Accountability in Athenian Politics," in
Democracy, Accountability, and Representation, ed. Adam Przeworski, Bernard Manin, and Susan C. Stokes
(Cambridge: Cambridge University Press, 1999), 268; Mogens Herman Hansen, The Athenian Democracy in
the Age of Demosthenes: Structure, Principle, and Ideology (Oxford: Oxford University press, 1991), 222. See also
Deirdre Dionysia Von Dornum, "The Straight and the Crooked: Legal Accountability in Ancient Greece,"
Columbia Law Review 97, no. 5 (Jun., 1997).
process or have an impact on the perceived legitimacy of the constitution.\footnote{Such delays are especially problematic given that constitution-making frequently occurs in turbulent settings. See Elster, "Forces and mechanisms in the Constitution-making process," 394; Elster, "Legislatures as Constituent Assemblies," 185.} How would the public view a constitution implemented without problems, yet written by representatives found to be deficient during accountability procedures? These concerns and others like them are bound to arise, but might be resolved by adjusting the accountability mechanism and the surrounding framing procedures.

Rather than continue to speculate about how to create an accountability mechanism for constitution-makers, I want to conclude this chapter by briefly looking at the assumption underlying the impetus to do so. This assumption, a component of RJ, is the belief that P2 framers should be representatives. This is a common belief, but begs the question whether there are good reasons for holding it. Why should we conceptualize framers as, or want them to be, political representatives? The intuitive response is to make recourse to the burgeoning pool of arguments made in favor of representative government and the institution of representation more generally; or to ignore the issue and simply assume representation occurs whenever framers are elected because elections and representation go hand in hand in contemporary representative democracies.\footnote{Elkins, Ginsburg, and Blount give an example of the latter tendency, when they reason as follows amidst a discussion of public participation in constitutional design: "...in either case the main deliberative body is selected by the public. We can thus presume some level of representation in the decisions that the deliberative body undertakes." Elkins, Ginsburg, and Blount, "The Citizen As Founder: Public Participation in Constitutional Approval," 364. See also Ghai, "The Role of Constituent Assemblies in Constitution Making," 23.} However, either response is theoretically sloppy, for it involves equating the writing of a constitution with other instances of political decision-making that might benefit from representation, when constitution-making is clearly a unique enterprise of its own.
Several possible arguments and reasons for thinking that framers should be representatives can be drawn from the constitution-making literature, but four seem central. The first argument claims that representative framers increase “the perceived legitimacy of a constitution-making process” and the constitution that results. Due to the lack of consensus on what legitimacy actually entails, this argument has multiple meanings. On the one hand, it might be an empirical or sociological claim that, for whatever reason, people will just perceive a constitution as more authoritative if political representatives create it. This could be the result of an already existing tradition of popular governance, or the influence of some international norm diffusion process. On the other hand, it might be a normative or moral claim that a constitution-making process involving political representatives is necessary for the creation of a legitimate constitution.

Second, and related to the first, is the claim that the constitutional process should mirror the desired political process to be created, especially in the case of democracies. Here, representative framers are desirable not because of the need to meet preexisting ideas about legitimacy in the populace, but in order to foster them. As Arato explains, “most democratic theories do not and cannot recognize any source of legitimacy other than direct or electoral participation by full members of the political community. If it is important that the rules of the game

143 I address the lack of clarity in conceptions of legitimacy, and how it affects potential justifications of ratification, in part 3 of this dissertation.
144 For instance, one could interpret Waldron’s claim that “the theory…which maintains…that right-bearers have the right to resolve disagreements about what rights they have among themselves and on roughly equal terms, is the only plausible rights-based theory of authority…” as supporting the idea that a constitution must be created by representatives when a public drafting process in unavailable. Jeremy Waldron, Law and Disagreement (Oxford: Oxford University Press, 1999), 254.
provide for democratic participation, it is equally or even more important that the rules of the

game emerge in a democratic manner.”145 In other words, if one desires to create a democratic

system of government, the corresponding democratic conception of legitimacy needs to be fos-
tered as early as possible, and insofar as representation is seen as an essential means of legiti-
mating democratic political decisions in the absence of direct citizen participation, it has to be

present in constitution-making as well. Therefore, as Göreng notes, since “the indispensable
tenet of contemporary democratic politics has been the participation of the people in making

collective choices through their representatives,” “constitutional choices are no exceptions.

They are generally made by the representatives of the people in modern democratic political

systems.”146

The third argument or reason for conceptualizing framers as representatives comes from

the participatory constitution-making or ‘new constitutionalism’ movement, an approach to

constitution-making design that seeks “to involve the public before, during, and after the text

is finalized” to the highest degree possible, under the belief that this “educates citizens and

empowers them to defend their constitutional rights, …strengthens democratic attitudes, en-
courages public consensus, facilitates citizens engagement, and build[s] support for state insti-

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145 Arato, Civil society, constitution, and legitimacy: 230. Similarly, Hart writes that: “A democratic constitution is

no longer simply one that establishes democratic governance. It is also a constitution that is made in a democ-


146 Levent Göreng, Prospects for Constitutionalism in Post-Communist Countries (The Hague: Martinus Nijhoff

Publishers, 2002). 112. See also Jon Elster’s brief discussion of process legitimacy, in which he explains that “if

the internal decision-making procedure of the assembly is perceived to be as undemocratic, the document may

be lacking in democratic legitimacy.” Elster, "Constitution-making in Eastern Europe: Rebuilding the boat in

the open sea," 178-79.
For a variety of factors—minority prosecution, deep pluralism, the legacy of authoritarianism, and a focus on deliberation—advocates of this approach claim that the drafting process must consider the actual viewpoints of every potentially affected societal group, such that the constitution becomes "the product of the integration of ideas from all the major stakeholders," and that this can only be accomplished by the direct participation of members of such groups in the drafting process. Jhala articulates this position clearly when summarizing the implications of constitution-making in South Africa, Uganda, and Ethiopia, writing that "Not all members of society are able to participate fully in the exercise [of constitution-making] and that is why it is important that those who are chosen to frame and approve the constitution are representative of as wide a sample of society as possible." Various efforts are taken to ensure the correct composition of the drafting body: proportional delegate selection (where proportionality applies to parties and genders/groups), the expansion of suffrage, and

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the supplementation of an elected constituent assembly with appointees representing relevant social groups.150 This call for inclusive participation of group members in the framing process turns into a straightforward demand for political representation, as the constitution-making delegates are assumed to be political representatives of their individual groups.151

Fourth and finally is the emerging tendency to “reconsider constitution-making as part of the process of conflict transformation,” which in extreme cases leads to conceptualizing the constitution as “partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate.”152 This reconsideration is unsurprising, in that contemporary instances of constitution-making frequently follow or occur amidst conflict situations that arise after the erosion of previously legitimate governments and political authorities; examples include constitution-making in Guatemala (1997-1998); Afghanistan (2001-2004); and Rwanda (2002-2004).153 This conflation results in the extension of research questions associ-

150 The selection of delegates to the Nepali Constituent Assembly, scheduled to promulgate a draft constitution in May 2011, demonstrates all of these inclusivity fostering mechanisms: 240 delegates were elected in accordance with FPP from geographic single-member-constituencies and 335 delegates through proportional voting. Parties had to take inclusiveness into consideration when choosing candidates for constituency seats, and were mandated to meet precise percentages of candidates from women and minority groups when composing party lists. Suffrage was universal throughout the elections, and afterwards the Council of Ministers elected 26 additional members from among distinguished persons and from groups who failed to be represented through the elections and suffrage was universal. Yash Ghai and Jill Cottrell, eds., Creating the New Constitution: A Guide for Nepali Citizens (Stockholm: International IDEA, 2008), 49-52; "Election to Members of the Constituent Assembly Act,” (Legislature-Parliament of Nepal, 2007 (2064)), 6-12.

151 This equation of group delegates to political representatives is confused, insofar as reasons exist for having such delegates involved in the drafting process that have nothing to do with the particular relationship of political representation. For instance, delegates might contribute "the knowledge of interest" of their respective groups, diverse viewpoints, and different problem-solving approaches, all of which might aid in the project of constitution-making. Elster, "The Optimal Design of a Constituent Assembly,” 20; Scott E. Page, The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies (Princeton: Princeton University Press, 2007). Note that Elster titles the contribution of different knowledge of interests by diverse framers ‘representativeness.’ Elster is not referring to political representation however, and thus I would argue that a different term should be used to avoid confusion.


ated with conflict resolution to the constitution-making process, such that "Policymakers have started to ask...whether some constitutional reform processes are more likely than others to deliver a reduction in violence."154 Since the cessation and prevention of violence in conflict situations often involves placating the relevant parties, representation becomes a desirable feature of constitution-making, for it appears to provide a reliable way to negotiate a mutually acceptable and durable agreement that reflects current interests and power distributions.

These are just four reasons contained in the constitution-making literature for why the framers of constitutions should be conceived of as political representatives, and all of them are abstract and imprecise, include unexplained normative concepts, and frequently equate notions of inclusiveness, pluralism, and participation with the specific relationship between an agent and his principal(s) that political representation entails. Moreover, the tendency to treat constitution-makers as framers may have negative effects, for it can deemphasize the long-term role of constitutions in establishing the rules of the game for the political process in a country—by creating the basic institutions and procedures for political action, enumerating the fundamental rights of citizens, and setting out the procedures for its own revisions—and instead place focus on the importance of giving current societal interests their say, fulfilling the already present needs of parties and groups, and allowing for the expression of political disagreement. This is especially prevalent when constitution-making serves as a component of the conflict resolution process, for in these instances representative framers are most likely to "entrench disagreement without providing avenues for change," and "incorporate too many inter-

ests of an already constituted future politics in the politics of constitution-making.” This is not to suggest that these new sites of focus are not of vital importance, but rather that the process of creating a constitution might not be the best context for addressing them.

To conclude, this brief discussion of P2 is not meant to be a knock-down argument against the belief that framers should be constitution-makers, for that is beyond the scope of this chapter and dissertation. Rather, I hope to make two additional points. First, that the second main conclusion of this chapter (that framers have never been political representatives) and its implications (that current procedures used to draft constitutions makes representative framers an impossibility) are not as problematic as they might initially seem. For though the treatment of framers as representatives is increasingly prevalent in the constitution-making literature, this tendency is based on ambiguous arguments in need of further elaboration, and might even have negative repercussions. Second, and perhaps more importantly, this discussion suggests that ratification is not the only aspect of the constitution-making process that is taken for granted, assumed to be positive, and in need of explanation. As constitution-making events become increasingly frequent, and more and more scholars contribute to the creation of a best-practices literature, greater attention needs to be paid to analyzing the appropriateness of the straightforward application of concepts and procedures developed and justified in the domestic setting to the constitution-making context.

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155 Benomar, “Constitution-Making and Peace Building: Lessons Learned From the Constitution-Making Processes of Post-Conflict Countries,” 4; Arato, Civil society, constitution, and legitimacy: 148. Benomar makes an excellent argument against the use of constitution-making for conflict resolution, concluding that “past experience demonstrates that when the conflict has not ended and negotiations on a peace agreement and on the constitution are conflated, constitutional principles may be compromised. The experience of constitution-making, while conflict continues, demonstrates that constitution-making cannot serve as a peace process.”
3.

THE CONSTITUENT POWER SPEAKS:
Some Attempts to Justify Ratification

The constitution-making power is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence.

_Carl Schmitt_\(^{156}\)

This, Mr. President, is not a government founded upon compact; it is founded upon the power of the people. They express in their name and their authority—"We, the people, do ordain and establish, &c.; from their ratification alone is it to take its constitutional authenticity, without that, it is no more than a tabula rasa."

_James Wilson_\(^{157}\)

The concept of constituent power appears ready-made to provide an explanation for implementing ratification procedures. For what, if anything, do ratification procedures involve if not the sovereign people exercising their will and accepting a constitution as their own? According to such a justification, any legitimate, authoritative, or rightful constitution must be the creation of the people, and ratification is the moment, or an essential moment, when this becomes a possibility. In other words, the reasons for implementing ratification stem from its intended function as a moment of higher law-making when the people are explicitly present. This conceptualization of ratification as a moment of constituent power is both intuitive and expressed by a wide-range of constitutional actors: from James Wilson at the Pennsylvania Ratification Convention in 1787, whose words are excerpted above, to the Ukrainian Justice V.M Kampo,


who claimed in a noteworthy dissent that constituent referendums are based on “the exclusive right of the people to define and alter the constitutional order...that is, to realize constituent power.”

This chapter and the following two explore constituent power justifications of this sort. However, as we will see, this type of justification gains some of its intuitive bite by blurring or avoiding the actual mechanics of constitution-making. Thus, our analysis is anything but straightforward, for constituent power theorizing operates on a level of abstraction above actual constitution-making procedures. In this chapter I first define the concept of constituent power and explain its relevance, explore some of the central questions that motivate its discussion, and highlight the immiscible relation between constituent power and the mechanics of creating a constitution. I then investigate several ways in which ratification might serve as an instance of constituent power and analyze the strength of the resulting justifications.

1. WHAT IS A THEORY OF CONSTITUENT POWER?

Before exploring whether a theory of constituent power justifies the use of ratification procedures, we must ask a more basic question: what is constituent power? What does a theory of constituent power entail? Constituent power, also known as the pouvoir constituant or the constitution-making power, is an old and central concept in constitutional theory. It arose in conjunction with the creation of the first written constitutions, yet its roots date back to earlier

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theoretical discussions of sovereignty, political resistance, authority, and the social contract.\textsuperscript{159}

Emmanuel Sieyès and Carl Schmitt are the most famous exponents of the fully developed concept, while Hobbes, Lawson, Locke, Paine, and various American revolutionaries are frequently held to be important contributors.\textsuperscript{160}

Put simply, constituent power is the unique power of the people (or the people themselves when exercising this power) to make and unmake their constitution, the set of fundamental laws that undergirds and creates their state. A theory of constituent power claims that the constituent power must create the constitution for it to be authoritative, i.e. that the only valid constitution for a state is one made by its people. As Andreas Kalyvas notes: “The constituent power demands that\textit{ those who are subject to a constitutional order co-institute it.}”\textsuperscript{161}

\textsuperscript{159} The first use of the term 'constituent power' in a manner similar to how it is now understood is an object of debate. Some historians claims that Thomas Young, a New York Radical, was the first to use the term. In 1776 he wrote "the people at large...are the supreme constituent power, and of Course their immediate Representatives are the supreme Delegate power; and as soon as the delegate power gets too far out of the hands of the constituent power, a tyranny is in some degree established." However, the British pamphleteer Junius used the term similarly six years earlier to refer to a type of power superior to the legislature. See Thomas Young, "Thomas Young to the People of the Grants," in \textit{The Documentary History of the State of New York}, ed. Christopher Morgan (Albany: Charles Van Benthuysen, 1851), 563; Willi Paul Adams, \textit{The First American constitutions : Republican ideology and the making of the state constitutions in the Revolutionary era}, Expanded ed. (Lanham, MD: Rowman & Littlefield, 2001), Book. 63; Junius, "To the Printer of the Public Advertiser," in \textit{The Letters of Junius} (New York: Leavitt, Trow & Co, 1848), 29.


\textsuperscript{161} Kalyvas, "Sovereignty, Democracy, and the Constituent Power," 237.
theory and concept of constituent power rely on two critical presuppositions: the distinction between ordinary and extraordinary law and power, and the absence of any source of political authority other than the people themselves. I explore both of these below.

1.1 ORDINARY VERSUS EXTRAORDINARY

We can begin unpacking constituent power by looking at the ideal-typical distinction between ordinary and extraordinary law, two types of legal rules found in a constitutional system of government.\textsuperscript{162} Ordinary law is familiar law, the body of positive law or legal rules that composes a working legal system; it contains anything from noise ordinances to tax codes to gun control regulations. Extraordinary law is constitutional law, the rules that determine how public power it to be exercised by organizing, defining, and limiting the institutions of government and setting out the formal procedures through which these institutions both govern and create ordinary law.\textsuperscript{163}

Extraordinary law is ‘higher’ than ordinary law in two central ways. First, since “the constitution is the highest level within national law,” as Kelsen notes, it overrides ordinary law within a constitutional framework.\textsuperscript{164} Thus, extraordinary law is controlling in cases of conflict.


\textsuperscript{164} Kelsen, \textit{General Theory of Law and State}: 124.
with ordinary law, as evidenced by the judicial invalidation of ordinary acts of legislation when found to contradict constitutional laws within the same jurisdiction.\textsuperscript{165}

Some of the first written constitutions were thought to be ‘supremely normative’ in this manner.\textsuperscript{166} For instance, in \textit{Federalist 78}, Hamilton insists that whenever an irreconcilable variance between two laws occurs, that which has the superior validity ought to be preferred, i.e. “the Constitution ought to be preferred to statute.”\textsuperscript{167} Today, it is increasingly common to stipulate this sort of legal and normative superiority directly within a constitution. The beginning of Article 9 of the Ethiopian Constitution provides an example: “The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.”\textsuperscript{168}

Second, extraordinary law is higher because it authorizes and helps create ordinary law. This is why constitutional law occupies the top of Kelsen’s legal hierarchy. As he explains, if “one legal norm determines the way in which another norm is created…the norm determining the creation of another norm is the superior, the norm created according to this regulation, the inferior norm.”\textsuperscript{169} Put differently, extraordinary law has higher status because it regulates the rules of the political game, part of which entails indirectly creating ordinary law by setting out

\textsuperscript{165} Of course, hierarchical superiority also exists between ordinary laws. For instance, in Federal systems such as the United States, valid federal legislation generally takes precedence over the statutes enacted by state legislatures. Extraordinary law is what lies at the very top of the legal hierarchy of a constitutional state. See Thomas C. Grey, "Constitutionalism: An Analytic Framework,” in \textit{Constitutionalism}, ed. Roland J. Pennock and John W. Chapman, NOMOS (New York: New York University Press, 1979), 195.


\textsuperscript{167} Alexander Hamilton et al., \textit{The Federalist : a collection} (Indianapolis, IN: Liberty Fund, 2001). 438. Admittedly, it is only clear whether Hamilton had Federal or only state law in mind.


\textsuperscript{169} Kelsen, \textit{General Theory of Law and State}: 124.
the legally legitimate process of legislating.\textsuperscript{170} Extraordinary law does this by constructing the institutions of government, outlining the rules they operate through, and assigning some of them the task of and the authority needed to legislate.

For theories of constituent power, the distinction between extraordinary and ordinary applies to political actors and political power as well as law. This sets these theories apart from Kelsenian strains of legal positivism, where the validity of extraordinary law rests on an abstract and assumed norm, rather than the decision of a primal authority.\textsuperscript{171} The legal and political institutions created and governed by the constitution are constituted bodies; the power they use is constituted power. This ordinary power manifests within existing legal institutions and procedures that form and limit its operation, determine its characters, and invest it with authority. All constituted bodies, from legislatures to judiciaries to the military, exercise constituted power in their day-to-day operation.

Unlike constituted ordinary political power, extraordinary political power is exercised infrequently, and only to accomplish the very specific task of creating a constitution.\textsuperscript{172} Constituent power is the name given to both the author of extraordinary law and the extraordinary

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\begin{enumerate}
\item[Hannah Lerner,] Making Constitutions in Deeply Divided Societies (Cambridge: Cambridge University Press, 2011), 16.
\item[Kay, "Constituent Authority," 4-5; Bruce A. Ackerman, We the people (Cambridge, Mass.: Belknap Press of Harvard University Press, 1991), Book. 6-10.]
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\end{footnotesize}
power that it wields, though the former is also referred to as constituent authority.¹⁷³ Put simply, the constituent authority exercises constituent power when creating its constitution.

Admittedly, this definition of constituent power elides the distinction between pouvoir constituent originaire and pouvoir constituent derive, between the original constituent power that creates a constitution and the derived constituent power that amends a constitution within an existing constitutional framework.¹⁷⁴ These twin concepts, developed by scholars such as Raymond Carre de Malberg and Rogern Bonnard, are common within French Constitutional Theory. However, as Schmitt forcibly argues, the power to amend the constituent is not constituent power, and thus the distinction dissolves.¹⁷⁵ Derived constituent power describes a type of power that operates within the confines of constituted bodies and constitutional rules. While a constitutional amendment, even one produced by a popular referendum, can alter the constitution, its process is dictated by the constitution and thus it leaves the normative superiority and sovereignty of the constitution intact. Since, as I show below, constituent power is inherently unconstrained, derived constituent power is not constituent power at all.

1.2 CHARACTERISTICS AND SUBJECT OF CONSTITUENT POWER

Three central characteristics of constituent power follow from the distinction between extraordinary and ordinary law and power. First, constituent power cannot be regulated by law

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¹⁷³ Sometimes constituent authority is used in a different sense. For instance, Kay uses it to refer to "that quality in a person or persons that enables them to produce an effective positive law constitution. Kay, "Constituent Authority," 7.


or constituted authority. On the one hand, the emergence of constituent power and the mere occurrence of constitution-making signal a deep dissatisfaction with the current mode of government. This, at least practically, deprives its components of their legitimacy, meaning that during the creation of a new constitution the constituted bodies, ordinary law, and constitution of the old regime would lack whatever power regulating the constituent authority entails. Elster describes this reasoning in regards to a constituent assembly invested with constituent power: “Almost by definition, the old regime is part of the problem that a constituent assembly is convened to solve. There would be no need to have an assembly if the regime was not flawed. But if it is flawed, why should the assembly respect its instructions?”

On the other hand, the inability of constituent power to be regulated follows directly from the nature of the constitutional legal hierarchy; since constituent power is the source of constitutional law, and thus the source of all authority in a legal system, nothing within this system has the power to constrain it. To claim otherwise is to mistakenly insist, in the words of Richard Price, that, “there ought to be a power in the state superior to that which gives it being.

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176 This includes international law as well, which is particularly at odds with the legal hierarchical logic of constituent power. Thus, attempts to impose international legal requirements on the nature of constitution-making procedures, for example the Mikmaq tribes attempt to gain a specific type of representation in the Canadian Constitutional Conference by appealing to article 25 of the ICCPR, are incoherent and unpersuasive for constituent power theory, which holds that no norms, even international ones, are capable of binding or influencing the constituent power. See Banks, "Expanding Participation in Constitution Making: Challenges and Opportunities," 1051-55; Franck and Thiruvengadam, "Norms of International Law Relating to the Constitution-Making Process."


178 Elster, "Forces and mechanisms in the Constitution-making process," 370.
and from which all jurisdiction in it is derived.” Thus, extraordinary law is unable to regulate constituent power because it is the creation of said power, and creations are always inferior to their makers. This logic applies all the way down the hierarchy: constituted bodies and the ordinary law they create are unable to regulate constituent power because they cannot have a power or ability beyond that possessed by extraordinary law itself. As Vindiciae Contra Tyran-

nos explains, “He who is established by another is under that person, and he who receives his authority from another is less than the person from who he derives his power.”

Of course, despite the fact that constituted bodies and law cannot regulate constituent power, they often try. In many instances, these attempts end in failure. Most famously, both the U.S. Federal Convention and the 1789 Assemblée Nationale Constituante violated the demands and restrictions imposed upon them by constituted bodies and preexisting legal systems. However, in other cases, the constituent power acts in accordance with existing procedures or institutional directives. For instance, the creation of the South African constitution followed the procedures set out in the interim constitution enacted by the final apartheid Parliament and the 2010 Kenyan constitution-making process followed the procedures laid out in

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180 “No constitutional law can confer a constitution-making power and prescribe the form of its own initiation.” Schmitt, Constitutional Theory: 132.


a 2008 amendment to the existing constitution regarding the proper legal methods for replacing the constitution.\textsuperscript{183}

A proponent of constituent power theory, in which the constituent power is immune to such attempts at constraint, has to interpret these events in one of two ways. She might claim that constituent power played no role in these processes, and that therefore either an illegitimate constitution was created or an old constitution was simply altered by constituted powers. Or, she might claim that in each case the constituent power did create the constitution, and that it chose rather than was forced to manifest and act in accordance with preexisting procedures.\textsuperscript{184}

A second characteristic of constituent power is that it is extra-legal and self-authorizing. It emerges \textit{ex nihilo} and authorizes both itself and the resulting legal and political system by its sheer existence and action. Since “the power to constitute,” Kalyvas states, “refers to the origins of higher constitutional norms, the very foundation of any valid legal system, it cannot be traced back to any juridical norm, simply because a norm does not yet exist.”\textsuperscript{185} Thus, constituent power emerges from an “extra-legal zone” and is unsupported by any authoritative legal structure, yet serves as the source of all legal and political authority within a state. It therefore


\textsuperscript{184} In addition, as Kay explains, sometimes the masking of an exercise of constituent authority behind a façade of legality serves important political interests. See Kay, "Constituent Authority," 22.

\textsuperscript{185} Kalyvas, "Sovereignty, Democracy, and the Constituent Power," 227. Kay writes something similar: “to inquire into the authority to make a new constitution is exactly to ask who may establish law without legal sanction.” Kay, "Constituent Authority," 20.
authorizes without being authorized, and founds without being founded.\textsuperscript{186} This is why, for theories of constituent power, constitution-making is described as a break, an exception, or a rupture, a radically creative event that results in the formation of a genuinely new political order that traces its authority to nothing but the unauthorized constituent power and the facticity of its founding act.\textsuperscript{187}

Third and finally, the constituent power is irreducible to the established legal and political order that it substantiates. In other words, the constituent power creates, rather than transforms into, constituted powers. It thus remains something distinct from the legal and political institutions of government it produces. Whether this means that constituent power disappears after the creation of a constitution is one of several central questions or ambiguities in the constituent power literature that I discuss below.

Who then is the constituent power? What can ground a political order by serving as the ultimate source of authority for its norms, legal rules, and institutions? What is self-authorizing, immune to external constrains, and irreducible to government? The preamble to the German Basic Law gives us a clue: “…the German people, in the exercise of their constituent power, have adopted this Basic Law.”\textsuperscript{188} Constituent power resides in the people or nation—if a constitution is to be made, Sieyès explains, “the Nation alone has the right to do


\textsuperscript{187} Kalyvas, "Sovereignty, Democracy, and the Constituent Power," 228. Note that here one can see the social contract origins of constituent power theory, for the extra-legal and pre-juridical zone inhabited by constituent power is very much like the contractual concept of the state of nature or state of civil society. As Baczko explains: “the doctrine of the constituent power thus linked the principle of the social contract to political practice and aided their translation into action.” Baczko, "The Social Contract of the French: Sieyes and Rousseau," 106.

\textsuperscript{188} "Grundgesetz der Bundesrepublik Deutschland," (1949), Preamble.
so.” For theories of constituent power, then, the body of individuals that inhabit the territory to be governed in accordance with the new constitution is the constituent authority.

The location of constituent power in the people stems from the above-mentioned presupposition that no authority exists than can rightly create a coercive government other than the people to be ruled by it. This presupposition itself rests on a dismissal of all other sources of political authority (divine appointment, beneficial consequences, superior force, etc.) in favor of the political rightness of self-government, and in this sense theories of constituent power apply popular sovereignty to constitution-making. In fact, ‘popular sovereignty’ is frequently used interchangeably with or in place of ‘constituent power’ in discussions of constitution-making.

However, the type of sovereignty exercised by the people as constituent power is not the Bodinian type common to modernist accounts of the legal state. In other words, the constituent sovereignty of the people is not ‘command sovereignty,’ the absolute and perpetual power

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189 Sieyès, "What is the Third Estate?" 133.


191 Of course, exceptions exist. Schmitt alleges that the 1815 monarchical restoration in France proceeded on the grounds that the king was the subject of constituent power, and notes that a constitutional aristocracy or oligarchy in which constituent power lays within a small body of elites is at least within the realm of possibility. However, even he admits that these conceptualizations are unlikely and uncommon. Schmitt, Constitutional Theory: 131. See also Renato Cristi, "The Metaphysics of Constituent Power: Schmitt and the Genesis of Chile’s 1980 Constitution," Cardozo Law Review 21(1999). Alternatively, Oklopcic claims that external nations served as constituent powers in the creation of the constitution of Kosovo. Zoran Oklopcic, "Populus Interruptus: Self-Determination, the Independence of Kosovo, and the Vocabulary of Peoplehood," Leiden Journal of International Law 22(2009).

192 Preuss explains: “after the universal triumph of popular sovereignty in the decades after World War II, today the normative force of constitutions rests upon the constituent power of the people.” Preuss, "Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution," 468. See also Kay, "Constituent Authority," 27.
of highest command within a commonwealth. Command sovereignty is the coercive force wielded by an absolute superior to his inferiors, and lies at the root of Austinian conceptions of law as command. Constituent sovereignty, the type of sovereignty held by the constituent power, is productive rather than repressive, and has as its model legislation rather than coercive rule.  

### 1.3 Central Questions

Of course, no settled or uniform version of a theory of constituent power actually exists. Instead, there are several key puzzles and corresponding questions that divide different versions of the theory and drive debate. The three most central questions—relating to the identity, potential for action, and outcome of constituent power—are worth mentioning, for not only do they serve as the subject of most contemporary discussions of the concept, but they also point to some of the weaknesses inherent in any version of the theory.

The first question pertains to identity and poses the well-known democratic boundary problem, the question of who exactly should be included when making democratic decisions, to the process of constitution-making itself.  

It asks: what it meant by ‘the people’ or ‘the nation?’ Who is the subject of constituent power?  

In the context of constitution-making, when polities are being remade or created, the identity of the people becomes even more important and real than in ordinary politics. Here it is a matter of deciding upon the people, rather than

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193 See Kalyvas, "Sovereignty, Democracy, and the Constituent Power."


195 Chambers notes that while "everyone agrees that popular sovereignty is a defining feature of modern constitutionalism, there appears to be an equally strong consensus that we can talk about a 'people' exercising constituent popular sovereignty only in a very loose way." Simone Chambers, "Democracy, Popular Sovereignty and Constitutional Legitimacy," *Constellations* 11, no. 2 (June 2004): 154.
finding a way to glean their will. Two general answers to this identity question are common, each of which correlates to different conceptualizations of national identity and the relation between the people and their constitution.196

On the one hand, the people can be cast as an ethnos, a pre-political community constituted by some sort of commonness such as race, religion, history, culture, and the like.197 This conception of the nation as 'culture nation', to use Meinecke’s terminology, was especially prominent in 20th century German and Eastern European constitutional theory198 It corresponds to a 'nation-state constitution,' understood as a reflection and protector of the aspirations, values, and culture of a pre-existing society.199 According to Preuss, Schmitt had this conception in mind when discussing the sort of constituent power capable of creating a democratic state.200 More recently, this conceptualization of the constituent power as ethnos appeared rather literally within the Estonian constitution-making process, when the franchise specified for the 1992 Constitutional Referendum was limited to those born in Estonian in 1940 and their descendants.201

On the other hand, the people as constituent power can be conceptualized as a demos or state nation, a political construction consisting of the totality of citizens in an existing state or

196 Lerner, Making Constitutions in Deeply Divided Societies: 25.
199 Lerner, Making Constitutions in Deeply Divided Societies: 25.
201 This excluded 40% of the population, most of whom were ethnic Russians. Levent Goneng, Prospects for Constitutionalism in Post-Communist Countries, vol. 50, Law in Eastern Europe (The Hague: Martinus Nijhoff Publishers, 2002). 167-68.
one that emerges during the constitution-making process. Sieyès seems to understand the constituent power in just this way, describing the nation as the “body of associates living under a common law, represented by the same legislature, etc.,” and later as “the sum total of all the associates governed by, and obedient to, the law that is the work of their will.” The corresponding vision of a constitution to this demotic conception is a ‘liberal constitution.’ Such a constitution expresses a shared civic identity consisting in the ground rules of democracy and lawmaking as agreed upon by either a preexisting citizenry or one formed during the constitution-making process itself. Recent constitution-making efforts in post-conflict settings, and the corresponding literature that arose alongside and in response to them, utilize and endorse this conception of the constituent power. Here, constitution-making is cast as a process through which competing social groups and communities unite as the constituent power and become a nation tied together through mutually agreed upon extraordinary law.

The second central question, the action question, asks: how can the constituent power act? This query stems from the observation that the people seem unable to act in ordinary politics without the presence of institutions and procedures designed to collect, form, and channel the popular will. However, these institutions are unavailable to the constituent power. On the one

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204 Discussions concerning the rejection of the European Constitutional Treaty highlight this puzzle. Some theorists argue that the ECT failed because the EU lacked the necessary resources of common trust, solidarity, and understanding, i.e. a shared public sphere, while others argue that properly conducted public constitution-making creates such a shared public sphere, and that procedural deficiencies failed to create it and thus led to rejection.

hand, the occurrence of constitution-making means that any existing constituted bodies are relics from a previous regime that, as evidenced by the constitution-making activity itself, is no longer authoritative. On the other hand, “no type of delegated power can modify the conditions of its own delegation,” i.e. constituted bodies cannot be used as the means to modify the source of their own authority and the determinate of their own shape.

Moreover, the use of any formal institutions to enact the popular will qualifies as some sort of constraint, and the constituent power is that which cannot be constrained. As Schmitt notes, “even the attempt to establish a definitive representative or interpreter of the people’s will in some binding manner contradicts this theory,” yet the “execution and formulation of a political decision reached by the people in unmediated form requires some organization, a procedure.” Thus, a paradox arises because the people seem unable to act without the constituted forms they have the sole authority to construct. This action question reveals that when it comes to constitution-making, as Count Joseph de Maistre writes, the people sometimes appear to be “a sovereign that cannot exercise sovereignty.”


207 Schmitt, Constitutional Theory: 128, 32.


209 Note that this question is also central to the debate between Kelsen and Schmitt regarding the genesis of a legal system. As mentioned, Kelsen solves the puzzle by turning the constituent power into a presupposed Grundnorm unifying and legitimizing the self-enclosed constituted system of legal norms, while Schmitt insists that the constituent power can act, and that therefore “a constitution is a conscious decision, which the political unity reaches for itself and provides itself through the bearer of the constitution-making power.” Jospeh Marie
The third and final question, the outcome question, asks: what happens to the constituted power after the constituting act? Underlying this question is the fundamental tension between the formless extra-constitutional constituent power and the formal constituted power, and the apparent impossibility of the two existing simultaneously. The constituent power becomes visible in moments of constitution-making as the pre-juridical supreme source of all future constitutional legitimacy, yet it is unclear what happens to the constituent power once it births the constituted form. If the constituent power disappears, does this mean that constitution-making involves a Hobbesian transfer of sovereignty to the constituted powers? If the constituent power remains, how are constitutional laws more permanent and sacred than ordinary provisional legislation? Three answers to this outcome question are dominant: the constituent power is exhausted by and absorbed into the institutional and juridical sites of power that it constructs (Rawls, Dyzenhaus, Holmes); the constituent power remains as a latent revolutionary potential underlying and in tension with the constituted legal authority (Negri, Agamben); and the constituent power remains in the form of a commitment to popular sovereignty in constructive tension with the constituted powers (Habermas, Ackerman, Amar, Preuss).

These identity, action, and outcome questions, and the issues which they involve, are crucial to discussions of constitutionalism and founding acts and important for understanding the

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210 Forsyth explains: “In Hobbes’ system the people as constituent power are but a fleeting moment in the all-important process of establishing government.” Forsyth, “Hobbes’s Contractarianism: A Comparative Analysis,” 42.

211 Preuss discusses all of these answers in: Preuss, “Constitutional Powemaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution,” 143-64.
justificatory force of constituent power, yet none points directly to ratification. Here, our concern is with the puzzling relationship between the constituent power and one of the mechanisms through which it constitutes. The question we are concerned with is: Does ratification serve as a vehicle through which the people exercise their constituent power and therefore come to create or own their constitution?

2. FINDING CONSTITUENT POWER JUSTIFICATIONS

The above discussion makes clear why constituent power theory is a likely candidate for justifying the implementation of ratification procedures. Constituent power theory claims that only the constituent power can create a valid constitution, and ratification, in its various forms, seems to be a perfect example of the people doing just that. However, testing this intuition requires bringing constituent power theory into contact with the actual procedures and institutions of constitution-making, something avoided by both constitution-makers and constitutional scholars.

2.1 ABSTRACT NOT TECHNICAL

Constitutions are made using fairly standardized institutions and procedures. Throughout the five phases of constitution-making—prefatory, drafting, consultative, review, and adoption—a variety of discrete tasks take place. These can include choosing the various decision-making procedures to be used, educating the public, creating and populating constituent bodies, drafting the document itself, collecting public opinion, ensuring technical coherence, and ratifying

and implementing the finalized constitution. According to a theory of constituent power, somewhere amidst these tasks the constituent authority must emerge and act. The question is: where and when?

Discussions of constituent power usually avoid this question. Instead, they stick to abstract theorizing and generalities. Claims that a particular constitution is authoritative because it is the product of the popular constituent power or popular sovereign are rarely followed by a detailed discussion of how the actual constitution-making process validates this claim.

When process is mentioned in these discussions we mostly find vague statements such as “The Colombian people no doubt delegated their constituent power to the assembly” or unexplained equations of participatory creation with constituent power authorship. For instance, a pamphlet discussing the Nepalese process claims that participatory constitution-making results in “a constitution that is owned by the people.” Similarly, a constitution-making manual written for Somali stakeholders emphasizes that participatory procedures create a constitution that is “the fundamental decision of the people to be governed.” What is missing from these sorts of statements is an explanation accompanying the claims. How did the Colombian

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213 Interpeace’s recent guidebook for constitution-making—Constitution-making and Re3form: Options for the Process—lists 24 possible tasks or steps. Brandt et al., Constitution-making and Reform: Options for the Process. 33.

214 This is not to mention the numerous instances in which authors use the term ‘constituent power’ simply to indicate parties that had any influence on the creation of a constitution. See Dann and Al-ali, “The Internationalized Pouvoir Constituant - Constitution-Making Under External Influence in Iraq, Sudan and East Timor.”


people delegate their constituent power to the assembly? Why does increasing participation necessarily lead to the constituent power acting? In which instances and how often does the constituent power act within the constitution-making process?

Generally, authors tend to invoke the concept of constituent power, or to use popular sovereignty to mean the same thing, when making a general descriptive claim, stating a normative ideal, or gesturing towards some vague conception of legitimacy that a particular constitutional moment or constitution meets or falls short of. For legal scholars, as Claude Klein notes, the constituent power serves as “the alchemists’ philosophers stone,” used to somehow “account for the transition from the ante-judicial to an institutionalized legal system.”218 For political theorists, philosophers, and others of the same ilk, constituent power and the image of popular founding serve as a means to reconcile the existence of fundamental rights and entrenched extraordinary law with a conception of self-government based on the will and consent of the governed.219 When invoked for either of these purposes, constituent power is attributed to an entire constitution-making process without any attention being paid to what actually transpires. From the perspective of procedural design, these treatments of constituent power are of little use. In order to be of help in designing a constitution-making process, in selecting certain procedures and rejecting others rather than evaluating an entire process ex post, constituent power theory must move from the abstract to the particular; it must embrace and discuss the actual procedures and institutions used to create constitutions.


Our central concern with constituent power is its potential use in justifying the inclusion of a ratification procedure within a constitution-making process. Such a justification would claim that ratification must be used because it plays a central role in enabling the people to act. The contemporary literature on constitution-making regularly alludes to such an argument. For instance, Interpeace’s recent handbook, *Constitution-making and Reform: Options for the Process*, explains that: “Modern democratic theory and emerging international norms, such as self-determination, proclaim that the sovereignty of a nation is vested in the people. Since the constitution is the supreme law, a manifestation of national sovereignty, it is appropriate that the final word should rest with the people.” Restated, such a constituent power justification (CPJ) claims that: only the constituent power can create a valid constitution; that ratification enables the constituent power to act; and that therefore ratification must be incorporated within the constitution-making process.

Of course, as stated this justification is far too general to justify ratification. What does it mean for ratification to enable the constituent power to act? How exactly does the procedure give “the final word” to the people? In addition, where does constituent action occur? Does the constituent power manifest solely in the ratification process or in other moments within the constitution-making process as well? As all of this makes clear, exactly when, where, and how the constituent power acts during constitution-making is essential for clarifying and explaining just how exactly constituent power justifies ratification. Below I explore several different types of constituent power justifications that emerge from attempting to make some of these distinctions.

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2.2 Sieyès and the Problem of Assembling the Nation

The tendency for many discussions of constituent power and popular sovereignty to eschew the details of the constitution-making process likely results from a simple fact hinted at by the action question discussed above: the people cannot actually come together, draft a constitution, and enact it. At no point during the procedures and tasks commonly used to create a constitution is it clear that the people, whether ethnus or demos, are actually present and creating their constitution. For instance, the actual writing of a constitution is usually completed by a subcommittee of a constituent assembly and or an appointed constitutional commission, both of which frequently make recourse to drafts prepared through even less popular channels. Participatory mechanisms such as public meetings and the collection of constitutional suggestions directly engage only a portion of the population and are often filtered by elected or appointed officials with incredible leeway.

Sieyès, one of the founders of constituent power theorizing, confronts this problem in several of his works. For him, a constitution can only be established by the nation, a singular entity that must be distinguished “from an immense flock of people scattered over a surface of

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222 For example, the Zimbabwe Constitutional Commission held public meetings across the country, where the educated the public and solicited constitutional suggestions and commentary. Nine thematic committees were given the task of distilling the people’s will from the thousands of submissions received, a feat that proved to be impossible. As one author wrote, “In such circumstances it was quite possible for a reasonably competent draftsman to produce several very different constitutions and find justification in the submissions made to the commission for each one of them.” Hatchard, "Some Lessons on Constitution-making from Zimbabwe," 211.
Constituted powers cannot decide upon matters that touch upon the present or future base of their authority, for to do so “would be a petition of principle or a vicious circle.” The constituent power resides in this unitary nation, its expression is the general will, and it cannot be alienated. Further, when exercising the constituent power, the nation “exercises the greatest and most important of its powers” and, because of its extra-legal nature, “must be free from every constraint, every procedural formality but that which it decides to adapt.”

In these and other passages, Sieyès puts forward a theory that tracks the conception of constituent power discussed above. He explains that constituent power is the sole source of all constituted power and constraints, that constitutions create and organize constituted powers, and that therefore only the constituent power can create a constitution. Since constituent power rests in the nation, its exercise being the general will, Sieyès claims that the nation must create its own constitution. And, because it is the source of all possible political constraints, the nation is inherently unconstrained when engaged in constitution-making.

Applying this theory of constituent power to the practical demands of constitution-making, specifically the writing of the French Constitution by the Estates Generale and the National Assembly, led Sieyès to the logistical problem mentioned above. As he admits: “a great nation cannot in real terms assemble every time that extraordinary circumstances may require.” Put differently, it is simply impossible to assemble the nation and create a constitut-

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223 Sieyès, “Views of the Executive Means,” 5. See also Sieyès, “What is the Third Estate?,” 133.

224 Sieyès, “What is the Third Estate?,” 139.


226 Sieyès, “What is the Third Estate?,” 139.
tion. This is true for the obvious reason that an assembly of the entire nation, at least a modern one, cannot physically convene. Also, even if such an assembly were possible, it would be catastrophically stagnant due to its size and the deliberation necessitated by the constitution-making process.²²⁷

Sieyès was certainly not the first person to notice and struggle with the theoretical and practical difficulties plaguing attempts to use the legitimating will of the people to create a constitution. In the 17th century, both Royalists and Tories in England attempted to utilize this vulnerability in order to undercut arguments made by their opponents, who purported to speak for the people.²²⁸ Also, about twenty years before Sieyès, Rousseau addressed the same problem:

“Laws are, properly speaking, nothing but the conditions of the civil association. The People subject to the laws ought to be their author...but how will they regulate them? Will it be by common agreement, by a sudden inspiration? Has the body politic an organ to state its wills? Who will give it the foresight necessary to form its acts and to publish them in advance, or how will it declare them in time of need? How will a blind multitude, which often does not know what it wills because it rarely knows what is good for it, carry out an undertaking as great, as difficult as a system of legislation?”²²⁹

Rousseau solved this conundrum by declaring popular institution building impossible. In its place, he imported the ancient *deus ex machina*, the Lawgiver, to construct a just system of through which the general will governs.²³⁰

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²²⁷ Note that Sieyès is primarily concerned with the drafting of the constitutional text, suggesting that he sees this process as the key constituent moment.


²³⁰ Admittedly, this comparison with Rousseau might be misleading, for the distinction between higher and ordinary law is ambiguous if not completely lacking in *The Social Contract*. 
Sieyès refused to give up on constituent power constitution-making despite its apparent impossibility. Rather than rely on a Lawgiver, he turned to a special type of representation. He writes, “it [the nation] has, on such occasions, to entrust the necessary powers to extraordinary representatives.” Because the people cannot physically convene and create a constitution, Sieyès allows them to entrust constituent power to extraordinary representatives who can actually assemble.

On its face this solution is ambiguous, for what does ‘entrust’ mean in this circumstance? If it indicates the delegation of constituent power to extraordinary representatives engaged in constitution-making, this subjects the nation to decisions reached by an external constituted body and amounts to locating constituent power somewhere other than the people themselves. This violates two central tenets of Sieyès’ own conception of the constituent power. Sieyès’ solution thus runs into an obstacle, stemming from the literal interpretation of popular sovereignty and extraordinary lawmaking that underlies constituent power theorizing. If the people alone exercise constituent power, but constitutions must be created by some sort of smaller body or bodies, how can a constitution ever be the product of constituent power?

Sieyès overcomes this obstacle by veering into the metaphysical. He radically equates the will of the extraordinary representatives to the will of the nation, arguing that the assembly “is a surrogate for an assembly of the nation,” one that has “been put in place of the Nation itself as if it was it that was settling the constitution…their common will has the same worth as that of the nation itself.”

Extraordinary representatives assemble and create a constitution as if they are the nation itself, with a will of equal worth. In other words, Sieyès links will with rep-

231 Sieyès, “What is the Third Estate?,” 139.
presentation, thereby transforming (not transferring) the will of the nation into the will of the extraordinary representatives, and the unrestrained constituent power of the people into the constituent power of the extraordinary representatives.\textsuperscript{232}

If Sieyès’ vision of extraordinary representatives is tenable and theoretically sound, and for the sake of argument I assume this, it enables him to avoid the problems plaguing an account in which constituent power is delegated and transferred to a constituted body. When it comes to extraordinary representatives, constituent power is not located in something external from the nation, because the will and actions of the assembly are the will and actions of the nation. Further, conceptualized in this manner, extraordinary representatives do not and cannot externally constrain the popular constituent authority, for their will and decisions are no longer external to those of the nation. Moreover, nothing external constrains the extraordinary representatives either, for their Assembly “is not subject to any particular form” and can “assemble and deliberate as would the nation itself.”\textsuperscript{233}

2.3 MULTIPLE MOMENTS JUSTIFICATION

To restate, for Sieyès, extraordinary representatives wield constituent power when writing the constitution. Delegate Onslow Peters, during the Illinois Convention of 1847, put this point more bluntly: “We are the sovereignty of the State. We are what the people of the State would be, if they were congregated here in one mass meeting. We are what Louis XIV said he was,


\textsuperscript{233} Sieyès, "What is the Third Estate?,” 140. For similar interpretations of Sieyès, see Arato, Civil society, constitution, and legitimacy: 237; Jameson, The Constitutional Convention: Its History, Powers, and Modes of Proceeding: 291.
“We are the State.”234 Within this model of constituent power constitution-making, what role can ratification play? What would it mean to require representatives embodying the will of the people to submit their creation to the people for evaluation?

Three possibilities present themselves. First, ratification is an attempt by some meta-authority above the constituent power to control constitution-making. This interpretation can be rejected immediately because constituent power is that which cannot be constrained; it is the source of all political power. Second, ratification might be a procedure left over or specified by the previous regime or constitution to constrain and check future constitution-making attempts. This interpretation can also be rejected, for it turns ratification into a prototypical example of a constituted power trying to regulate the source of its own authority.

Third, ratification is simply another moment during constitution-making when the constituent authority emerges and acts. In the first instance, the constituent power takes the form of extraordinary representatives writing the constitution with the will of the people. In the second, constituent power manifests as the people review the constitution and decide if it is to their liking. This interpretation is an example of what we will call a multiple moment conceptualization of the relationship between constituent power and constitution-making procedures. Here, the people create their constitution by taking discrete actions during two or more moments of the constitution-making process. At each of these constituent power moments the people act through a given procedure, institution, or mechanism.

Thus, for example, a multiple moments conceptualization of the constitution-making process that led to the 2002 Rwanda Constitution might claim that it contained three moments of

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constituent power: the Constitutional Commission exercised constituent power while drafting the constitution; the National Assembly exercised constituent power when amending constitution; and those voting in the ratification referenda exercised constituent power when they approved the constitution. In each of these moments, albeit differently, the constituent power manifested and took action, and in combination they enabled the constituent power to create its governing document. Banks and Alvarez seem to conceptualize ratification in just this way when discussing the opportunities Colombian constitution-makers missed by choosing not to use popular ratification. They write, “Popular ratification...gives the people another chance to decide whether they want a new charter.”

A multiple moment justification is a type of constituent power justification that relies on a multiple moment conceptualization of constituent power and constitution-making.

Multiple Moment Justification: Ratification should be implemented because it is one of several moments in the constitution-making process when the constituent power acts.

As stated, this justification is severely underdeveloped. At the least, some sort of argument is needed to explain how ratification functions as a moment of constituent power and why, in the presence of other sites of constituent action, its implementation is required. For instance, if the constituent power operated during the drafting and amending phase in Rwanda, why did the constitution need to be submitted to a ratification referendum? Why were two prior moments of constituent power not enough?


However, developing the argument further is unnecessary because of a more basic flaw within a multiple moment justification: any moment of constituent power after the first is either redundant or contradictory. Consider Sieyès’ characterization of the constituent assembly. Since the will of the extraordinary assembly is necessarily the will of the people, the creation of the former is necessarily the creation of the constituent power. In other words, the constitution produced by extraordinary representatives is and always will be the work of the constituent power. Submitting the constitution to ratification, and conceptualizing ratification as another instance in which the constituent power acts, means that ratification involves the constituent power deciding whether or not to adopt its own creation.

Think of the two possible outcomes. If the constitution is approved, ratification is entirely redundant; if the constitution is rejected, the constituent power is contradictory and the procedure incoherent. On the one hand, the constituent power accepts the constitution it created during ratification. There is no need to utilize a procedure that tasks an actor with accepting its own creation, let alone justify the procedure on the basis of this function. On the other hand, if the constituent power rejects the constitution through ratification, the constituent power is incoherent and the ratification procedure contradictory. What does it mean for the constituent power to reject something it just created? Neither outcome provides a firm justification for including a ratification procedure within a constitution-making process. Simply put, if constitution-making representatives embody the will of the people and exercise constituent

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237 Assuming that their drafters were extraordinary representatives, the approval of the 1997 Polish Constitution is an example of the former, and the rejection of the 1998 Australian Constitution of the latter.
power, there is no justification for implementing ratification on the basis of the need for further constituent action.

The nineteenth century political scientist and historian, John Joseph Lalor, concisely spells out the redundancy of ratification for a Sieyesian theory of constitution-making and the constituent power. Describing the ‘French theory of convention,’ he writes:

"[T]hat by reason of the impracticability of an actual assemblage of the sovereign body itself, the convention must be taken to be its plenipotentiary representative, and, as such, possessed of all the powers that the body would have were it ‘assembled on some vast plain,’ in a state of nature, without government, but purposing to ordain and establish one by its original authority; ...a body which is virtually the people itself could not properly be required to refer its work to the people for approval. Hence, according to this theory, if a convention frame or amend a constitution, no submission of it to the people need be made."

This objection to justifying ratification by appealing to constituent power within a Sieyèsian framework applies to any attempt to justify ratification using a multiple moment justification. If previous moments in the constitution-making process involved the constituent authority determining the form and content of the constitution, i.e. creating the constitution, there is simply no reason to implement a redundant procedure in which the constituent power evaluates its own work.

3. OBJECTIONS & OTHER JUSTIFICATIONS

Several objections to the above reading of Sieyès, and to my treatment of MMJ, are possible. For instance, one might claim that Sieyès explicitly endorses ratification in some of his later writings and that therefore my analysis is inaccurate. Alternatively, one might claim that ratification is neither redundant nor contradictory, for if the people approve the constitution it

means that its creators were extraordinary, and if the people reject the constitution it means they were not. Ratification thus serves as a means to ensure that the constituent power wrote the constitution.

This objection presumes that during the ratification process the constituent power unambiguously makes its will known, such that its decision is final and beyond reproach and overrides all previous actions taken during the constitution-making process. When a constitution is rejected, it means that the constituent power never acted earlier in the process or was overridden by some other actor. When a constitution is accepted it means that the constituent power approves of and creates the constitution, regardless of how it was created. Justifying this conception of ratification requires one of two things: either the knowledge that the constitution-making process went wrong before ratification, or the claim that all constitution-making procedures, other than ratification, might fall short of channeling constituent power. I consider two justifications of ratification that proceed along these lines, as well as Sieyès apparent endorsement of ratification, in this section.

3.1 SIEYÈS AND THE SECOND CONSTITUENT ASSEMBLY

An objector to the above reading of Sieyès might point to the following passage in the “Reasoned Exposition of the Rights of Man and Citizen,” where Sieyès seems to explicitly depict ratification as a moment of constituent power and recommend its implementation:
They [the National Assembly] will, consequently, act as a constituting power. And yet, since the existing Assembly does not precisely meet the requirements for the exercise of such a power, they declare that while the constitution that they are going to give the nation is provisionally obligatory, it will only become definitive after a new constituent power, convened specifically for this purpose, will provide it with the sanction necessitated by a rigorous application of principles.\textsuperscript{239}

This passage can be interpreted in one of three ways. First, it might be an instance in which Sieyès portrays ratification as a second moment of constituent power and thus endorses something like a multiple moment justification. This seems to be the interpretation of Lucien Jaume, who suggests that for Sieyès, alongside extraordinary representatives, “a procedure for ratification of the Constitution, once drafted, would have been required,” because “the nation would have to be consulted in order to express the view of whether this Constitution was really theirs—that is to say, the expression of their constituent power.”\textsuperscript{240} Note that even if such an interpretation is correct, it does not provide us with a reason for submitting a constitution created by the people to the people, nor does it provide an additional constituent power based justification for ratification, i.e. it does not salvage the multiple moment justification or help us construct a different type of constituent power justification. Instead, it simply portrays Sieyès as calling for a procedure that is unnecessary in the lights of his own theory.

Second, Sieyès might not be calling for ratification at all. In chapter six of “What is the Third Estate?” Sieyès explains two ways in which the Third Estate could “put itself in possession of the place in the political order that is its due” through the National Assembly.\textsuperscript{241} The first path consists in the deputies of the Third Estate separating from the nobility and clergy,

\textsuperscript{239} Sieyès, “Reasoned Exposition of the Rights of Man and Citizen,” 136.


\textsuperscript{241} Sieyès, “What is the Third Estate?,” 151.
equating their will with the constituent will of the nation due to their majority status, and enacting a constitution. The second path is identical to the first, except the deputies do “not enact anything definitively,” and instead create a provisional constitution. Afterwards, they must “demonstrate the need to give special powers to an extraordinary deputation” that would “settle, above all else, the great matter of the constitution.”

In the passage, Sieyès might simply be articulating the second path for the Third Estate, recommending that the Constituent Assembly temporarily adopt a provisional constitution to govern France until a truly extraordinary constituent assembly convenes. This second assembly would evaluate the provisional constitution and make any necessary changes. According to this reading, only the second assembly would be a site of constituent power, there would be no multiple moments of constituent action, and ratification, defined as the up or down vote on a constitution by actors uninvolved in the drafting process, would never occur. Thus, this interpretation provides no alternative constituent power justification.

Third, Sieyès might be using ratification for ameliorative purposes and only recommending the procedure because of prior deficiencies in the National Assembly. Though Sieyès notes that “the existing Assembly does not precisely meet the requirements for the exercise of such a [constituent] power,” he does not spell out the shortcoming. Two seem likely. On the one hand, the membership of the National Constituent Assembly in July 22, 1789 (when the above was written) did not reflect Sieyès’ initial vision. The Assembly consisted of the same

242 Ibid., 152.
244 This sort of process would be a nascent version of the interim constitutional arrangements famously deployed in the making of the 1997 South African Constitution.
delegates elected by the three estates to serve in the Estates-Generale in order to address the financial troubles plaguing France, not the sort of extraordinary representatives elected specifically for the purpose of creating a new Constitution that Sieyès wished for and theorized in the first sections of “What is the Third Estate?”

On the other hand, the Assembly engaged in constitution-making and ordinary governance, thus becoming both extraordinary and ordinary lawmakers. This is something Sieyès specifically warned against; “In politics, mixing up and conflating power is what constantly makes it impossible to establish social order.”245 The combination of these deficiencies might have led Sieyès to conclude that the National Constituent Assembly did not possess the constituent power of the people and did not necessarily articulate the general will. His endorsement of ratification is thus an attempt to convocate the constituent power for the first time.

This third interpretation of the passage points to another potential constituent power justification, the ameliorative function justification.

\textit{Ameliorative Function Justification:} Ratification should be implemented because it provides a moment of constituent power needed because of deficiencies that prevented an earlier moment or moments of constituent power from taking place.246

Several things are worth noting about the ameliorative function justification. First, it implicitly endorses the dismissal of the multiple moment justification. By justifying ratification due to

\footnote{Sieyès, “What is the Third Estate?,” 143.}

\footnote{Once again, Banks & Alvarez seem to conceptualize ratification in just this way. They argue that the Colombian Constitution should have been submitted to popular ratification because doing so “effectively counters the positivist argument that the new Constitution was not authorized and is therefore illegal.” In other words, they argued that ratification would have been a tool used to link the constitution with the constituent power despite previous insufficiencies in the constitution-making process. Banks and Alvarez, “The New Colombian Constitution: Democratic Victory or Popular Surrender,” 81.}
deficiencies in prior constituent power moments, the ameliorative function justification implies that in the absence of these deficiencies, ratification would be unnecessary. Second, it seems liable to run into all sort of practical problems, such as identifying a proper authority to judge whether or not deficiencies are present. Most importantly, however, it can be rejected because it is not a proper constituent power justification.

The central question motivating this dissertation is whether general reasons exist for including ratification procedures within designed constitution-making processes. This means that a constituent power justification, like any type of justification that would answer our question, must provide a normative reason for using ratification procedures from the beginning of the constitution-making process. The ameliorative function justification, which only justifies ratification if specific problems emerge during the process of creating a constitution, does not provide such a reason and is thus not an acceptable constituent power justification. It turns ratification into an ad-hoc particular solution, rather than a justified component of constitution-making more generally.247

3.2 MULTIPLE ATTEMPT JUSTIFICATION

A constituent power justification similar to the ameliorative function justification—one that seizes upon the intuition that ratification procedures provide a final opportunity for the people to stop a constitution-making process gone wrong—becomes possible if we adopt a slightly different conceptualization of the relation between constitution-making procedures and the workings of the constituent power. Up until now, in accordance with a multiple moment con-

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247 Disregarding these objections, AFJ would run into other sorts of problems such as identifying a proper authority to judge whether or not deficiencies are present and assigning a reliable source to initiate ratification procedures in the event that deficiencies occur.
ceptualization, we characterized different procedures as having the potential to serve as actual moments when the constituent power manifested and took action in accordance with its will. Under this assumption, the actions of properly extraordinary representatives are the actions of the constituent power, and the outcome of a ratification referendum simply is the constituent power’s decision.

However, there are numerous problems with this multiple moment conceptualization. For one thing, it takes its inspiration from Sieyès’ dubious claim that the will of extraordinary representatives is the will of the constituent power, and then applies such logic to other constitution-making procedures. This requires that we assume that the constituent power enacts its will through various mechanisms and institutions without problem, which overlooks the fact that political procedures sometimes produce unexpected outcomes. The delegates of constituent assembly might behave contrary to the wishes of their constituents. Fringe political parties might submit a disproportionate amount of comments on a draft constitution. And certain segments of the population might simply refrain from voting during referendums.

Similarly, the multiple moment conceptualization of constituent power overlooks the fact that individuals might have a variety of constitutional preferences, and that different aggregative procedures might result in different versions of the constituent will. It also ignores the fact that if the constituent power is a demos, such that it both acts within and is formed by the constitution-making process, it will look different from one constitution-making procedure to the next. Moreover, a multiple moment conceptualization fails to take seriously the unconstrained nature of constituent power, its inability to be accurately channeled through institutions and procedures of any type. Finally, it overlooks the possibility that the constituent pow-
er, like the individuals of which it is composed, might change its mind. In other words, the constituent power might change its views on what an acceptable constitution looks like throughout the constitution-making process.

These sorts of problems disappear if we adopt what can be called a multiple attempt conceptualization of constituent power. According to this conceptualization, no procedure is guaranteed to enable the constituent power to manifest and definitively take a stand on the constitution. Thus, the constitution-making process contains multiple procedures and mechanisms designed, in combination, to ensure that the constituent power creates its constitution, and that this constitution matches its overall will, or at the least to increase the chances that both of these occur. I will call a constituent power justification that uses this conceptualization a multiple attempt justification:

*Multiple Attempt Justification:* Ratification should be implemented because it serves as one of several procedures that in combination help to ensure that the constituent power creates its constitution.

As noted, this justification is similar to the ameliorative function justification, yet rather than being an ad-hoc solution to particular deficiencies ratification becomes a standard component of the constitution-making process because of the assumed imperfection of any attempt to harness the constituent power when writing the constitution.

However, the multiple attempt justification fails for two reasons. On the one hand, it justifies ratification on the basis of the claim that a constitution-making procedure meant to serve as a moment of constituent power might err. However, ratification is the final procedure in a constitution-making process, and in all of its forms it has two definitive outcomes: a constitu-
tion is either accepted or rejected. This means that either the multiple attempts justification excludes ratification from its central fallibility claim, or it recommends the inclusion of a procedure that it admits is fallible, yet has the final say on whether a completed constitution will go into effect. The former is contradictory, and the second is entirely unpersuasive. Attempting to get around this flaw leads to additional problems. For instance, the introduction of a further ratification process to double-check the first runs the risk of infinite regress, for why should a third and not a fourth ratification process be instituted for similar reasons.248

On the other hand, the multiple attempts justification seems to miss the entire point of constituent power theorizing more generally. Constituent power theory holds that the people must act and create their own constitution. Creating a constitution that aligns with the actual or considered preferences of the people is not the goal, nor is such an outcome sufficient. What matters for the purposes of constituent power is that the people actually take action. Thus, a multiple attempts justification, which conceptualizes the constitution-making process as a series of procedures that hope to approximate the will of the constituent power, misses this altogether and fails to enlist the normative force of constituent power theory.

4. CONCLUSION

On its face, constituent power theory appears to be the perfect candidate for justifying ratification. The people must create their constitution if it is to be authoritative, and ratification seems to provide just such an opportunity. However, as I have argued, figuring out the exact

248 Condorcet makes a similar point in his discussion of ratification. When examining the possibility of appointing a second convention to ratify the work of the first he writes: “Either this new Convention must be given the power to change what the first has done, in which case a third would have to be elected to ratify these changes, and so on…” Condorcet, “On the Need for the Citizens to Ratify the Constitution,” 274.
manner in which ratification justifies constituent power proves more complicated than this intuition suggests.

In this chapter, I explored the theoretical background of constituent power and drew out its chief characteristics. Constituent power theory extends the distinction between ordinary and extraordinary to the realm of political power. It posits the existence of an ultimate source of authority that creates the constitution and legitimizes the state. This constituent power, identified solely with the people, legitimizes itself, cannot be constrained by external sources of authority, and remains independent from the constituted powers it produces.

A constituent power justification justifies ratification by claiming that constitutions must be created by the constituent power and identifying ratification as playing some sort of role in enabling the constituent power to manifest and takes action. This makes identifying exactly when and where constituent power appears within the various procedures used to create a constitution an essential point of inquiry. As noted, constituent power theory is normally used retroactively to characterize constitution-making processes taken as a whole, and thus bringing the concept into contact with actual procedures is something that rarely occurs in the literature.

Starting from Sieyès’ attempt to explain how the people could actually write a constitution when a mass assembly is impossible, I posited three possible constituent power justifications. The multiple moment justification claims that ratification serves as one of several essential moments of constituent power in the constitution-making process. The ameliorative function justification defends ratification by characterizing it as a moment of constituent power made necessary by prior deficiencies in the constitution-making process. Finally, the multiple at-
tempt justification claims that the procedure was one of several imperfect attempts at creating, manifesting, and enabling the constituent power to act and make a constitution its own. Each of these justifications fails for different reasons. The first makes ratification a redundant or incoherent process, the second makes the procedure into an ad-hoc solution, and the third contradicts itself and misinterprets constituent power theory.

However, the flaws of these procedures push us towards a final constituent power justification that begs consideration. The multiple moment justification fails because any moment of constituent power manifestation makes all others unnecessary, such that the prior emergence of constituent power within a constituent assembly eliminates the need for ratification. However, what if no prior manifestation of the constituent power took place? What if the constituent assembly did not and was not supposed to be a moment of constituent action, meaning that ratification served as the sole site of constituent power?

An ameliorative function justification cannot be a constituent power justification, for it relies on observations made during constitution-making, thereby violating the ex-ante perspective of the latter. However, as an ad-hoc solution, the ameliorative function justification portrays ratification as a procedure through which the popular constituent power can act and create an authoritative constitution in the absence of other constituent moments, suggesting again that a ratification procedure involving the people might be sufficient for the purposes of constituent power theory.

One reason for the failure of the multiple attempts justification is that while the justification is motivated by the claim that any constitution-making procedure might err in channeling or enabling the constituent power to act, it either must exclude ratification from fallibility or
else risk being unpersuasive. However, if one chooses the former and characterizes ratification as a moment in the constitution-making process when the constituent power inevitably acts, this eliminates the need for multiple attempts at constituent power. In other words, it suggests an image of constitution-making in which the constituent power acts only during ratification, i.e. where ratification is the sole site of constituent power.

The idea that ratification serves as the only site of constituent power, which the failure of these justifications suggests, points to a final type of constituent power justification. According to it, ratification should be implemented because the constituent power must create its constitution, and ratification is the only moment in the constitution-making process when the constituent power is able to act and make a constitution theirs. This *sole moment justification* is immune to the deficiencies that plagued the justifications considered above and is the subject of the following two chapters. As I will show, it also happens to be the argument used by the early Americans to explain why they demanded the right to ratify their constitution.
THE DOMAIN OF CONSTITUENT POWER:
The Berkshire Constitutionalists Explain Ratification

“We beg leave to therefore to represent that we have always been persuaded that the people are the fountain of power. That since the Dissolution of the power of Great Britain over these Colonies they have fallen into a state of Nature. That the first step to be taken by a people in such a state...is the formation of a fundamental Constitution as the Basis and ground work of Legislation. That the Approbation of the Majority of the people of this fundamental Constitution is absolutely necessary to give Life and being to it. That than and not 'till then is the foundation laid for Legislation.

Thomas Allen

Indeed, it was if all the imaginings of political philosophers for centuries were being lived out in a matter of years in the hills of New England.

Gordon Wood

Does conceptualizing ratification as a moment of constituent power justify its use? As argued in the previous chapter, it does not if we understand ratification to be one in a series of such moments. For instance, in Sieyès' theoretical landscape, ratification is simply an incoherent or redundant procedure, a second moment of constituent power that needlessly checks the work of framers already embodying the popular will. However, nothing about the nature of constituent power entails its manifestation in any particular stage of the drafting process, and Sieyès' argument is simply one result, albeit a popular one, of applying constituent power theorizing

to the procedures involved in creating a constitution. An alternative conceptualization of the emergence of constituent power, one different from Sieyès' and the other variations considered above, might be able to explain ratification without resulting in similar redundancy or incoherence.

In fact, such an account exists. It is embedded within the constitutional theory of the Berkshire Constitutionalists, a political faction in Western Massachusetts that played an active role in the events leading up to the creation of the Massachusetts Constitution of 1780. Using a method of dissent they initially pioneered to protest British rule, the Constitutionalists successfully prevented the local courts of law from sitting in Berkshire County and the surrounding towns from 1774 to 1780, effectively denying the civil authority of the newly independent government any jurisdiction in the area. They led this virtual rebellion to protest what they saw as an illegitimate provisional government operating from Boston, to advocate for the principles of popular control of political authority, and most importantly to call for the creation of a new constitution.

In the course of their battle with the state authorities, during which they remained ardent supporters of the patriot cause in the revolutionary war, the Constitutionalists articulated the first argument for why a constitution should be ratified, and their writings remain some of the most extensive theoretical discussions of the topic to date. Moreover, they provide a means of reconciling constituent power, constitution-making, and ratification, without resulting in the problems detailed above. Put simply, the Berkshire Constitutionalists argue that the exercise of constituent power is unalienable, emerging solely during ratification and never penetrating the drafting process. They thus take the basic premise of theories of constituent power—that
only the people can create and authorize a constitution—and interpret it literally. For the Constitutionalists, the people only create a constitution when every eligible voter has the opportunity to be a direct participant, which means being able to approve or reject the written constitution directly.

In this chapter, I introduce the Berkshire Constitutionalists, explain their role in Massachusetts’s constitutional development during the Revolutionary War, situate their writings within the contractual tradition popular at the time, and reconstruct their theory of constituent power. I then argue that this conceptualization of ratification as the first and only site of constituent power suggests a strong route for justifying the procedure, a sole site justification, which avoids the problems plaguing other forms of constitution power justification.

1. HISTORICAL CONTEXT, THEORETICAL CONTEXT

The Berkshire Constitutionalists developed their theory of constituent power and ratification during the tumultuous series of political events that led to the replacement of the aging Province Charter with the oft-celebrated Massachusetts Constitution of 1780. This period is well-traversed ground—as one historian notes, “for generations, historians... have been obsessed with the Massachusetts constitution of 1780”—and is covered in many if not most treatments of Early American history and the development of American political thought. Nonetheless,

in this chapter I sketch out the history of constitution-making in Massachusetts, paying particular attention to the events that the Constitutionalists reacted to and played an active role within.

This focus is warranted because the history of the Berkshire Constitutionalists is the history of those who first came up with, argued for, and successfully implemented ratification. Their actions led to the procedure becoming the ubiquitous component of constitution-making that it is today, they began the practice of ratification, and are thus of obvious interest to anyone wanting to understand ratification generally. Moreover, the Constitutionalists did not write free-standing philosophical treatises and essays. Instead, their political theory must be distilled from a variety of documents firmly embedded within the constitution-making events of the time, a task that requires historical engagement for its success.

In addition, focusing on this history has the benefit of revealing certain limitations of state constitution-making grand narratives. Consider Gordon Wood’s *Creation of the American Republic*, which despite its many attributes screens out state-specific political and theoretical variance by focusing on patterns of general state formation. For Massachusetts alone it filters out the early emphasis placed on ratification, fails to explore local political factions to any significant depth, and overlooks the fact that higher law constitutional thinking arose in the mid 1770s, rather than a decade or two later. In addition, Wood’s and similar accounts collapse the different reasons underlying the demand for ratification and constitutional conventions. Both serve to distinguish a constitution as higher law, but the call for ratification occurred earlier

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and was primarily based on a particular conception of constituent power, rather than on the inability for a legislative body to limit itself.  

At the same time, even when placed in their appropriate historical context, many of the Constitutionalist's arguments appear incomplete, vague, or, even worse, mistaken. For instance, they claim that the dissolution of British authority sent the colonies “into a state of nature,” an assertion that appears to neglect the intermediary stage of civil society and thus contradict most sophisticated accounts of the transition from and into the state of nature (PP, 90). Or take their central argument regarding ratification, which boils down to the assertion that the people have an unalienable right to directly approve or reject their constitution. Unalienability means that a right cannot be voluntary given away or exchanged, and it is unclear how one can justify ascribing such a property, usually reserved for rights pertaining to basics

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252 Of course, studies focusing on early constitution-making in Massachusetts and the Berkshire Constitutionists exist and are cited throughout this chapter. However, many of these focus on the history rather than the ideas of the Constitutionists, or treat the latter in a manner that is distorting or purely descriptive. For instance, Taylor presents the seminal history of their activities, but his Beardsian approach reduces their political philosophy to expressions of economic and social angst. Subsequent historians have corrected this depiction—for example Hammett demonstrates that the disagreement between Constitutionists and others in their country had little to do with economic and social distinctions—yet still only provide a superficial analysis of the theoretical content of the Constitutionalist’s arguments. Peters is the only scholar to seriously engage with the theory of the Constitutionists, but he does so in passing and his approach is hostile without explanation. Theodore M. Hammett, “The Revolutionary Ideology in its Social Context: Berkshire County, Massachusetts 1725-1785” (Dissertation, Brandeis University, 1976); Robert J. Taylor, Western Massachusetts in the Revolution (Providence: Brown University Press, 1954); Ronald M. Peters, The Massachusetts Constitution of 1780: A Social Compact (Amherst: The University of Massachusetts Press, 1978). 29.

253 This 'mistake' is one of the main reasons that some historians describe Thomas Allen and the Constitutionists as "illogical and shallow in his [or their] reasoning." Peters, The Massachusetts Constitution of 1780: A Social Compact: 29, 98-103. According to Tate this neglect of civil society was common, for nearly all "American spokesmen...failed...to distinguish between the separate contracts of society and of government. They often proclaimed that the demise of the old royal government had destroyed society as well as brought them to a 'state of nature,' when the rest of their argument made it abundantly clear they meant no such thing." Thad W. Tate, "The Social Contract in America, 1774-1787: Revolutionary Theory as a Conservative Instrument," The William and Mary Quarterly 22, no. 3 (Jul., 1965): 376.
like life, movement and belief, to something so specific and historically contingent as the formal approval of a written constitution.

In order to better understand these claims, and to reconstruct the Constitutionalists’ theory more generally, we need to examine not just the history, but also the constellation of political ideas that informed the Constitutionalists’ approach. This seems like a daunting task, for like many during the Revolution, a variety of intellectual traditions likely influenced the Constitutionalists. Ideas mattered in Early America, but the exact nature and pedigree of these ideas has been the subject of an interpretive dispute for over half a century. The most productive yet contentious debate, linked to a larger discussion in Anglo-American modern political thought more generally, lies between the liberal and republican schools of interpretation.254

On the one side, scholars such as Becker, Hartz and Rossiter, later joined by more contemporary authors such as Appleby, argue that the predominant influence on political discourse and constitutional theory in early America was a Lockean-liberal political tradition emphasizing natural rights, an instrumentalist conception of government, and individualism.255 In opposition, scholars such as Bailyn, Pocock, and Wood claim that the republican tradition, with its focus on citizenship, political participation, virtue, and mixed government, played the


more central role. This debate becomes more complicated because neither side is monolithic; for instance the origins of American republicanism lay in the works of English radical opposition Whigs for Bailyn and Italian civic humanism via English Machiavellians for Pocock. Moreover, debates within Anglo modern political thought regarding the number and nature of political ideologies in 17th and 18th century England, as well as recent works pointing to the influence of American religious institutions and colonial experiences in self-government, make the task of understanding ideas in Early America all the more difficult.

For our purposes, however, matters are simpler than this makes them appear. We are interested in understanding the Berkshire Constitutionalists’ approach to founding a new government after the demise of British authority, not the relative influence of theoretical traditions on the formation of early American political thought more generally. As we will see, this specific subject matter, as well as the language used by the Constitutionalists and the authors they site, points solidly towards contractualism, a theoretical trope that cuts across schools of political thought in its usage. Thus, the writings of English Republicans such as Algernon

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258 I use the words ‘contractualism’ or ‘social contract’ because of their prominence in the literature. However, it is important to note that different authors used different words, such as covenant and compact, which sometimes conveyed slightly different meanings. Moreover, in the American context, compact is more appropriate, for it specifically referred to a self-authorizing covenant. See Donald S. Lutz, The Origins of American Constitutionalism (Baton Rouge: Lousiana State University Press, 1988). 18. For information regarding the
Sidney, radical opposition Whigs such as the authors of *Cato’s Letters*, and liberals such as Paine regularly appeal to contracts and compacts in which individuals cede personal liberties to create society and delegate limited powers to appointed rulers.\(^{259}\)

The pamphlets and newspaper articles from the time support this emphasis on contractualism, for they indicate that Massachusetts was awash in social contract thinking. For instance, a 1772 article in the Massachusetts Spy notes that “a man when he enters into society is only part of a whole; from this result many benefits of which he could not experience in a state of nature.” In their Proclamation of January 23, 1776, the General Court writes that “the Consent of the People is the only Foundation of [government]...and therefore every Exercise of Sovereignty, against, or without, the Consent of the People, is Injustice, Usurpation, and Tyranny.”\(^{260}\) This decision to use social contract theory in a proclamation designed to justify the Revolutionary War and elicit public support and obedience attests to the diffusion, if not the acceptance, of contractualist logic in the Commonwealth at the time.\(^{261}\)

In addition, social contractualism combined with, added to, and drew support from the century old practice in New England of consensually creating new religious and political communities through covenants and compacts.\(^{262}\) This practice, likely originating in the old Pur-
tan belief that the history of humanity is the history of covenants, was particularly alive in the Western towns, most of which were established, along with their churches, in the thirty year period preceding the Revolution.\textsuperscript{263} Further, by the mid-eighteenth century contractualism was fully embedded in Congregationalism, the dominant form of Protestantism in the colony, and its clergy integrated contractual ideas drawn from Scottish Enlightenment and Whig political thought into their theological dogma.\textsuperscript{264} Thus, the Constitutionalists acted in a context where both the theory and practice of contractualism was very much alive. So, rather than engage with and take a position in the methodological and interpretive disputes of early American political thought, we can combine the social contract tradition with historical context to more fully understand the Constitutionalists’ arguments.\textsuperscript{265}

2. HISTORY OF THE BERKSHIRE CONSTITUTIONALISTS

For our purposes, the struggle to create a constitution for Massachusetts began on May 20, 1774, when the British Parliament revised the colony’s charter by passing the Massachusetts Government Act, one of the five ‘Intolerable Acts’ designed to punish the colonists for their ongoing dispute with the Governor.\textsuperscript{266} The purpose of the act was clear: as Lord North stated,

\begin{itemize}
  \item \textsuperscript{263} Taylor, Western Massachusetts: 4; Kuehne, Massachusetts Congregationalist Political Thought: 35.
  \item \textsuperscript{264} Kuehne, Massachusetts Congregationalist Political Thought: 90-103; Abraham Williams, “An Election Sermon: Boston, 1762,” in American Political Writing during the Founding Era: 1760-1805, ed. Charles S. Hyneman and Donald S. Lutz (Indianapolis: Liberty, 1983).
  \item \textsuperscript{265} This is not to imply that conceptions of the social contract were particularly uniform in the 18\textsuperscript{th} century, so that focusing on them makes understanding the Constitutionalists’ theoretical background particularly easy. Rather, my point is that by focusing on a particular type of argument and considering its various versions and facets we can attempt to understand the intellectual context of the Constitutionalists’ writings without first deciding upon a favorite ideology.
\end{itemize}
it was meant “to take the executive power from the democratic part of Government.”

Local dissent erupted immediately, prompting Governor Thomas Gage to dissolve the General Court in June and issue writs for a new assembly to be convened on October 5th. To say that Gage’s actions backfired is an understatement. Rather than punish dissent by depriving the colonists of governmental power until the next election, Gage effectively cut himself off from fully functioning local political units that continued business as usual. Town governments remained in operation, committees of correspondences formed to enable communication across the commonwealth, local conventions supplemented the court systems (the chief means of royal control at the county level), and an increasing number of colonists began questioning the legitimacy of their now abrogated charter.

The events of 1774 not only fanned the flames of dissent in the northeastern counties and towns surrounding Boston, long the epicenter of resistance to British rule, but awoke radicalism in the Western counties of Berkshire and Hampshire as well. Traditionally, due to geo-

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267 Cited in Abner L. Braley, "Provisional Government of Massachusetts," in Commonwealth History of Massachusetts, ed. Albert Bushnell Hart (New York: Russell & Russell, 1966), 64. Before the Act, the Massachusetts government included a royally appointed Governor and Lieutenant Governor, a bicameral legislature (the General Court), and a judiciary branch organized by the General Court and filled through royal appointment and local election. The lower house of the General Court was the popularly elected House of Representatives, and the upper house, which also served as an advisory body to the governor, was the Council. Members of the Council were selected by the House and the outgoing Council. The Act eliminated terms limits for the Council and made them royal appointees, forbid town meetings without express gubernatorial consent, gave the Governor sole power to appoint and remove judges of the lower courts, and gave royally appointed sheriffs the power to choose jury members, rather than leave the decision up to town meetings. Samuel Eliot Morison, A History of the Constitution of Massachusetts (Boston: Wright & Potter Printing Co., 1917), 9-12.


graphic isolation, control by elite families loyal to the crown, and a general suspicion of Boston and its politics, the towns in these counties displayed relative indifference to the larger political and revolutionary questions of the day. Nonetheless, some radical Whigs resided in the region, foremost of whom was the Reverend Thomas Allen, the pastor of the Congregational Church in Pittsfield and the future “intellectual leader and mastermind” of the Berkshire Constitutionalists. The events following the Intolerable Acts gave Allen the opportunity to break free from the conservatism and sometimes-outright Toryism of the region’s leaders and drum up support for the patriot cause. He became the head of the Pittsfield Committee of Correspondence and, along with his growing team of radical Whigs, traveled throughout the region advocating the revolutionary project.

After a few minor political victories, Allen and his followers engineered a form of protest that went beyond the organized condemnations of the northeast. In August, the town of Pittsfield petitioned the Inferior Court of Common Pleas not to transact any business during

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271 Taylor, Western Massachusetts: 11-26, 77; John L. Brooke, “To the Quiet of the People: Revolutionary Settlements and Civil Unrest in Western Massachusetts, 1774-1789,” The William and Mary Quarterly 46, no. 3 (Jul., 1989): 435.


273 Allen pushed through Pittsfield and Berkshire’s adoption of the non-importation agreement in June and July 1774. See DeSorbo, “Reverend Thomas Allen and Revolutionary Politics in Western Massachusetts,” 57-59; William Lincoln, ed. The Journals of each Provincial Congress of Massachusetts in 1774 and 1775 (Boston: Dutton and Wentworth, 1838), 653.
the term. The language used in the petition betrays the political ideas already in circulation at the time, for it includes the claim that “the people of this province fall in a State of Nature until our grievances are fully redressed by a final repeal of those injurious oppressive and unconstitutional acts....” Three days later, a crowd of 1500 people prevented the judges from sitting. Soon after, on August 30th in the Hampshire County town of Springfield, an even larger crowd shut down the courts and forced court officials to swear not to enforce any part of the Massachusetts Government Act. These were the first instances of counties overthrowing the royal courts of justice, and patriots across the state approved and soon mimicked the Berkshiremen. By September, all normal judicial procedures had ceased colony-wide.

2.1 EARLY RESISTANCE TO THE CHARTER-BASED GOVERNMENT (1775)

Governor Gage responded to “the many tumults and disorders” and the “unhappy state of the Province” by cancelling the planned convocation of the General Court and resorting to abso-

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274 Hammett, "Revolutionary Ideology in its Social Context," 316. Four courts comprised the Massachusetts judicial system. Highest was the Superior Court of Judicature, which heard appeals cases and had original jurisdiction for major criminal and land-title cases. Next were the quarterly county courts. The General Sessions of the Peace, also known as the Court of Quarter Sessions, handled civil appeals and had original jurisdiction for cases concerning large sums and ordinary land titles. The Inferior Court of Common Pleas was one of the main governing bodies in each county, having jurisdiction over all but the most serious criminal cases and carrying out numerous administrative functions. Finally, the lowest courts were the Justices of the Peace, which handled minor violations of the peace. Taylor, Western Massachusetts: 27-30.


276 Thomas Gage, "Proclamation by Governour Gage, In consequences of the disordered state of the Province," in American Archives: Documents of the American Revolution, 1774-1776 (Northern Illinois University Libraries, September 28, 1774), 809. See also Taylor, Western Massachusetts: 75-76.

277 Steven E. Patterson, Political Parties in Revolutionary Massachusetts (Wisconsin: University of Wisconsin Press, 1973). 99. This

278 Braley, "Provisional Government of Massachusetts," 76; Smith, History of Pittsfield: 196, 325.

279 Patterson, Political Parties in Revolutionary Massachusetts: 100.
lute military rule.\textsuperscript{280} Despite this cancellation, representatives assembled in Salem and on October 7\textsuperscript{th} formed themselves into a Provincial Congress. Three Provincial Congresses informally governed the Commonwealth until July 1775. These bodies had no constitutional or legal status, and were meant to be temporary fixes, nothing more than a means of loosely organizing the towns and linking them to the Continental Congress and to General Gage while talks with the British continued. However, the events at Concord and Lexington made reconciliation with the crown unlikely and the need for a more stable and comprehensive government became clear.\textsuperscript{281} On May 5\textsuperscript{th} the Second Provincial Congress declared that “no obedience ought, in future, to be paid to Governor Gage. Eleven days later they applied to the Continental Congress for advice on how to set up a more permanent government.\textsuperscript{282}

In June, the Continental Congress responded, recommending that the colony “conform, as near as may be, to the spirit and substance of the charter,” while treating the Governor and Lieutenant Governor “as absent and their offices vacant.”\textsuperscript{283} Though it essentially amounted to an admission that the unrevised charter remained valid, colonial leaders followed these recommendations precisely.\textsuperscript{284} The Provincial Congress dissolved, new elections were held, the first House of Representatives of the State of Massachusetts Bay convened on July 19, 1775,

\textsuperscript{280} Gage, ”Proclamation by Governour Gage,” 809. See also Smith, History of Pittsfield: 326.


\textsuperscript{282} Lincoln, Journals of Each Provincial Congress, 193; Handlin, ”Introduction,” 9.


\textsuperscript{284} The Continental Congress’ advice still went against the British, for it recommended returning to the 1691 charter, and therefore undid the changes of the Massachusetts Government Act. See Kruman, Between Authority and Liberty: State Constitution Making in Revolutionary America: 12.
and its members soon chose a new council to exercise gubernatorial powers until the return of an amicable royal governor.

Revamping the old charter displeased many patriots, for it shackled the commonwealth to an ill-suited royal document that had been the chief instrument of its oppression. Moreover, the resultant government was inefficient and gave the power to appoint well-paid military and court officials to the General Court rather than local units, as was the custom under the Provincial Congresses.285 Discontent only increased when, five months later, the Continental Congress recommended that South Carolina and New Hampshire create new governments from scratch.286 To many in Massachusetts, it appeared that other states were being offered the opportunity to create their own government, while they were left with a recreated elite-driven political framework that drew its only authority from the very thing they were fighting against. Mild protests spread throughout the commonwealth, with dissension reaching its peak in Berkshire and Hampshire, where Allen and his followers transformed from simple patriots to the Berkshire Constitutionalists, a quasi political party that quickly made its demands known throughout the state.

In December 1775, the Constitutionalists successfully pushed through two resolves at a convention of the Berkshire Committee of Correspondences: the towns would not recommend supporting the provisional government and each would nominate four candidates for common pleas judges, with those getting the most votes being sent to the Council for appro-

285 According to its critics, the General Court initially picked their friends or themselves for these lucrative posts. Morison, A History of the Constitution of Massachusetts: 10, 13; Braley, "Provisional Government of Massachusetts," 72-73.

al. Soon after, a town convention in Pittsfield successfully directed the county courts to remain closed. These actions echoed those taken in Berkshire a year earlier, but now Allen’s group directed their opposition against the home-grown provisional government, rather than British authorities. Fearing that their actions would be misinterpreted, the Pittsfield convention sent an explanation, written by Allen himself, to the General Court.

This Pittsfield Memorial explains the Constitutionists’ “abhorrence of that Constitution now adopting in this province,” attributes its defects primarily to the replacement of local control with the “nominating to office by those in power,” and argues that there is no reason to create a government on top of the reviled charter, for the Continental Congress’s advice was open to interpretation and invalidated by that given to South Carolina and New Hampshire. The memorial closes with two demands for institutional reform: create an elected Governor and Lieutenant Governor and give local units the sole power of appointing individuals to civil and military offices.


288 According to Smith, the judiciary and civil magistracy were a strategic target of dissent, for “their obstruction would sufficiently arrest attention at Boston, while it would least embarrass the State in its operations against the enemy, and the people in their efforts to obtain a constitution.” Smith, History of Pittsfield: 338.


These demands, and other criticisms articulated by the Constitutionalists in the document, derived from their straightforward application of revolutionary rhetoric and theory. The Berkshire Constitutionalists wanted independence immediately, so they called for the creation of an elected executive, thereby rejecting the pretense that the new government operated in the temporary absence of the royal governor. They were avid participants in a revolution buoyed by a commitment to popular sovereignty, so they rejected the General Court’s decision to appoint judicial and military officials without local consultation. And they shared in the conspiratorial paranoia that served as an accelerant for the revolution, the tendency to see “overwhelming evidence...that they were faced with conspirators against liberty,” and thus viewed with suspicion the appointment of former colonial power holders and members of the sitting legislature to these offices.

Having explained themselves, the Berkshire Constitutionalists continued their dissent into 1776, growing in strength and influence in the process. A February meeting of Berkshire committees, which Allen called and opened by reading aloud Paine’s recently published Common Sense, resulted in the forced closing of the Court of Quarter Sessions, and the strip-
ping of all recently appointed civil officers of their commissions. One month later, Allen similarly convinced twenty-eight towns in Hampshire County to forcefully close their Court of Quarter Sessions.

The continued and increased opposition to the provisional government, as well as the petitions sent to the General Court from Western anti-Constitutionalists seeking relief from these “unthinking, rash, and designing men,” prompted the General Court to take further action. In May, they lowered judicial fee schedules and eliminated mention of the crown in its commissions. By making the courts less expensive, and dropping the pretense of British authority, they hoped to reopen the courts by appeasing the Constitutionalists.

These efforts fell on deaf ears. By the time the General Court acted, the Constitutionalists had changed their institutional focus to a broader demand: that the General Court abandons the royal charter and initiates procedures to create a new constitution in toto. As Allen explained:

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296 For an account of local opponents, see Hammett, “Revolutionary Ideology in its Social Context,” 342-99.

297 Taylor, Western Massachusetts: 86.

298 Brooke, “To the Quiet of the People: Revolutionary Settlements and Civil Unrest in Western Massachusetts, 1774-1789,” 439.
“...if Commissions should be recalled and the Kings Name struck out of them, if the Fee Table be reduced never so low, and multitudes of other things be done to still the people all is to us as Nothing whilst the foundation is unfixed the Corner stone of Government unlaid. We have heared much of Governments being founded in Compact. What Compact has been formed as the foundation of Government in this province?” (PP, 92)

These words appear in the *Pittsfield Petitions*. Written by Allen and sent by the town to the General Court on May 29th, it first reaffirms that the townspeople "by no means object to the most speedy institution of Legal Government," being as “earnestly desirous as any others of this great Blessing,” and then outlines the “Principles real Views and Designs” of the Constitutionalists, i.e. the theory underlying their dissent.

Drawing from social contract theory, Allen asserts that “the people are the fountain of power,” that the “dissolution of the power of Great Britain over the Colonies” sent them into “a state of Nature,” and that the only way to exit such a state and enjoy civil government capable of warding off “Tyranny and Despotism” is “the formation of a fundamental Constitution as the Basis and ground work for Legislation” (PP, 90). He then notes that “a Representative Body may form, but cannot impose said fundamental Constitution upon a people,” for “the Approbation of the Majority of the people...is absolutely necessary to give Life and being to it.” He ends the petition making a single demand: “Your petitioners beg leave there to Request that this Honourable Body would form a fundamental Constitution for this province...and that said Constitution be sent abroad for the Approbation of the Majority of the people in this Colony” (PP, 90-93). While the details of this argument will be fleshed out in

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299 Note that this supports Kruman’s claim, contra Wood and Adams, that “at the beginning of the Revolution, citizens distinguished readily between constitutional and statutory law and believed that the people themselves created and restricted government.” Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America*: 32.
the next section, it is worth noting now that Allen’s emphasis is on the necessity of having people ratify the constitution, and that the identity of the framer or framers appears to be relatively unimportant.

The general demand for a new constitution spread throughout Massachusetts, gaining support from the Continental Congress’ May 15 recommendation that the colonies establish governments in which all powers were to be exerted “under the authority of the people,” and from the Declaration of Independence promulgated two months later; both of which appeared to put the legitimacy of anything but a locally created constitution into question.\(^{300}\) The General Court initiated the constitution-making process on September 17, 1776, asking the towns for permission to transform into a constituent legislature and create a constitution.\(^{301}\)

Specifically, in this ‘1776 request’ they asked towns to “give their consent that the present House of Representatives and the Council…shall agree on and enact such a Constitution and Form of Government… and will direct that the same be made public for the Inspection and Perusal of the inhabitants, before the Ratification thereof by the Assembly.”\(^{302}\) Four things are worth noting about the 1776 request. First, the offering of inspection privileges was not without precedent. Since at least 1639 the various governments of Massachusetts Bay periodically


\(^{301}\) According to Taylor the request was sent to 260 towns. Taylor, “Introduction and Notes,” 36.

submitted fundamental laws and important questions to the people for review and, on occasion, comment.\(^{303}\) Second, the plan to combine the General Court and the Council into one body was in fact unique, and suggests that even the General Court considered the normal bicameral legislature insufficient to create a constitution.\(^{304}\) Third, the General Court ignored one of the Constitutionalists’ central requests, for they left final approval of the constitution to themselves, rather than the people. Fourth and finally, the General Court’s decision to have itself, an existing governing body, write and enact the constitution, followed the norm established by earlier constitution-making efforts in the other colonies.\(^{305}\)

At least 132 towns responded to the 1776 request.\(^{306}\) Though a majority of these towns (92) approved it, the overall response likely displeased the General Court. Many of the towns did not respond, a significant number dissented, and a majority of the approving towns did so only under certain conditions. Though most of the dissenting towns agreed on the need for a

\(^{303}\) For instance, in 1639 the General Court sent potential legislation to towns for review and comment by local elders, and more recently they had asked the towns for their opinion on the Declaration of Independence. See Charles Sumner Lobingier, *The People's Law or Popular Participation in Law-Making: From Ancient Folk-Moot to Modern Referendum* (New York: The Macmillan Company, 1909). 79; Hartwell, "Referenda in Massachusetts and Boston," 249.


\(^{306}\) Towns responded to requests from the General Court by sending records of their voting results. These records frequently included an explanation for the overall decision reached by each town, and are known as ‘Returns.’ Below, all claims regarding the results of the 1776 request stem from my own analysis of the 126 surviving returns collected and printed by the Handlins, and six other returns that are either described or printed in other sources. The details of this analysis appear in Appendix 1. See "Returns of the Towns on the Resolution of September 17, 1776," in *The Popular Sources of Authority: Documents on the Massachusetts Constitution of 1780*, ed. Oscar and Mary Handlin (Cambridge: Harvard University Press, 1966); Hammett, "Revolutionary Ideology in its Social Context," 327; Harry A. Cushing, *History of the Transition from Provincial to Commonwealth Government in Massachusetts* (New York: Columbia University, 1896). 189; Smith, *History of Pittsfield*: 356.
new Constitution, they objected to the proposal for several reasons. Six towns claimed that the members of the General Court did not have the power to create a constitution for they “were never elected by the people for that purpose.” Thirty-one towns took issue with the composition of the House, claiming that the representation was “very unequal and unsafe.” Eleven towns argued that it was a bad time to make a new constitution, for many potential voters were off fighting the war and the General Court had more pressing matters to deal with.

Acton and Concord made the more sophisticated argument that an effective constitution should not be created by the very body it is meant to limit, for constitutions are meant to secure certain rights and privileges from government encroachment, and “the Same Body that forms a Constitution have of Consequence a power to alter it,” and therefore “a constitution alterable by the Supreme Legislative is no Security at all.” Thirty-three towns joined Acton and Concord in embracing the logical corollary of this objection by requesting that, “a Convention be Chosen by the Inhabitants of the Several Towns and Districts in this State to form and Establish a Constitution for this State.” These requests mark the first discussion of a

307 Return of Stoughton in "Returns of the Towns on the Resolution of September 17, 1776," 107. See also Lexington’s Return at ibid., 150.


309 "Return of Concord" in "Returns of the Towns on the Resolution of September 17, 1776," 152.

310 Ibid., 157. Acton and Concord were the only two towns to make the request for a constitutional convention in their individual voting returns. However, a convention representing 35 Worcester County Towns published a resolution on November 26, 1776, indicating their desire for a convention if possible. I counted these in my calculations, but only counted those towns whose original votes are either included in the published returns, or summarized in the resolution ibid., 164-66. See Appendix A for more specifics.
pure constitutional convention, a body of delegates elected for the sole purpose of writing a constitution, which some consider to be “the most distinctive institutional contribution...the American Revolutionaries made to Western politics.”

Seventy-four towns made a final objection, claiming that the General Court erred by not including popular ratification in the proposed constitution-making process, for the people had to have an opportunity to formally approve or disapprove of the constitution before enactment. Despite being of Constitutionalist origin, the most striking examples of this objection are found in the returns from Boston and Lexington. Boston claims that, “We apprehend that the People have some higher privileges, than a bare Inspection and Perusal of the Constitution under which they are to live.” Similarly, Lexington’s return reads: “that... id does not appear from thence, that there is any just Provision made for the Inhabitants, as Towns, or Societies, to express their approbation, or the Contrary, in Order to Such Ratification by the Assembly.”

More towns complained about the lack of ratification than any other objection. Previous scholars overlook this fact, likely because only twenty-four of the towns that asserted the need for ratification actually dissented to the General Court’s 1776 request. The remaining fifty-two towns approved the request, but only under the condition that ratification took place, fre-

Wood, Creation of the American Republic: 342. Roger S. Hoar was perhaps the first to pinpoint Acton as being the source of the constitutional convention idea. He made this claim in opposition to Dodd, who falsely attributed the idea to a New Hampshire grants meeting in Hanover in 1777. Roger Sherman Hoar, Constitutional conventions, their nature, powers, and limitations (Boston: Little, Brown, 1917). 7; Walter F. Dodd, Revision and Amendment of State Constitutions (Baltimore: The John Hopkins Press, 1910). 6. See also Adams, The First American Constitutions: 86.

“Boston Town Records” in “Returns of the Towns on the Resolution of September 17, 1776,” 136.

“Return of the Town of Lexington,” in ibid., 150.
sequently by repeating an altered version of the General Court’s language. For example, the Hampshire towns of Greenfield and Colrain wrote: “...that the same [draft constitution] be made public for the inspection perusal and approbation of the people before the ratification thereof.”

Conway specified the need of obtaining the “Consent or Rejection” of each town, while Sheffield demanded that the constitution only be accepted if “agreed to by the People att Large.” Thus, a majority of the towns in Massachusetts deemed the mere opportunity of perusal and inspection insufficient, and only a bare majority (68) approved the 1776 request. By 1776, the central tenet of the Berkshire Constitutionalists—that only the direct consent of the majority can give life to a constitution—seems to have gained widespread acceptance.

2.2 CONSTITUTION-MAKING: FAILURE AND SUCCESS (1777-1780)

After months of inaction, on May 5, 1777, the General Court announced that it would create a new constitution. Though it ignored (v) by keeping constitution-making within the legislature, and did the same to (iii) and (iv) by not waiting until the cessation of the war, the Court responded directly to all other objections. Thus, it announced that the following session of the General Court would create the constitution, and asked each town to instruct their delegates to meet “in one Body with the Council, to form such a Constitution of Government.” This plan addressed objection (i), for members of the next House would be elected to both legislature

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314 Ibid., 103.
315 Ibid., 103-05.
and create a constitution, as well as objection (ii), for each town would have the opportunity to send their full quota of delegates in accordance with the now fully circulated May 1776 law.\footnote{See n308}

In response to (vi), the General Court announced that the constitution would only go into effect if it was approved by the public, defined as being “approved of by at least two Thirds of those who are free and twenty-one Years of Age, belonging to this State and present in the several meetings...”\footnote{Bacon, "The State Constitution (17777-1780)," 184. See also "Resolve of May 5, 1777," 174-75. This marked an expansion of suffrage, for previously property qualifications regulated voter eligibility. See Adams, The First American Constitutions: 87. It is not uncommon for ratification provisions to specify expanded suffrage.} Specifically, each town was to hold a special meeting during which they would evaluate the draft constitution and draw up “a Return of their Approbation or Disapprobation.” The General Court would then calculate whether a 2/3 majority had been reached. This marked the first proposed use of ratification in modern constitution-making, and signaled an important victory for the Berkshire Constitutionalists. Most of the towns approved the proposal and sent delegates to the legislature. The newly elected General Court resolved itself into a constituent legislature in June and submitted a constitution to the towns on February 28, 1778.\footnote{"Journal of the Convention, June 17, 1777 - March 6, 1778," in The Popular Sources of Authority: Documents on the Massachusetts Constitution of 1780, ed. Oscar and Mary Handlin (Cambridge: Harvard University Press, 1966); Taylor, "Introduction and Notes," 48-49; Morison, A History of the Constitution of Massachusetts: 15, 20.}

This first use of popular ratification resulted in the first instance of constitutional rejection. The constitution failed by a spectacular margin of five to one, with towns giving a wide-range of reasons for their disapproval.\footnote{"Returns of the Towns on the Constitution of 1778," in The Popular Sources of Authority: Documents on the Massachusetts Constitution of 1780, ed. Oscar and Mary Handlin (Cambridge: Harvard University Press, 1966); Morison, A History of the Constitution of Massachusetts: 16; Handlin, "Introduction," 22. Ackerman’s assertion that the constitution failed because “the town meetings...had insisted on state conventions to propose..."} The most famous criticism is memorialized in The-
ophilus Parsons' *The Essex Result*, which provides an excellent summary of many political principles in circulation at the time in its focus on the lack of a Bill of Rights, insufficient separation of powers, and the unfairness of the proposed system of representation. The Western towns criticized the proposed constitution from a predictably more populist viewpoint, arguing against property requirements for the franchise, the appointment of officers by the governor and council, and the use of life appointments for judges.

Throughout this entire period, the Berkshire Constitutionalists continued to shutdown the courts in the Western Counties, despite the General Court explicitly ordering them to desist on several occasions. In August 1778, the Constitutionalists sent the General Court another explanatory document. After defending the county against further charges of disloyalty and anarchy, and affirming that the courts would remain closed, this 'Berkshire County Remonstrance' demands that the General Court convolve a constitutional convention, “a special convention of Delegates from each Town in this State, for the purpose of forming a Bill of Rights and a Constitution or Form of Government,” and threatens secession in the absence of action.

constitutions," lacks historical support. The returns of 1778, like those of 1776, reveal a plurality of reasons for rejection, only a few of which concern the lack of a constitutional convention. Ackerman, *We the People* 2: 82.


322 Taylor, *Western Massachusetts*: 88-90. DeSorbo claims that Allen saw *The Essex Result* as confirmation that eastern merchants were bent on preventing the erosion of their power. DeSorbo, "Reverend Thomas Allen and Revolutionary Politics in Western Massachusetts," 132. See ibid., 132-33; Smith, *History of Pittsfield*: 360.

323 See Smith, *History of Pittsfield*: 359. Hampshire County eventually allowed their courts to reopen in December 1777, due to the promise of a new constitution, but courts in Berkshire remained closed until 1780.

Note that this demand does not seem to represent a new interest in the theoretical advantages of conventions—it completely lacks the principled justifications of other Constitutionalist writings—but instead seems indicative of the growing opinion that the General Court had no interest in creating a new constitution. Such thoughts were fueled by rumors circulating the commonwealth, such as the one expressed by a convention of Hampshire towns: “We Fear that there is Designing men in this State that Intends by Delaying the Forming a Bill of Rights and a free Constitution to Lull People to Sleep, or Fatigue them other ways so as to obtain a Constitution to their minds, Calculated to Answer their own Ends and wicked Purposes.” Thus, in the Remonstrance, the Constitutionalists likely joined the growing number of people who thought the only means to a constitution would be the circumvention of the General Court.

Eventually, the General Court sent an investigating committee to Berkshire, which returned to Boston bearing the 'Statement of Berkshire County Representatives,' written by Thomas Allen and dated November 17, 1778. In it, Allen neither mentions a convention nor threatens secession, but instead repeats and enlarges his core contractual arguments—that the people are the fountain of power, that a constitution is the foundation of government and legislation, and that only the ratification of the people can give life to it—and makes one significant addition: he claims that the right to ratify a constitution is unalienable, and that attempt-


ing to give it away necessarily harms the people.\textsuperscript{327} As we will see, this addition marks the cul-
mination of Constitutionalist thought and the completion of their theory of ratification.

On February 19, 1779, the House asked the towns of Massachusetts if they wanted to “have a new Constitution of Form of Government Made,” and if so whether they wanted to “empower their Representatives...to vote for the calling of a state Convention.”\textsuperscript{328} Though the strongest response came from their stronghold—every town in Hampshire and Berkshire County answered in the affirmative to both questions—the Constitutionalis
did not reopen the courts.\textsuperscript{329} Instead, hoping to avoid legitimating the General Court in the event of another constitutional rejection, the Constitutionalis
ted the courts closed throughout the year.\textsuperscript{330}

In June 1779, following an overwhelmingly positive response to the 1779 request, the General Court called for the election of convention delegates.\textsuperscript{331} On September 1, 1779, approximately 300 of them assembled in Boston as the Massachusetts Constitutional Convention. The initial draft of the constitution was the work of a small subcommittee consisting of the John Adams, Samuel Adams, and James Bowdoin, though John Adams did most of the


\textsuperscript{331} “Returns of the Towns on Resolves of February 20, 1779.”
writing. In the following two sessions of the convention, delegates debated and revised this draft in a process described by John Adams as “Locke, Sidney, and Rousseau and De Mably reduced to practice.”

In February and early March, the delegates discussed the procedural details of ratification. Unknowingly beginning a tradition of constitution-making bodies diverging from the constraints set by their creators, the delegates did not even consider the procedures described by the General Court in its 1779 resolve, which gave itself responsibility for tallying the votes and enacting the constitution if approved. Rather, after much confused debate, the convention presented the following scheme: copies of the constitution would be sent to each town, discussed in town meetings, and all qualified voters (freemen 21 years or older) would vote on each clause. The towns would then send these voting records, including objections to each rejected clause, to the Convention for tabulation. Delegates would return to the Convention, entrusted with the power to either implement the constitution if all clauses obtained a two-thirds majority or alter the constitution to conform “to the Sentiments of two thirds of the

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333 Cited in Handlin, "Introduction," 24.. In actuality the bulk of the revisions took place in the third session of the Convention, from late January to early March, when a harsh winter reduced the number of delegates to a maximum of 82 members.


Voters throughout the State” and then implement this revised version.\textsuperscript{336} This clause by clause voting procedure appears to be a final contribution by the Berkshire Constitutionalists, for both Pittsfield and Williamstown ordered their convention delegates to push for something similar.\textsuperscript{337}

Regardless of its source, the deficiencies of this ratification process are numerous, particularly the plan for altering constitutional provisions approved by less than two-thirds of those voting. The plan neglects the possibility that a constitutional provision altered in order to satisfy objectors might no longer be acceptable to those voters who originally approved it, and that towns might reject a provision of the constitution for different and conflicting reasons, making it impossible for the convention to use the voting returns to create a provision more congruent with the majority will.\textsuperscript{338}

However, the convention bypassed these sorts of complications in their efforts to address a more immediate problem concerning vote tabulation. Simply put, many towns did not follow the convention’s voting directions. For instance, Hancock only reported voting results for three amended clauses and for a vote taken on the entire constitution as amended. Hadley reported the votes correctly for approved clauses, but gave the voting results on amended ver-


\textsuperscript{338} Condorcet discusses a ratification procedure that looks strikingly like the Massachusetts one, predicts a lot of the complications that actually arose during the Massachusetts vote, and makes criticisms similar to my own. While it is certainly possible that Condorcet knew of the Massachusetts experience in 1789 when writing his essay, perhaps via John and Samuel Adams and Benjamin Franklin, I am unaware of any evidence supporting this connection. Condorcet, “On the Need for the Citizens to Ratify the Constitution,” 273-74.
visions of defeated clauses, rather than on the original defeated clauses themselves.\textsuperscript{339} Charlemont, Windsor, Rutland, and others only reported the results of a single vote on an amended version of the constitution.\textsuperscript{340} Other towns, such as Groton, submitted complete voting returns but also voted that they would drop their objections and accept the original provisions if 2/3 of the state approved of them.\textsuperscript{341}

When the committee appointed by the convention to tabulate the 181 voting returns began their work, they likely came to a simple conclusion: combining the disparate voting returns in a manner that would allow the convention to see whether each provision of the constitution obtained 2/3 approval was impossible. The solutions adopted by the committee and ultimately accepted by the convention was, as one historian notes, an act of political jugglery.\textsuperscript{342} Put simply, the committee ignored votes in favor of amended clauses or treated them as votes in favor of the original and counted votes such as Groton’s as votes in favor of the original constitution.\textsuperscript{343} This means, as Morison notes, “that in computing the vote for a given article the returns of practically all the towns that opposed it were either counted in favor of it or not counted at all.\textsuperscript{344}

\textsuperscript{340} Ibid., 347-48, 505, and 866.
\textsuperscript{341} Ibid., 650.
\textsuperscript{342} Morison, \textit{A History of the Constitution of Massachusetts}: 21.
\textsuperscript{343} Morison, "The Struggle Over Adoption," 396-99; Morison, \textit{A History of the Constitution of Massachusetts}: 21-22; Bacon, "The State Constitution (17777-1780)," 207-08; \textit{Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, from the Commencement of their First Session, September 1, 1779, to the Close of their Last Session, June 16, 1780.}: 176-77.
\textsuperscript{344} Morison, "The Struggle Over Adoption," 398-99.
In this way, the committee found a two-thirds majority in favor of each article, and there is no evidence suggesting that any of the convention delegates objected. On June 15, 1780, the convention voted that “the People of the State of Massachusetts Bay have accepted of the Constitution as it stood in the printed form.” Elections were soon held for a new General Court and on October 25th the Constitution of the Commonwealth of Massachusetts went into effect, with John Hancock being elected Governor a day later. This Constitution soon served as the blueprint for other state constitutions and the United States Constitution, and today it remains the oldest written constitution in active use anywhere in the world.

Though the final product was certainly more conservative than their ideal constitution, the mere fact that a constitution ratified by the people came into existence marked the ultimate success of the Berkshire Constitutionalists. At the same time, it also marked the beginning of the end for the movement, or at least a change in its nature, for the establishment of a new framework of government on popular grounds meant the oppositional stance that kept the courts closed until 1780 had to transform into one of support. Thus, their leaders quickly integrated themselves into the new political life of Massachusetts, eventually relocating the capital of Berkshire County to the town of Lenox, a Constitutionalist stronghold, and gaining control of the local court system, as evidenced by seven signers of the 1778 Remonstrance becoming justices of the peace within a year of ratification. In the end, however, their influence

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345 Regardless, most of the constitution likely received supermajority support, for the juggling only seems to have affected two or three provisions. Taylor, “Introduction and Notes,” 113. These controversial provisions were article III of the Declaration of Rights (religion); Chapter II, Section I, Article II (required Governor to be Christian); and Chapter VI, Article X (amendment procedures).


347 Brooke, “To the Quiet of the People: Revolutionary Settlements and Civil Unrest in Western Massachusetts, 1774-1789,” 440-41.
reaches further than the confines of Massachusetts and even the United States. Thomas Allen and his Constitutionalists were the first to demand that the people ratify their constitution, a practice that spread throughout the states and then the world. Moreover, they provided the first and perhaps only sophisticated defense of ratification and it is to this that we now turn.\footnote{They also had influence of a different sort, for participants in Shay’s rebellion adopted the Constitutionalists’ tactic of closing the courts in their fight against the state government in 1787.}

3. CONSTITUENT POWER ROOTED IN CONTRACTUALISM

Stitching together the various arguments made by the Constitutionalists yields a consistent theory of constituent power that, most importantly for our purposes, provides a justification for the use of ratification. This argument divides into five parts: (1) government is necessary and its power comes from the people; (2) only the majority of civil society is capable of constructing a legitimate government; (3) creating a constitution is the first step in this process; (4) constituent power operates during authorization rather than the drafting of a constitution or anywhere else in the process; and (5) the exercise of it is unalienable. From these five claims, the Berkshire Constitutionalists’ conclude that all constitutions must be ratified directly by the people before final enactment. In this section, I unpack, reconstruct, and explain this argument in order to show the theoretical edifice supporting the Constitutionalists’ activism.

3.1 SOCIAL CONTRACT BASICS

As mentioned earlier, the Berkshire Constitutionalists rooted their theory in the social contract tradition. They embraced several of its central tenets, two of which are the following: government is a necessity and all power resides or stems from the people. The Constitutionalists traced
the “absolute necessity of legal government” to its ability to “prevent [the] Anarchy and Confusion” that arises in its absence, to ward off “the destructive nature of Tyranny and lawless power,” and to secure civil and religious liberties by helping the people “emerge from a state of Nature” (SB, 374; PP, 88, 93). In other words, the Constitutionalists held government to be the solution to the undesirable liberty-threatening state of nature that inevitably results from human deficiency and weakness.

This particularly dire vision of the state of nature likely stemmed from the Constitutionalists’ wide reading of political thought in conjunction with their religious heritage; Puritanism emphasized government’s divine role in warding off the selfish actions of fallen man, while Congregationalism stressed its earthly role in securing the conditions necessary to retain God-given liberties despite man’s near-total depravity.

Like the Levelers and the Whigs before them, the Constitutionalists arrived at the second tenet of social contractualism—that “the people are the fountain of power”—by denying any other source of political power (PP, 90). Here, ‘power’ refers to moral power, i.e. the right to

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349 Thomas Paine’s *Common Sense*, which Allen read aloud to a 1776 Berkshire Convention, clearly articulates this position. After explaining how humans naturally form a society, he writes: “but as nothing but heaven is impregnable to vice, it will unavoidably happen, that in proportion as they surmount the first difficulties of emigration, which bound them together in a common cause, they will begin to relax in their duty and attachment to each other; and this remissness, will point out the necessity, of establishing some form of government to supply the defect of moral virtue.” Thomas Paine, *Collected Writings* (New York: The Library of America, 1995). 7-8.


351 Like the American founders would do several years later, Allen likely took this particular phrase from James Burgh’s popular *Political Disquisitions*. See James Burgh, *Political Disquisitions: or, an enquiry into public errors, defects, and abuses.*, 3 vols., vol. 1 (London: Edward and Charles Dilly, 1774). 4.
use physical force in accordance with natural law or right. In the political context, this power became “the right of making law for the society and of using that society’s force to execute the law and protect the society.” For the Constitutionalists, while the laws of nature and the behavior of human beings produce reasons to create a government, they do not assign authority to any particular person or group (SB, 375). Individuals “by nature are free, and have no dominion one over another.” Thus, the only remaining source of moral power is the rights or liberties individuals hold over themselves in a state of nature; “power originates in the people” and it does not and cannot arise from divine commissions, natural power relations, or any other non-popular source. As one Congregationalist minister put it, “the Voice of the People…is the Voice of God.”

If power comes from the people, how does a government come to hold or wield it? A third foundational idea in the social contract tradition adopted by the Constitutionalists answers this question: individuals transfer or entrust some of their natural liberties or rights to a government through a series of consensual actions referred to as contracts or compacts. Pittsfield referred to this idea directly in the instructions given to their delegate to the 1780 constitutional convention, writing “as all men by nature are free, and have no dominion over another,

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353 Simmons, On the Edge of Anarchy: 60.


and all power originates in the people, so ...all power is founded in compact." Elsewhere, the Constitutionalists claimed that “Government is founded in Compact so it Origenates in the people” and that “Men form the social Compact” (SB, 375; V, 522).

3.2 TWO TYPES OF CONTRACTUALISM

This third foundational idea, that political power results from a consensual process during which individuals transfer their natural rights or liberties to a government, begs further discussion. For, while there is relative uniformity regarding the necessity and popular foundations of government, the details of this transference process vary between the different versions of social contract theory available to the Constitutionalists. Though somewhat artificially, we can divide these versions into two types: Classic Contractualism and Simple Contractualism.

Classic contractualism characterizes the social contract as a three-stage process culminating in a mutual arrangement between two parties, the ruler and ruled, in which the ruled transfer power in the form of obedience and allegiance to a ruler in exchange for protection and order. Pufendorf provides a seminal description of this process: first, individuals create a “single and perpetual group” of united “wills and strengths” through the Compact of Civil Society; second, the major part of civil society agrees “upon the form of government” in the Decree of Form; and third, rulers recognize the liberties of the people and “bind themselves to the care of the commons security and safety, and the rest to render them obedience” in the Com-

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Two aspects of this account beg mention. First, the compact of submission resembles a legal contract, insofar as it involves two separate parties exchanging one thing for another and thereby binding themselves to specific performances. Second, the compact of civil society was normally considered perpetual, and the decree of form treated as a separate event from the compact of submission. In this sense, institutions of government, such as representative bodies in mixed constitutional regimes, would be largely unaffected by the creation or demise of a compact of submission. Situating the first two steps of the social contract in the distant past heightened this effect.

This classic contractual model was thus a boon to certain moderate British Whigs, for it allowed them to enlist yet tame the popular sovereignty arguments developed by radicals during the English Civil War, such that they could justify resistance against a monarch on the basis of the people’s power (by pointing to the violation of the third compact) while simultaneously maintaining and strengthening their defense of the Ancient Constitution and the other institutions of governance (which were buried in the past and thus immune to royal misbehav-

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ior). 358 William Atwood, Algernon Sydney, and James Ferguson, for instance, articulated versions of this argument in their defense of the Glorious Revolution. 359

In the colonies, classic contractual arguments of this sort were not only rampant, but eventually took on a form of their own. While traditionally the King’s coronation oath and the people’s acquiescence were taken to be the compact of submission, by the 1770s many colonists identified it with the charter or founding document of their colonies. 360 These ‘charters as compacts’ became especially critical to revolutionaries after their refusal to accept the extension of virtual representation outside the shores of Great Britain came to its inevitable conclusion: if British legislators did not represent the colonies, then they had no authority over them, and the charters became the sole remaining legal connection between the colonies and the metropole. 361 This explains the near exclusive focus on royal misbehavior in the Declaration of Independence and the surrounding debate, for justifying the revolution now entailed showing


that the King’s repeated violations of the terms and conditions of the charter severed this link.362

Despite its usefulness in conceptualizing and justifying the dispute with the British, classic contractualism offered little help to colonists concerned with founding new governments. On the one hand, as Gordon Wood explains, “The mutual contract between rulers and ruled began to seem inoperable once the character and the obligations of the two parties overlapped and combined and became indistinguishable.”363 In other words, classic contractualism’s dependence on the compact of submission, the reciprocal juristic agreement between rulers and the ruled, broke down when representative institutions replaced independent magistrates as primary power holders. Representatives, even virtual ones, not only represented the will of the people but were members of the people, and thus explaining obedience as the result of a legal contract between two separate parties was neither necessary nor conceptually coherent.

On the other hand, Americans during the revolution were intent on creating something new, which meant unsettling institutional arrangements rather than falling back on them. Thus, the Declaration of Independence effectively rejected both the theoretical and practical authority of the British Constitution and separated the colonies into new body politics. This rendered classical contractualism far less relevant, insofar as the tradition focused on protecting the rights and liberties of Englishmen by burying the compact of civil society and the de-


363 Wood, Creation of the American Republic: 283.
cree of form in the distant past and focusing on the repair of a distorted Ancient Constitution.\(^{364}\)

For these and other reasons, the Berkshire Constitutionalists, joined many Early Americans in enlisting simple contractualism to understand and justify their constitutional project. As Wood explains:

There was, however, another contractual analogy that ran through the Whig mind of the eighteenth century. This was the idea of the social compact, the conception John Locke had developed in his Second Treatise on Civil Government. … Although this Lockean notion of a social compact was not generally drawn upon by Americans in their dispute with Great Britain, for it had little relevance in explaining either the nature of their colonial charters or their relationship to the empire, it became increasingly meaningful in the years after 1776."\(^{365}\)

Simple contractualism, of which Locke is the central theorist, eliminates the compact of submission and presents a two stage account of the transference of power from individuals to the government.\(^{366}\) First, interested individuals create a civil society through a mutual compact. Second, this society creates an empowered government.\(^{367}\) At each stage, two rights or powers are 'transferred' or entrusted to the newly created entity: the power "to do whatsoever he thinks fit for the preservation of himself and others within the permission of the Law of Na-

\(^{364}\) Tate explains: “because separation [from the British] did mark a complete and explicit repudiation of the old basis of authority for government, it became almost necessary to think of making new contracts in equally explicit terms. The formation of the contract was no longer something that once happened in a remote, almost mythical past—it was occurring in the present.” Tate, "Social Contract in America," 386.

\(^{365}\) Wood, Creation of the American Republic: 283.

\(^{366}\) By simple contractualism I mean those versions of social contract theory which drew from or resembled Locke’s theory in the manner I discuss below. Price, Priestly, and other British dissenters fall within this tradition, as do certain essayists at the Constitutionalists’ time. I primarily use Locke’s arguments when analyzing the Constitutionalists’ arguments, for his work laid at the root of much of the writings the Constitutionalists that helped inspire Allen and his supporters. For a discussion of contemporaries to Locke who articulated similar contractual ideas, see Richard Ashcraft, Revolutionary Politics & Locke’s Two Treatises of Government (Princeton: Princeton University Press, 1986). 560-71; Franklin, John Locke and the Theory of Sovereignty: 87-126.

\(^{367}\) Of course, these two steps sometimes become lost due to the varying ways in which Locke uses the term ‘government.’ See Ruth Grant, John Locke’s Liberalism (Chicago: Chicago University Press, 1987). 101-04.
ture,” and “the power to punish the Crimes committed against the Law” (TT, II.128). The former becomes a government’s executive and federative powers and the latter becomes its legislative power.\textsuperscript{368} The combination of these two rights or moral powers, first transferred to the major part of civil society and then entrusted to a government, constitutes political power and rightful authority (TT, II.171).

Three things are worth noting about this account. First, though personal consent is central for the transfer of power throughout, different voting thresholds apply to each stage. To create a civil society, “the consent of every individual” is needed, for only a person’s own consent can remove him or her from the state of nature.\textsuperscript{369} Consenting to form and join civil society simultaneously entails consenting and agreeing to “submit to the determination of the majority” in certain future political matters, which means that the second stage, the transition from civil society to civil government, proceeds through majority rule (TT, II.96-7).\textsuperscript{370} Second, this process creates a right to be ruled directly by the majority or to have the majority create a new form of government.

Third, simple contractualism presents an easily missed theory of constituent power (provided that one defines the second compact as creating extraordinary law), for, as Grant explains, “while political society does not possess special ‘constituent’ power distinct from the

\footnotesize{\textsuperscript{368} Simmons, On the Edge of Anarchy: 62-63.}

\footnotesize{\textsuperscript{369} This is not a unanimity threshold in the normal sense, for dissenters become non-members rather than prevent the formation of civil society.}

\footnotesize{\textsuperscript{370} Note that Locke’s argument for why consent to civil society membership necessarily means consent to majority rule is rather weak. See Simmons, On the Edge of Anarchy: 92-94. See also Ward, The Politics of Liberty: 248-49. This will be discussed in the next section.}
‘ordinary’ power of government, the effect of Locke’s line of argument is much as if it did.”371 In
other words, though Locke does not include different types of power differentiated by their
content and holder in his account—for him political power is simply the combination of trans-
ferred individual powers—his theory logically confines the ability to create government to civil
society and prevents this power from being usurped by a government or given up by society.
This, for all intents and purposes, is a form of constituent power.

As we will see, the arguments of the Berkshire Constitutionalists appear directly drawn
from this simple contractualist tradition. Indeed, as one author notes, the culmination of their
dissent, the Massachusetts ratification process itself, “represented the most ambitious effort in
the revolutionary period to institutionalize and operationalize the Lockean liberal understand-
ing of the origin of government.”372 The material cited by the Constitutionalists to buttress
their arguments supports this conclusion as well. For instance, Allen cites the self-described
Lockean Richard Price, an 18th century Radical Whig pamphlet mostly comprised of restate-
ments and excerpts of the Two Treatises, and Philip Furneaux’s Lockean critique of Black-
stone’s classical contractualism.373

371 Grant, John Locke’s Liberalism: 104-09. See also Richard Ashcraft, Locke’s Two Treatises of Government
373 SB, 376; V, 522 and 526; and The Judgment of Whole Kingdoms and Nations,  (Boston: Printed for T.
Harrison, 1713). The above mentioned pamphlet is The Judgment of Whole Kingdoms and Nations, a renamed
version of the 1709 pamphlet Vox Populi, Vox Dei, one of the best selling British pamphlets in the 18th century.
Allen attributes it to John Lord Somers, though other possible authors include Robert Ferguson, Gilbert Burn-
et, and Daniel Defoe, with the last being most likely. For an excellent discussion of the work and its relation to
Locke, see Ashcraft and Goldsmith, “Locke, Revolution Principles, and the Formation of Whig Ideology.”; J. P.
Kenyon, Revolution Principles: The Politics of Party, 1689-1720  (Cambridge: Cambridge University Press,
Further still, William Whiting’s “An Address to the Inhabitants of Berkshire County,” a response to several Constitutionalist tracts by a discontented former member of the Berkshire Constitutionalists, criticizes Allen by showing how he misinterprets and contradicts the contractualism of “the great Mr. Locke.” The fact that Whiting, who knew Thomas Allen and eventually rejoined his group, thought that an exegesis on the details of Lockean contractualism might be an effective means of persuasion attests to the significance of these ideas for the Constitutionalists.

3.3 STATE OF NATURE OR CIVIL SOCIETY

Whiting’s criticism of the Berkshire Constitutionalists begs closer examination, for it helps clarify how the Constitutionalists used simple contractualism and why they claimed that creating a constitution is the necessary first step out of the state of nature and into civil government. In regards to the latter, it is worth noting that neither Whiting nor the Constitutionalists deviated far from their simple contractual roots, yet their interpretations of how the theory applied to revolutionary Massachusetts diverge significantly. While partly due to the ever present gap between theory and practice, much of this divergence stems from two features particular to simple contractualism.

First, it contains a critical ambiguity. While relatively clear when describing the steps and logic behind the social contract, the rights transferred, and the causes of government dissolution, Locke and similar writers are vague about the actualization of their theories. Nowhere is this truer than in discussions of what happens after the dissolution of government, i.e. how

civil society creates a new government and rules itself in the interim. Second, Locke's social contract theory is relatively silent on the creation and function of a constitution, and to the extent that it mentions one at all, it is in reference to the Ancient Constitution lying at the center of the debate raging between Filmer's royalist proponents and radical Whigs. As I discuss below, the Constitutionalists and their American contemporaries' possessed a new and dynamic conception of a constitution, and how this meshed with simple contractualism was an open issue.

In his address, Whiting attempts to convince his fellow Berkshire County citizens of the weaknesses of the Constitutionalists' arguments. To do so, he focuses on two of their frequent assertions: “since the Dissolution of the power of Great Britain over these Colonies they have fallen into a state of nature,” and “that the first step to be taken by a people in such a state for the Enjoyment or Restoration of Civil Government amongst them, is the formation of a fundamental constitution” (PP, 90). As we have seen, the Constitutionalists used these claims to justify their denial of the provisional government's authority, which they symbolized by shutting down the courts. For them, the Declaration of Independence invalidated the sitting Gen-

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375 As Tate notes, "the theorists, frequently so detailed at other points, were generally vague about how to proceed…" Tate, "Social Contract in America," 379. See also Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University of Kansas Press, 1985), 145; Morgan, *Inventing the People*: 256. Lawson actually attempts an explanation twice, but they amount to brief suggestions with little explanation. In his early work on Hobbes, he claims that the community should act through the English counties to create a new government. Later, he assigns this role to a popular Assembly that distinguishes itself from Parliament. Oddly, this in some way mirrors the two positions taken by Allen and Whiting, though there is no evidence that either read Lawson. Ibid., 88-89; George Lawson, *An Examination of the Political Part of Mr. Hobbs his Leviathan* (London: Printed for Francis Tyton at the three Daggers in Fleet-street, 1657), 15; George Lawson, *Politica Sacra et Civilis* (Cambridge: Cambridge University Press, 1992), 48.


eral Court’s two possible sources of authority, the royal charter (already eroded by King’s despotism) and the Continental Congress’ 1775 advice on how to create an interim government (V, 526). This meant that until the majority of the people consented to a constitution, no government in Massachusetts existed, the people were in a state of nature, and they were therefore under no obligation to any constituted authority. As Allen wrote, “Hear then Goes Charter Covenants Compacts Laws and Constitution All is Redust to a parfect State of Nature” (V, 521).

Whiting begins his critique by attacking the first assertion. Citing Locke for support, he explains that individuals first leave the state of nature by consenting to form civil society and entrusting two of their alienable rights to the majority. Only then can the adoption of a constitution or mode of government take place; constitutional government “is necessarily subsequent” to civil society, for no other agent is capable of such a creative act. Next, Whiting writes “no revolution in, or dissolution of, particular constitutions or forms of government, can absolve the members of the society from their allegiance to the major part of the community” (Whiting, 467). In other words, the destruction of its government does not automatically destroy civil society and eliminate the authority of the majority. Locke ends the Second Treatise making just this point, noting that when government dissolves “it [the Supreme Power] revert

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378 The Continental Congress’ advice was predicated on a future resolution between England and the colonies, and thus the declaration of independence negated it.

379 Whiting quotes TT, II.99. As Grant points out, it is illogical for government to precede civil society because the purpose of the former is the protection and benefit of the latter. TT, II.212; Grant, John Locke’s Liberalism: 104.

380 According to Locke, successful conquest by a foreign power is “the usual, and almost only way,” that civil society dissolves. For other possible avenues of such dissolution, unmentioned but congruent with Locke’s thought, see Simmons, On the Edge of Anarchy: 167-70.
to the Society, and the People have a Right to act as Supreme, and continue the Legislative in themselves, or erect a new Form” (TT, II.243).381

This means, Whiting argues, “that even admitting the declaration of Independence did actually annihilate the Constitution of the province of the Massachusetts Bay; yet it did not annihilate or materially affect the union or compact existing among the people” (Whiting, 467). Thus, Whiting enlists simple contractualism to show that the Constitutionalists made a mistake, for the demise of British authority did not send the people back into a state of nature. Rather, “the inhabitants of the state of Massachusetts Bay, are now in a state of some measure familiar to that which every community must pass through, while they are emerging from a state of nature to that of a free and equal government. They are...in a state of civil society” (Whiting, 470).

If Whiting is correct, if the Constitutionalists’ actually ignored civil society by arguing that the dissolution of British rule sent everyone back into a state of nature, then they either grossly misinterpreted the social contract tradition or were simply distorting it for rhetorical purposes.382 Several things attest to the latter interpretation. Most obviously is Allen’s repeated mention of ‘the people,’ a concept without a referent in the state of nature. Similarly, he calls for a majoritarian threshold to be used for ratification, a decision-making procedure inoperable in a state of nature and, at least in terms of simple contractualism, only authoritative after the for-

381 Lawson makes a similar point: “The continuance and dissolution of a legal power is also to be observed. As for real majesty it always continues, whilst the community remains a community.” Lawson, Politica Sacra et Civilis: 226.

382 Using the state of nature for rhetorical purposes was not uncommon. For instance, Patrick Henry claimed that “Government is dissolved. ...We are in a state of nature, sir,” in order to justify his proposal for representation in the First Continental Congress. See John Adams, The Works of John Adams, vol. 2 (Boston: Little, Brown, and Co., 1850). 366.
mation of civil society. In addition, we know that Thomas Allen was a proponent of Paine’s *Common Sense*, frequently quoting from the work publicly, and it seems unlikely that he or his followers overlooked the implications of the text’s first line: “Some writers have so confounded society with government, as to leave little or no distinction between them; whereas that are not only different, but have different origins.”

However, while Whiting’s critique succeeds if we understand the Lockean state of nature as a social or historical condition that a person is either in or out of, things are much less clear if we see it as a relational property, i.e. something that describes a particular moral relationship between one person and another. Under this reading, two people are in a state of nature with one another if and only if they are not current voluntary members of the same legitimate civil society. This squares with the myriad ways in which Locke uses the state of nature—for instance it makes sense of the claims that a person can be in a state of nature with fellow citizens under a tyrannical government and with visiting aliens, minors, and idiots under a consensual and rightful government—and gives rise to at least one way to understand the Berkshire Constitutionalists’ argument without attributing a mistake to them (TT, II.15, 18, 19, 60).

Put simply, the Berkshire Constitutionalists’ assertions regarding the state of nature are unproblematic if they refer to the relationship between the people and any entity (other than the majority) that claims a right to rule in between the two contracts. Since only the majority has political power in a condition of civil society, and since, according to the Constitutionalists, the majority of Massachusetts had yet to create a new government, the use or attempted use of

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384 This conception of Locke’s state of nature comes from Simmons, *On the Edge of Anarchy*: 13-23. See also Grant, *John Locke’s Liberalism*: 66.
force or political power on the people by any entity other than the majority would constitute a wrong coercive action taken against civil society and the individuals within. Specifically, it would be an example of usurpation, “the exercise of power which another has a right to,” and indicate that the coercer refuses to recognize the majority as the rightful common judge and holder of governing power. At the least, this sends the coercer into the state of nature in regards to civil society.385 As Locke writes, “When any one, or more, shall take upon them to make Laws, whom the People have not appointed so to do, they make Laws without Authority” which means that “the People are not therefore bound to obey” and are able “to resist the force of those, who without Authority would impose any thing upon them” (TT, II.212).386

According to this interpretation, members of civil society in Massachusetts remain out of the state of nature in regards to each other, but within it in regards to any entity other than the majority that claims or attempts to use political power, whether this is the refashioned General Court, the British government, or a particularly ambitious individual. Thus, without contradicting themselves, violating basic Lockean tenets, or engaging in polemics, the Constitutionalists could simultaneously advocate for a majoritarian voting procedure only appropriate after the formation of civil society and claim that they were in a state of nature. This is the most plausible defense of the Constitutionalists’ state of nature claims, yet it relies on rejecting

385 Ashcraft, Locke's Two Treatises of Government: 202; Simmons, On the Edge of Anarchy: 158-59; Locke, Two Treatises of Government: II.239, 40. 'Serving as a common judge' entails the exercise of executive, judicial, and legislative powers for Locke. See Grant, John Locke's Liberalism: 75.

Whiting’s next argument: that the provisional government rightfully ruled the Commonwealth.387

2.4 WHITING: GOVERNMENT BEFORE A CONSTITUTION

Neither pedantry nor an educative impulse drove Whiting’s interpretive dispute with the Berkshire Constitutionalists. Rather, he hoped to convince the residents of Berkshire County to reopen the courts and admit the rule of law by persuading them that they were in a state of civil society and not a state of nature, that they therefore had to obey the majority, and that the majority of civil society in Massachusetts approved and or spoke through the General Court and its various subsidiary institutions. Thus, after attacking Allen’s state of nature claims, he next turned his attention to the Constitutionalists’ second assertion, the claim that government requires a constitution:

I think it evident to demonstration, that the common cry in this county, that we have no foundation of government, is altogether groundless. For, even admitting that we have no particular constitution yet, it hath been shown, that such a constitution is not so essential to government, that there can be no foundation of government without it; but, on the contrary, that a compact or union among the people, by which they agree to submit themselves to be governed by the major part of the community, is itself, a sufficient and substantial foundation of government.” (Whiting, 476)

Whiting, like the Constitutionalists and others during the period, equates the second compact to the adoption of a constitution and the creation of constitutional government. Thus, as evident from this passage, he claims that government is possible before the second contract, i.e.

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387 The above departs from the interpretations of the Constitutionalist/Whiting debate given by Woods and Peters. Woods claims that Whiting mistakenly equates the constitution with the form of government while the Constitutionalists equated it with the social compact itself. Peters disagrees with Woods and claims that Whiting persuasively argues that there is no middle ground between the state of nature and civil society, something that the Constitutionalists refused to acknowledge. Peters, The Massachusetts Constitution of 1780: A Social Compact: 101f31; Wood, Creation of the American Republic: 286.
that non-constitutional government can exist in civil society, appropriately command obedience, and draw sufficient authority from the first compact.

To make this argument, Whiting first exploits simple contractualism’s ambiguity about the workings of civil society between the two contracts. As noted, Locke argued that the major part of civil society gains its authority from the rights transferred from individuals as part of the first compact. In one of the few passages in which he discusses the topic, Locke suggests that the majority can abstain from the second contract and the creation of a separate form of government by choosing to rule society as a direct democracy, “making Laws for the Community from time to time, and Executing those Laws by Officers of their own appointing” (TT, II.132). Whiting begins from this premise, writing that, “the supreme judge…the major part of the community…have an undoubted right to enter upon, or postpone that manner [creating a form of government], when, and so long as they see fit,” but expands the means through which the majority can exercise political power far beyond the governmental form of direct democracy that Locke describes (Whiting, 467).

As Whiting explains it, in order to address the “peace and safety of the community,” the majority in Massachusetts adopted “whatever modes and forms therefore, they had been accustomed to from the old charter, and still found would be useful and expedient for a free and independent society” (Whiting, 472). For Whiting, these modes and forms regained their au-

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388 Two things beg mention. First, Locke is notoriously vague when it comes to discussing civil society’s ability to function, and means of functioning, in the absence of government. For excellent discussions on the matter see Grant and Simmons, whose interpretations I follow. Second, if one considers direct democracy a form of government, then government is possible without the second contract. In fact, as Grant notes, Locke sometimes uses the term government in just this manner. However, Locke and his followers mostly use the term to mean any configuration in which representatives exercise political powers granted to them as a trust. I mean only this when I use the term. See TT, II.96, 205, 211, 219; Grant, John Locke’s Liberalism: 104-18; Simmons, On the Edge of Anarchy: 167-72.
thority through this process, for he repeatedly asserts that as members of civil society the Constitutionalists had to obey them. This means that in a condition of civil society before the second contract, the majority is capable of ruling civil society through a representative and multi-branch non-constitutional form of government legitimated only by the first contract.

This begs two questions: first, how can Whiting claim that the majority adopted or authorized the provisional government when even he admits that direct consent never occurred? Whiting never gives a clear answer, but the text indicates that he follows the logic of classic contractualism by stressing acquiescence and the lasting legitimacy of government institutions apart from the monarchy. For instance, he suggests that the use of the revised charter and the elections of members to the new General Court counted as acquiescence by the majority from which a form of consent could be imputed. Put differently, his writings imply that the mere operation of the provisional government—successful elections, managing an army, levying taxes—signals that it is the concrete manifestation of the major part of civil society, or at least its designated ruler, for these activities require the majority taking action, giving consent, or at the least not making objections. The authority of the provisional government is further supplemented by the fact that it consisted in recycled institutions previously held to be authoritative.

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389 In fact, there was no 'revised charter' to consent to. Rather, the provisional government operated in accordance with the original Province Charter, as it had been interpreted and reformulated over the near decade since its adoption, with powers delegated to royal authorities now exercised by the Council and the General Court.

390 See also, see "Response of the Worcester Committee of Correspondence, October 8, 1778," in The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780, ed. Oscar and Mary Handlin (Cambridge: Harvard University Press, 1966), 370. See also Christian G. Fritz, American Sovereigns: The People and America's Constitutional Tradition Before the Civil War (Cambridge: Cambridge University Press, 2008), 90.
Second, if legitimate government can exist before the second compact, what exactly is the point of the second contract and the constitutional government it creates? Put differently, what is so special about a constitution? Elsewhere in his essay, Whiting notes that a constitution clarifies unalienable rights which the state is meant to protect, establishes general rules for the government of the armed forces, and lays out the branches of government (Whiting, 473). However, this cannot be what makes constitutional government unique for him, for the provisional government and its revised charter more or less guaranteed a set of rights and set out a system of divided government, while the acts taken by the provincial congresses and retroactively codified by the General Court served as general rules for governing the armed forces. This leaves three ways, hinted at in his essay, in which constitutional government is unique for Whiting: the constitution makes it “fixed and unalterable...for preventing usurpations, and for the security of future generations,” the majority approved its form directly, and its details are more rigidly clarified (Whiting, 374).

In the end, Whiting alters simple contractualism when combining it with the idea of a constitution, for defining the second contract as the creation of constitutional government allows him to introduce the possibility of an authoritative government existing between the two contracts. Whiting expresses his “wish that we had such a constitution of government and bill of rights firmly established,” for a permanent, clarified, and popularly approved government is certainly a desired end, but its absence does not mean that no government exists at all (Whiting, 470). Thus, for Whiting, government existed in the Commonwealth even without a constitution. Moreover, every member of civil society owed this government some level of obedience, for the majority spoke through its institutions and all members of civil society agreed to
follow the will of the majority as part of the first contract. The residents of Berkshire County had to either accept their membership into civil society and obey the General Court or renounce their membership and give up any opportunity to be in the provisional government or future constitution-making endeavors, both of which fell under the purview of the majority of civil society (Whiting, 478, 467).

2.5 BERKSHIRE RESPONSE: NO CONSTITUTION, NO GOVERNMENT

The Berkshire Constitutionalists also combined constitutionalism with simple contractualism and agreed with Whiting on three key points: they understood the second compact as involving the creation of a constitution, ascribed constituent power to civil society, and portrayed its exercise in majoritarian terms. Moreover, they attributed similar functions to the constitution as Whiting. Nonetheless, the Constitutionalists diverged from Whiting in their emphatic insistence that (legitimate) government without a constitution was impossible, “all is to us as Nothing whilst the foundation is unfixed the Corner stone of Government unlaid,” and that therefore no government existed in Massachusetts (PP, 92).

This divergence stemmed from two points of disagreement between the Constitutionalists and Whiting. First, the Constitutionalists strictly adhered to simple contractualism and thus thoroughly rejected the notion of consent via acquiescence undergirding Whiting’s argument. If the provisional government continued to usurp the majority’s political power this would not somehow render it legitimate in their eyes, even if this went unnoticed by the bulk of the Commonwealth. However, while denying that acquiescence and longevity would morally legitimate a form of government, the Constitutionalists were quite aware that the passage of time makes it more difficult to effect institutional change. In fact, one reason the Constitutionalists
shut down the courts was to alert the rest of the Commonwealth to the illegitimacy of the provisional government, to “conjure our Brethren in this state to awake from Unmanly slumbers, ...[to] see with your own Eyes and Judge for your selves,” and thereby prevent acquiescence from defeating the possibility of popular government (V, 527). As Allen wrote, “We have feared, we now realize those fears, that upon our submission we shall sink down into a dead Calm and never transmit to posterity a single Right nor leave them the least Knowledge of so fair an Inheritance” (SB, 378).

Second, and more importantly, the Constitutionalists ascribed the following two central roles or purposes to a constitution that Whiting did not share or did not fully understand: a constitution protects the people from tyranny and authorizes the legislature and government. The following passage mentions both: “The fundamental Constitution is the Basis and ground work of Legislation, and ascertains the Rights Franchises, Immunities and Liberties of the people, Howr and how often officers Civil and military shall be elected by the people, and circumscribing and definig the powers of the Rulers, and so affording a sacred Barrier against Tyranny and Despotism” (SB, 375).

The Constitutionalists’ Calvinist conception of human beings and their belief in power’s corrupting effect led to the ‘constitution as barrier’ conception. Men may “use all manner of Deceit and Craft,” “every Man by Nature has the seeds of Tyranny deeply implanted within him” (PP, 89, 91), and there is a “strong Byass of human Nature to Tyranny and Despotism.”391 For the Constitutionalists then, it was a fact of nature that power could corrupt any man and transform him into a tyrant. This was not simply a hypothetical possibility, nor

something confined to monarchs, for the Berkshire Constitutionalists and their ancestors had witnessed a variety of political actors undergo this transformation time and time again, leading to their conclusion that “Tyranny Triumps thro’ the world.” Corruption actively hampered revolutionary efforts, for “men who has drank of this baneful poison could not be confided in to aid and assist their Country in the present Contest,” and, in the Constitutionalists’ minds, many of the men supporting and taking part in the provisional government had already succumbed to this temptation of power (PM, 62; SB, 377).

A description of a lecture given by Allen in February 1776 to the town of Richmond illustrates these points:

“In Speaking of the Congress and General Court, the Said Mr. Allen frequently repeated the words, beware of men—and Said it concerned the People to See to it that whilst we are fighting against oppression from the King and Parliament, That we Did not Suffer it to rise up in our own Bowels, That he was not so much concerned about Carrying our Point against Great Brittain, as he was of having Usurpers rising up amongst ourselves, he further Endeavoured to Insinuate into the minds of the People that our Provincial Congress and General Court had been, and were Composed of designing men.”

In the face of this real possibility of tyranny, the Constitutionalists sought relief in a constitution. “We have Nothing else in View,” Allen wrote in the ‘Pittsfield Petitions,’ “but to provide for Posterity against the wanton Exercise of power which cannot otherwise be don than by the formation of a fundamental constitution,” which secures “sacred Rights and Immunities against all Tyrants that my spring up” (PP, 91-92).

The Berkshire Constitutionalists claimed that no government could ever rightfully exercise or possess political powers in the absence of a constitution, for any alternative opens the door to tyranny. What is so important about a constitution in this regard? How can it prevent

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392 Ibid., 71.
tyranny or put a stop to despotism? The Constitutionalists never answer these questions directly, but the following seems a likely response. Arguments such as Whiting’s, in which political power is vested in representative governments without a constitution, rely on informal rules, habitual institutions, legislative practices and the general good behavior of government actors to prevent a fall into despotism. For instance, to combat the Constitutionalist’s claims that wicked men in the Commonwealth intended to enslave the people, Whiting defies “anyone to show how it is possible for them, in our present circumstances, to effect it.” He supports his position by emphasizing that Councilors and Representatives take oaths “to be true to the people of the state” and that representatives will make good political appointments because “they are sufficiently apprized that if they do not…they will not be elected themselves again” (Whiting, 471).

These sorts of reassurances would not do for the Constitutionalists, who believed that all men are corruptible and that, as the behavior of the British Parliament and the provisional government’s Councilors demonstrated, informal rules and traditions could be broken, oaths violated, elections altered or postponed, and legislative practices replaced with new legislation. Simply put, the formation of a non-constitutional government entrusted with political power creates a situation in which a common judge did not exist between the agents of government and the rest of civil society, i.e. produced a state of nature (in the relational sense) between the rulers and the ruled. What was needed then was a constitution, something above the purview of legislators and government officials that would organize and constrain them in

a visible manner, i.e. make public the conditions of their trust and the limits of their power and clarify the proper juridical authority and means of resolution for the inevitable conflicts that power produces. Such a Constitution would make it “peculiarly out of the Power of Designing men to Enroach on the Inherent and Unalienable rights of the People,” and serve as “Lines...Drawn as rules of Government,” making “the Servants of the People...as much as may be in the Possession of the People.”

Without such a device, the majority could never grant political power to a government without endangering themselves, for “whatever Building is reared without a foundation must fall into Ruins” (PP, 91). In an essay quoted by Allen in V, Richard Price expresses similar sentiments, noting that political power is “delegation for gaining particular ends,” and that because “this trust may be misapplied and abused...employed to defeat the very ends for which it was instituted, and to subvert the very rights it ought to protect...all delegated power must be subordinate and limited.” For the Constitutionalists, such subordination and limitation required a constitution.

This brings us to the other central but related role of a constitution that Whiting did not seem to share or understand. “The fundamental Constitution is the Basis and ground work of Legislation,” Allen explains, and “Legislators stand on this foundation, and enact Laws agreeably to it.” In other words, legislators and their legislation, and in fact the entire legal system and government, draw their authority from the constitution. On the one hand, claims such as

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these simply express the distinction between higher and ordinary law that allows constitutions to serve as a barrier of tyranny in the above-mentioned fashion. Allen expresses this point by quoting from Furneaux’s commentary on Blackstone’s assertion that it “is the height of Political Absurdity” to envision a government without the power “to alter every part of its law.” Furneaux claims that Blackstone is mistaken, for “free states would be unfree” if there did not exist some “Liberties and privileges” that “Society has not given out of their own Hands to their Governors.” These retained liberties and privileges, Furneaux explains, are enshrined in the constitution in order to limit and organize government, and set the terms for the entrustment of political power and the conditions under which it ends (SB, 376-377; V, 523-524).

On the other hand, Allen suggests that legislators owe their very existence to the Constitution. A convention of Hampshire County towns issued a resolution expressing similar sentiments, stating that “No select Body of men can Lawfully Legislate them, unless the People have by Some mode or form Delegated their Power to them as their Representative, which form of Government we call a Constitution of a state or kingdom; by which there should be Proper Bounds set to the Legislative and Executive Authority, without which the People Cannot be saf, Free or Happy.” The idea that legislators and legislation exist only because of a constitution is not a rhetorical flourish or a mere legal statement, but instead suggests a deep argument in favor of constitutional government.

396 Allen expresses this point by quoting from Furneaux’s commentary on Blackstone’s claim that “The bare idea of a State without a power See Tate, “Social Contract in America,” 379.

Consider a non-constitutional government in which legislative and legal authority stem directly from the people, meaning that authority in one sense depends on how decisions track the public will or interest. For the Constitutionalists, this would undo the entire point of entering into civil society and creating a government; it would create the dangerous condition in which interpretive disputes arise without their being an identifiable and accepted common judge. The Berkshire Constitutionalists’ own fight with the provisional government is a perfect example of this scenario, insofar as it was a protracted conflict over the proper source of government authority with no common judge to resolve the dispute. Adopting a constitution helps avoid such situations by explicitly setting out bounds of authority and legislative procedures understood by the major part of civil society, and institutionalizing means of resolving disputes if they arise. In this sense, legislative authority, and all governmental authority, comes from the constitution. As Allen’s citation of The Judgment of Whole Kingdoms explains:

“Every subjects allegiance is first oweing to the Constitution and to the Ruler only in the fource and virtue of what Every member of the Political society is Bound unto by the Terms of the Original pact or settlement” (V, 522).

The Constitutionalists’ thus opposed the provisional government by shutting down the courts, for without a constitution government was impossible, and therefore the provisional government was simply an illegitimate entity. However, not all of the Constitutionalists’ actions or words reflect this position. Consider the following passage, written after Whiting’s essay:

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398 Note that by legislative authority the Constitutionalists seem to have in mind all political power concerning the making, enforcement, and interpretation of laws.
“[we are not saying that] we have no Law, or that the Honorable Council and House of Representatives are Usurpers and Tyrants. Far from it. We consider our case as very Extraordinary. We do not consider this state in all Respects as in a state of Nature tho’ destitute of such fundamental Constitution. When the power of Government were totally dissolved in this state, we esteemed the State Congress as a necessary and useful body of Men suited to our Exigencies and sufficiently authorized to levy Taxes, raise an Army and do what was necessary for our common defence and it is Sir in this Light that we view our present Honorable Court and for these and other reasons have inculcated a careful Adherence to their orders.” (SB, 378)

At first glance this passage seems to contradict the very position that the Constitutionalists’ actions and previous arguments were so intent on supporting. During the previous four years they shut down courts, disobeyed orders to reopen them, denied that their actions constituted rebellion, and repeatedly claimed that the General Court and its judicial bodies lacked authority. Such actions unambiguously depicted the provisional government as an illegitimate entity that could neither expect nor demand political obligation on the part of the people, not as an “authorized,” “necessary and useful” body whose orders deserve adherence. At the least, this passage seems to reflect a shift in Constitutionalists thought towards something more akin to Whiting’s position.

However, upon closer analysis neither of these conclusions follows. The Constitutionalists only acknowledge two things: first, they accept that quasi-governmental institutions are capable of solving collective action problems—such as organizing a tax collection system or maintaining an army—and that they as individuals in civil society are willing to permit them to do so in cases in which the actions being taken are desired and needed. This admission is not altogether surprising, in that even Constitutionalist strongholds such as Pittsfield governed themselves throughout the revolution—“the Government of our respective Committees is le-

399 Allen expressed the latter view by citing the following line from The Judgment of Whole Kingdoms: “abstracting from the Constitution and the Obligations which it Lays us under no man can challenge a Right of Commanding us nor do we owe him any Duty of subjection and Obediance” (V, 522).

nient and efficacious”—without, in their mind, a constitution or an established government (PM, 64). Moreover, there is nothing in simple contractualism that rules out informal organizing of this sort in civil society. Second, the Constitutionalists claim that the provisional government was authorized to carry out these sorts of actions. The implications of this are unclear, for the Constitutionalists do not explain what they mean by authorization. Perhaps they meant that the current holder of political power, effectively the major part of civil society, created or endorsed the provisional government to accomplish the above-mentioned tasks. This is perfectly compatible with simple contractualism, and could simply be an example of what Locke describes as “Executing those Laws by officers of their own appointing” (TT, II.132).

Regardless, what is crucial is that these acknowledgements do not lead to the conclusion that the provisional government itself is a legitimate government in the Lockean sense, i.e. an entity rightfully in possession of the legislative, executive, and federative powers, and thus endowed with the rights to make, interpret, and enforce laws, and to have these laws obeyed whenever morally and legally acceptable (TT, II.143-46). This gives us a way to read and understand the Constitutionalists’ initially bewildering tendency to disobey and obey the provisional government simultaneously. The Constitutionalists obeyed and supported the provisional government when it executed tasks delegated to it by the majority of civil society in their capacity as a direct democracy, and when it took actions in the interest of the Constitutionalists that did not involve the exercise of political power. At the same time, the Constitutionalists disobeyed whenever the provisional government attempted to exercise powers it did not possess, such as the power to legislate, choose officers, or enforce a historical legal system now lacking in authority.
Thus, for the Constitutionalists a legitimate government did not exist in Massachusetts from 1774 until 1780, and by refusing to reopen the courts they did not rebel, but simply ignored the orders of an illegitimate and usurping authority. Certain actions taken by the provisional government served a useful and welcome purpose, but its attempts at exercising real political power were illegitimate and dangerous. A real government used political power entrusted to it by the major part of civil society, and the terms of this trust must be codified in a constitution. Thus, as the Berkshire Constitutionalists frequently explained, “the first step to be taken by a people in such a state for the Enjoyment or Restoration of Civil Government amongst them, is the formation of a fundamental constitution,” and until then the people “are but beating the Air and doing what will and must be undone afterwards” (PP, 90-91).

3. CONSTITUTIONAL CREATION AND CONSTITUENT POWER

As we have seen, the Berkshire Constitutionalists combined simple contractualism and the concept of a written constitution in a relatively straightforward manner; since government without a constitution was impossible they simply interpreted the second compact, constituting “a new Form of Government,” as creating a constitution (TT, II.132). Thus, creating legitimate government is tantamount to creating a constitution, constituent power belongs to civil society whose decisions follow the will of the majority, and therefore only the majority can create a constitution. Of course, the idea that the majority must create the constitution is no less vague than the Lockean notion that the majority creates the second compact from which it descends. It requires further explanation before any attempt at application.
3.1 AUTHORIZATION AND THE LEGISLATURE

At a minimum, creating a constitution requires writing the document. As discussed in the previous chapter, this presents a potential problem to those who hold that only the people possess constituent power, or in the terms of the Constitutionalists’ simple contractualism, that only civil society through majority rule can create a constitution. The problem is that the most intuitive solution, having every member of civil society directly take part in a participatory process designed to draft a document, is impossible for all but the smallest communities. Thus, constitution-makers must figure out alternate ways to translate the idea of popularly held constituent power to the actual process creating a constitution entails.

Several solutions present themselves. One is to have an individual or group write and enact the constitution, and somehow associate or identify its actions with the will of the majority. For instance, construing constituent power as something that can be entrusted or delegated enables principal-agent dynamics. The people hold constituent power, but they temporarily entrust it to a group of elected delegates who write the constitution at the people’s behest. Alternately, Sieyès conceptualized constituent power as non-communicable, and bypassed the problem posed by the impossibility of direct authorship though a conception of extraordinary representation, in which special representatives embody and become identical to, rather than represent, the will of the people when creating the constitution.401

Both of these options place emphasis on the identity of the framers and the characteristics of the drafting process, with the idea that only the right sort of framers in the right sort of conditions can actually embody the majority will. The first three objections of the Massachu-

401 Sieyès, "What is the Third Estate?,” 139.
setts towns to the General Court’s first request, that (i) the representatives lacked the authority to create a constitution, (ii) that representation was too unequal, and (iii) that too many voters were off fighting, reflect concerns of this kind. Another solution might involve some sort of Lawgiver, who through certain extraordinary attributes is able to create a constitution that so perfectly aligns with the nascent will of the majority that its creation can be attributed to them.

These solutions, and others like them, depict constitution-making as a monolithic process when it comes to its authority: that is, as one unbroken procedure undertaken by the constituent power. The Berkshire Constitutonalists took a different approach; they divided the process into drafting and authorization with the latter involving the review and approval or rejection of the written document. They first articulated this two-step process of constitution-making in the ‘Pittsfield Petitions: “We Request that this Honourable Body [General Court] would form a fundamental Constitution for this province…and that said Constitution be sent abroad for the Approbation of the Majority of the people in this Colony” (PP, 91-92). Here, as in future writings, the Constitutionalists distinguish between the two stages of the constitution-making process and place constituent power in the second. This deemphasizes the drafting of the constitution and the identity of the framers as sources of constitutional authority, and elevates the importance of the people’s authorization instead.

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402 Ratification is therefore a particular form of authorization, i.e. one conducted by a group or entity uninvolved in the drafting process and standing for or identical to the people.

403 This explains why the Constitutionalists did not object to the General Court, whom they deemed illegitimate, writing the constitution, while many of their fellow Massachusettans made such objections even while supporting the General Court’s right to rule. The one exception to the Constitutionalists’ ambivalence about drafting is the argument made for a constitutional convention in the Berkshire County Remonstrance. However, as argued above, this argument likely stemmed from contextual rather than theoretical concerns.
Majority of the people of this fundamental Constitution,” the Constitutionalists claim, “is absolute necessary to give Life and being to it” (PP, 90). In this sense, the people ‘create’ their constitution only when they authorize it, i.e. have the final word on its implementation through direct popular ratification.

The Constitutionalists reached this position by assuming that constituent power only emerged during authorization and rejecting the possibility of it being exercised by anything or anyone other than the people themselves in a direct vote. They thus rejected any constitution-making process in which an entity other than the majority authorized a constitution. Note that while in their writings they focus on instances in which the drafters simply enacted the constitution once written, thereby effectively authorizing it as well, their arguments also apply to instances in which the authorizing body is separate from both the drafters and civil society. This includes every type of ratification where the identity of the ratifier is something other than the people through popular referendum.

Allen explains in the ‘Statement of Berkshire County Representatives’:

“Legislators stand on this foundation, and enact Laws agreeably to it. They cannot give Life to the Constitution: it is the approbation of the Majority of the people at large that gives Life and being to it. …A Representative body may form but cannot impose said Constitution upon a free people. The giving Existence to the fundamental Constitution of a free state is a Trust that cannot be delegated. For any rational person to give his vote for another person to aid and assist in forming said Constitution with a view of imposing it on the people without reserving to himself a Right of Inspection Approbation Rejection or Amendment, imports, if not impiety, yet real popery in politicks. …In this the very essence of true Liberty consists, viz. in every free state the Constitution is adopted by the majority.” (SB, 375)

404 “Popery in politicks” referred to the idea that there is an entity in the state with supremacy. For an example of such usage, see Granville Sharp, A Declaration of the People’s Natural Right to a Share in the Legislature (Bedford, MA: Applewood Books, 2009). xxxiv.
This passage, and others like it, contains two entangled arguments. The first attacks the possibility of existing legislative bodies authorizing a constitution.405 According to the Constitutionalists, such a plan circulated as early as mid 1776, when “several of the Justices newly created without the Voice of the People” suggested that, “the Representatives of the People may form just what fundamental constitution they please and impose it upon the people” (PP, 91). To the Constitutionalists, such a plan was “the rankest kind of Toryism, the self same Monster we are now fighting against” (PP, 90-91). Later that same year, the General Court’s first request, to create and enact a constitution without any real town consultation, confirmed these suspicions.

The Constitutionalists’ explanation for the inability of a legislative body to create a constitution is a slight reformulation of the now familiar claim that a constituted body cannot constitute itself, for the constitution, as Schmitt notes, “is the comprehensive foundation of all other ‘powers’ and divisions of powers.” This follows from two observations. On the one hand, like any organ of government, legislative bodies receive their power and authority from the people. However, for the Constitutionalists, political power can only rightfully be given to governmental organs organized and limited by formal rules. These rules come from the constitution, and since constitution-making events take place in the absence of an operable constitution, any existing legislative branch or body of government lacks authority in general, let alone the power to create a constitution. “A Legal Representative is a Creature of the Constitution of a state, or Kingdom,” several Hampshire County Towns explained, in reference to General

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405 This assumes the absence of direct democracy where the legislative body is the people.
Court members, and “we Desire to know how such a Creature can Exist in a Legal Sense prior to that Constitution on which his being and Existance Depends.”

On the other hand, the act of creating a constitution involves creating the source of authority for any governmental organ or branch. Adhering to the principle that the creator of something necessarily has more power than its creation, this makes it a contradiction for one of the branches to form the constitution, for that would make the branch the creator of its own creator, the source of authority for its own source of authority. As Allen notes, “the whole Legislature of any state is insufficient to give Life to the fundamental Constitution of such state, it being the foundation on which they themselves stand and from which alone the Legislature derives its Authority” (SB, 377).

### 3.2 An Unalienable Right

The second argument for confining constituent power to the act of popular ratification ends up encompassing the first; the Constitutionalists claim that any type of representative or delegated entity, not just a legislative body or other branch of government, is unable to create and authorize a legitimate constitution because constituent power cannot delegated, entrusted, or embodied. Put differently, the Constitutionalists claim that constituent power, or the right to create (authorize) a constitution, is unalienable. Admittedly, on its face this claim appears unpersuasive, for unalienability is a property usually ascribed to only the most basic and essential rights. Such rights might include the right to live, the right to freedom of movement, and the right of conscience, but seem unlikely to include a right that only becomes actionable and rele-

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vant upon the formation of civil society and the start of a constitution-making process. This intuition, however, needs to be put on hold until we have a better idea of what the Constitutionalists meant by unalienability and why they ascribed it to a right to ratification.

Unfortunately, Allen fails to provide a substantive definition of unalienability. Nonetheless, we can look at conceptions of rights in circulation at the time to approximate what the Constitutionalists meant by the term and reconstruct why they thought it applied to ratification. Generally, in the context of seventeenth and eighteenth century philosophy, a ‘right’ referred to a moral power, the ability to effect or do something through the use of physical strength in a manner approved by or not in violation of reason and the natural law that it tracks. Many of the popular natural rights theorists at the time elucidated rights in this way. For instance Burlamaqui, following a tradition stemming back to Gerson through Suarez to Pufendorf, defined the term as “a power that man hath to make use of his liberty and natural strength in a particular manner...so far as this exercise...is approved by reason.”

In more contemporary terms, this conception of a ‘right’ encompasses Hohfeldian moral powers, liberties, and claim rights, and relates to but is not necessarily prior, secondary, or coextensive to the concept of ‘duty.’ Note that we are already familiar with this conception of rights, for it

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408 Wesley Hohfeld, Fundamental Legal Conceptions (New Haven: Yale University Press, 1919). In addition, contemporary accounts of rights, for instance the choice, interest, or benefit theories of rights, do not apply to ‘rights’ in the political philosophy of this period.
is rights and their accompanying powers that are transferred between stages in simple contractualism.

Unalienable rights are those rights that cannot voluntarily be given away or exchanged by their owner. Unalienability is distinct from forfeiture, prescription, defeasibleness, and the like; it is a property that describes how consensual acts can lead to the intentional transfer of a right, and has nothing to do with whether a right can be lost because of wrongdoing, taken away by force, or outweighed by competing considerations. Further, unalienable rights overlap but are not equivalent to those rights not ceded to civil society or government. The rights remaining with individuals after each of the two contracts include unalienable rights, but also include all natural rights, such as Locke’s “liberty…of innocent delights,” that do not need to be ceded in order to fulfill the purpose of civil society or government. Finally, an unalienable right is not necessarily a natural right, i.e. a right that exists before any contracting takes place. It is only a right that cannot be voluntarily transferred, and its genesis remains an open question.

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409 A broad rather than narrow interpretation of unalienability is most appropriate for the time period, in that the consent of the possessor is neither necessary nor sufficient to justify encroaching the right. See Terrance McConnell, "The Nature and Basis of Inalienable Rights," Law and Philosophy 3, no. 1 (1984): 31.

410 Thus, Peters is incorrect when describing unalienable rights as "criteria…by which the legitimate extent of political authority could be determined." Peters, The Massachusetts Constitution of 1780: A Social Compact: 75. See also Simmons, On the Edge of Anarchy: 62.


412 For the claim that, in revolutionary America, natural rights were never conceived of as acquired rights, see Philip A. Hamburger, "Natural Rights, Natural Law, and American Constitutions," The Yale Law Journal 102, no. 4 (1993): 908.
With this conception in hand, we can examine how the Berkshire Constitutionalists understood ratification as an unalienable right. Consider the following two passages:

“The people at large are endowed with certain alienable and unalienable Rights. Those which are unalienable, are those which belong to Conscience respecting the worship of God and the practice of the Christian Religion, and that of being determined or governed by the Majority in the Institution or formation of Government. The alienable are those which may be delegated for the Common good, or those which are for the common good to be parted with. It is of the unalienable Rights, particularly that of being determined or governed by the Majority in the Institution or formation of Government of which something further is necessary to be considered at this Time.” (SB, 374-75)

“And he who would invest an Honorable House of Representatives with Power of forming A New Constitution and Imposing it upon the people without the Approbation of the Majority of the people at Large is Guilty of the Most horrid Impiety in yealding up that birthright which is in its own Nature as Incommunicable as that of seeing and Judging for ourselves in Matters of Religion and of Being saved for our selves.” (V, 527)

In these passages, Allen refers to three unalienable rights. The first two relate to religion: the right of belief (inner worship) and the right of religious practice (external worship). The third and most important right for both our and the Constitutionalists’ purpose is, as described in the SB passage, the right to be determined by the majority in the institution or formation of government. Since we know that the critical moment in creating a government is the authorization of its constitution, this right can be restated as the right of civil society to authorize its constitution through a majority vote before its implementation, and it is this reformulated version that Allen mentions in the second passage.

Two ambiguities or inconsistencies leap out from the Constitutionalists’ claims. First, the SB passage states that the rights to be discussed are those belonging to the people at large (civil

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413 The Constitutionalists were not entirely committed to the full ramifications of their stance on the freedom of internal and external worship, for they frequently confined religious freedom to the Christian religion or, more specifically, Protestantism. As Kuehne notes, this reflected a tendency in Massachusetts for religious liberty to be narrowly understood as “an individual’s right to public toleration of his Protestant denominational choice.” See “Returns of the Towns on the Constitution of 1780,” 491, 93; Kuehne, Massachusetts Congregationalist Political Thought: 91; Morison, “The Struggle Over Adoption,” 368-80.
society), yet the rights of external and internal worship adhere to individuals, regardless of whether or not they are in civil society, and never to civil society itself. Despite this, the plural subject makes sense when discussing the right to ratification, for individuals do not have an original right to be determined by the majority in the formation of government; rather, they endow civil society as a whole with some of their individual rights upon entering it, with the understanding that society acts through majority rule, and the combination of all such endowments grants civil society the right and ability to govern and create a constitution.\footnote{Thus, a right to ratification could not be an unalienable right if they were equivalent to natural rights.}

Second, different conceptions of unalienability are needed to explain the three rights. By this I mean that in addition to a discussion of what a right is and what it means for one to be unalienable, a conception of unalienable rights also explains why some cannot be alienated, and no single explanation applies to the rights of inner and external worship and the right to ratify a constitution.\footnote{Note that this applies even if one believes that rights are basic, i.e. in need of no additional justification. See McConnell, “The Nature and Basis of Inalienable Rights,” 27.} Perhaps, as initially suspected of the state of nature claims, the Constitutionalists used the language of unalienability solely for rhetorical purposes, despite the fact that ratification’s unalienability cannot be explained under a unified conception of the property. While this conclusion is tempting and bolstered by the lack of any effort by the Constitutionalists to make explicit just why civil society cannot entrust constituent power to delegates, it is too quick. Using different conceptions of unalienability without distinction was commonplace in the philosophical and religious works of the time.\footnote{See, for example, Richard Price’s quick gloss on the unalienability of the rights to internal worship, external worship, self-legislation, and property; Price, “Two Tracts on Civil Liberty,” 33.} Thus, in what follows I lay out several conceptions of unalienability, each with a unique explanation for why a certain right
cannot be alienated, and attempt to see which, if any, make sense of the Constitutionalists’ assertions.

Francis Hutcheson, who first introduced the terminology of alienable/unalienable rights and greatly influenced early American political thought, helps in this task. According to Hutcheson, to determine if rights are alienable or not, one must consider: “1. If the Alienation be within our natural Power, so that it be possible for us in Fact to transfer our Right; and if it be so, then, 2nd. It must appear that to transfer such Rights may serve some valuable Purpose.”

Generalizing from Hutcheson, we can divide unalienable rights into two types: naturally unalienable and morally unalienable. A right is naturally unalienable if it concerns an ability or power that a person cannot physically transfer to another. Hutcheson’s discussion of the right to private judgment or inward sentiment falls into this category, for he believes that both occur involuntarily. The mind automatically forms certain judgments in response to evidence, just as certain sentiments rise up in response to external stimuli. A right to either of these occurrences is naturally unalienable, because no matter what individuals do or want to do, they cannot give another person the ability to make judgments or form sentiments for them, let alone the rights to use these abilities.

Locke invokes something like natural unalienability in his toleration writings; he argues that one reason magistrates can never acquire the right to coerce in religious matters is because

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418 Even if one does not accept Hutcheson’s particular conception of cognition, the point stands, for attempting to give someone the power to make judgments for us would necessarily involve making the constant judgment that their judgments are the correct ones.
“no man can, if he would, conform his faith to the dictates of another,” for “to believe this or that to be true does not depend upon our will.”\footnote{John Locke, “A Letter Concerning Toleration,” in \textit{The Works of John Locke, Volume Five} (London: Rivington, 1824), 11, 40. This argument relies on Locke’s claim that coercion works on the will.} Similar viewpoints abound in the robust discourse on religion in late 18\textsuperscript{th} century Massachusetts; for instance, the Congregationalist Pastor Abraham Williams notes in his election sermon that “Human Law can’t control the Mind.—The Rights of Conscience are unalienable; inseparable from our Nature; —they ought not—they cannot possible be given up to Society.”\footnote{Williams, “An Election Sermon: Boston, 1762,” 8.} In this way, natural unalienability explains the Constitutionalists treatment of the right belonging to inner worship as unalienable, insofar as a person cannot give another the ability to dictate their genuine faith and religious belief. However, the right to have the majority create the constitution does not fit into this category, nor does the right to practice a religion in a certain way. There is nothing physically impossible about civil society enabling some entity other than the majority to create its constitution, just as there is nothing physically impossible about an individual allowing someone else to dictate their religious practice.\footnote{Though popular at the time, there is something fundamentally contradictory about natural alienability, for it is hard to see how a person has a right to abilities and actions that he cannot control and objects that he does not possess. In this sense, the property of alienability is irrelevant, for non-existent rights have no properties. This confusion is particularly problematic for the theories of Pufendorf, Hutcheson, Jefferson, and the like, where rights are intimately connected with the will and intentions. As White notes, “if we deny that a man can perform an action, we should deny that he has a right to perform it. And if he has no right to perform it, he lacks a right which he can alienate or transfer to another.” White, \textit{The Philosophy of the American Revolution}: 199-200.}

A right is \textit{morally unalienable} if it is possible for a person to control and alienate the activity or object in question, but not without violating moral law. Of course, this definition of moral unalienability could yield an endless number of variations, each correlated with a different conception of morality. However, in the context of early America, these variations narrow
down to two: non-ownership moral unalienability and no-reason moral unalienability. A right that we do not possess is non-ownership morally unalienable. For instance, a person might be able to take some action x or use some object y but be unable to transfer the right to do x or use y because he does not possess the relevant right.

This conception of unalienability appears within Locke’s discussion of the impossibility of voluntary enslavement or submission to absolute rule. Locke writes: “Nobody can give more power than he has himself, and he that cannot take away his own life cannot give another power over it” (TT, II.23). Locke of course is not suggesting that individuals do not possess the ability to take their own life or give another full power over it, which would be true if the right was naturally unalienable, but rather making the point that they cannot do either without violating moral law, for they do not possess such a right over their lives. Underlying this claim is his belief that control over our own life, but not the right to end it at will, is entrusted to us by God. In fact, we explicitly do not have such a right, for God’s natural law imposes on us a duty of self-preservation that conditions the trust, and such duties always make contrary rights claims impossible. We therefore cannot voluntary enter into a condition of slavery or absolute arbitrary rule because doing so involves the alienation of a right to destroy our life.

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422 Simmons, On the Edge of Anarchy: 115-16; White, The Philosophy of the American Revolution: 210; Peters, The Massachusetts Constitution of 1780: A Social Compact: 80; McConnell, “The Nature and Basis of Inalienable Rights,” 45. Note that my interpretation diverges from these authors, in that they collapse what I call non-ownership moral unalienability into natural alienability, while I hold the two to be distinct.

423 See also The Judgment of Whole Kingdoms and Nations: 18.

424 Locke’s argument might also fit into another conception of moral unalienability popular in the late 18th century: the idea that a right is unalienable if it stems from a duty. This conception, discussed by Burlamaqui, Jefferson, and others, holds that alienating a right to do x derived from a duty to do x is impossible, for this would involve taking on a duty not to do x and thus contradict the original duty. I leave this alternative type of moral unalienability out because of its similarity to non-ownership moral unalienability, and its absence from most discussions of unalienability in the Massachusetts dialogue at the time. See Burlamaqui, The principles of natural and politic law: 74; White, The Philosophy of the American Revolution: 209-10.
or a right to totally control our life, and either right is non-ownership morally unalienable because we do not possess it and therefore cannot alienate it. 425

Non-ownership moral unalienability clearly does not explain the right to practice religion as one chooses, but what about the right to ratification? Consider two possible explanations: civil society cannot alienate the right to ratify the constitution because individuals possess it; and the majority cannot alienate the right to ratify the constitution because civil society possesses it. The first explanation fails because we know that civil society possesses the right to ratification, which stems from the rights of self-preservation and punishment ceded by individuals upon entering civil society. In this sense, individuals never possessed such a right because it does not exist before the creation of civil society. The second explanation also fails, for it makes the mistake of treating the majority as a distinct agent separate from civil society, rather than the means through which the will and decision of civil society is determined in accordance with the agreement made in the first contract.

Finally, a right is no-reason morally unalienable if the reasons against alienating the right always win out over those in favor; i.e. its alienation is always irrational. This conception is a descendant of the Grotian idea of interpretive charity seized upon by English Radicals in the 17th century, whom argued that while it is logically possible for free men to renounce all of their natural rights, charity dictates that we assume that our predecessors were rational, and therefore could not have intended to leave themselves and future generations without any crit-

425 Note that this only pertains to an individual’s ability to alienate a right. Thus, a right to life might be unalienable, but subject to forfeiture under certain conditions. Grotius first stated such a position when he wrote: “A man’s life is so far his own that he may defend it even at the cost of injury to an aggressor; may forfeit it for crime may sacrifice it in the service of his country. But no one has unlimited right over his life...no one may pledge his life by contract.” Cited in Tuck, Natural Rights: 70.
ical rights. Moving from classic to simple contractualism eliminates the focus on the original contract and the ancient constitution, turning the principle of interpretive charity into a general form or type of unalienability that, I argue, best explains the right of ratification. Here, the irrationality of alienating certain rights is treated like a defeating condition, i.e. a condition like fraud, duress, or insanity, the presence of which automatically voids a contract, or in this case voids any attempt at alienation.

Noting that a right is morally unalienable because alienating it is necessarily irrational does not fully clarify this conception of unalienability, but instead shifts the point of ambiguity. Instead of asking why a right is unalienable, we now have to ask why there are never good enough reasons to alienate it. Many options suggest themselves. For instance, it might be irrational to alienate a right if doing so made the exercise of reason impossible, made all other rights unstable, or if doing so degraded human dignity or made one less human. However, as attractive as such conceptions might be, they do not correspond to the actual arguments suggested by the Berkshire Constitutionalists and the authors that likely influenced them.

As cited above, Allen claims that “alienable [rights] may be delegated for the Common good, or those which are for the common good to be parted with.” This can be read in two ways. On the one hand, Allen simply explains that those rights delegated for the common good are alienable rights. On the other hand, Allen describes alienable rights as those rights the alienation of which can benefit the common good. This latter interpretation suggests that unalienable rights are those rights that harm the common good when alienated. From this, and

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426 Ibid., 143-52.

427 See Simmons, On the Edge of Anarchy: 137.
taking into consideration that Allen is referring explicitly to those rights held by civil society, the good of which is the ‘common good,’ we can define alienation against reason as alienating a right when doing so harms the good of the rights holder. This produces the following definition of no-reason moral unalienability: a right is unalienable if alienating it is always contrary to the good of its holder.

Undergirding this conception is the idea that the alienation of a right, considered in isolation, has a negative effect on a rights holder. A rational rights holder therefore only alienates a right if doing so, in some way, has a greater positive impact on their well-being, whatever this might entail. For instance, individuals in the state of nature give up their rights to be judges in their own cases and to take whatever actions they think lead to their self-preservation in order to better protect themselves, their remaining rights, and their property, results they purportedly take to be more valuable than the possession of their now alienated rights. Thus, unalienable rights are those rights that, for some reason, always leave the rights holder in a worse position following alienation, regardless of his or her identity or context. In a sense, any attempt at alienating such a right is Pareto inefficient for the rights holders.

This conception of no-reason moral unalienability is not unfamiliar. A version of it is common to many rights-based social contract theories. For instance, Hobbes demonstrates a similar logic when he writes: “Whensoever a man transfers his right or renounces it, it is either in consideration of some right reciprocally transferred to himself or for some other good he hope thereby…and therefore there be some rights which no man can be understood by any
words or other signs to have abandoned or transferred." Likewise, in a discussion of the limits of legislative power, Locke explains that "no rational creature can be supposed to change his condition with an intention to be worse" (TT, II.131). The Constitutionalists’ contemporaries also seem to have relied on this conception of unalienability at times, as evident by Theodolphilus Parsons claim that certain rights are "are unalienable and inherent, and of that importance, that no equivalent can be received in exchange." No-reason moral unalienability explains the remaining two unalienable rights mentioned in the passages above: the right to practice religion and the right to ratify the constitution. In regards to the former, the Constitutionalists’ explanation would likely follow Hutcheson’s, who wrote "the Right of serving God, in the manner which we think is acceptable, is not alienable; because it can never serve any valuable purpose, to make Men worship him in a way which seems to them displeasing to him.” In other words, since the point of practicing religion is to take actions one believes God desires and to be judged accordingly, allowing another person to dictate one’s religious practice eliminates the value of religious practice, adds nothing, hurts the individual rights-holder as a result, and is therefore without reason. Since such

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429 Parsons, "The Essex Result, 1778," 330; Simmons, On the Edge of Anarchy: 137-38; Peters, The Massachusetts Constitution of 1780: A Social Compact: 80. Note that Locke relies on the irrationality of ceding certain rights to clarify the content of inexplicit consensual actions. He suggests that in the absence of evidence to the contrary, we should assume that individuals do not consent to irrational terms, for instance agree to give away rights the absence of which harms them. For Locke, this is not a means of defining unalienable rights, but rather a way of intuiting what people vaguely consent to. Parson and Allen, if enunciating no-reason moral unalienability, are doing something quite different; they are using irrationality to define a certain rights category.


431 As with internal worship, this stance on external worship bears the influence of the Constitutionalists’ theological commitments. Congregationalists, such as the Constitutionalists, likely subscribed to Calvin’s adoption of Luther’s two kingdoms conception, which held that secular government was profoundly distinct from reli-
alienation is irrational, the right to practice one's religion as one pleases is unalienable. We can understand Parsons as articulating a version of this argument in *The Essex Result*, when he notes that religious practice is a necessary means of fulfilling some of our duties that "for the discharge of which we are accountable to our Creator and benefactor, which no human power can cancel." These duties are determined by individual reason, and therefore even external worship must be internally motivated. Thus, alienating the right to practice one's religion makes it impossible to fulfill one's duties to god, something that is detrimental to the good of an individual and for which "no equivalent can be received."\textsuperscript{432}

In these terms, the right to ratification is unalienable because any alienation endangers or harms civil society (the rights holder) and is therefore without reason. This means that our reconstruction of the Constitutionalists' account of the unalienability of ratification requires one last component—we need to understand why alienating the right is necessarily contrary to the good of civil society. Consider the following passage:

\begin{quote}
[T]o suppose the Representative Body capable of forming and imposing this Compact or constitution without the Inspection and Approbation Rejection or Amendment of the people at large would involve in it the greatest Absurdity. This would make them greater than the people who send them, this supposes them their own Creators, formers of the foundation upon which they themselves stand. This imports uncontroulable Dominion over their Constituents for what should hinder them from making such a constitution as invests them and their successors in office with unlimited Authority, if it be admitted that the Representatives are the people as to forming and imposing the fundamental Constitution of the state upon them without their Approbation and perhaps in opposition to their united sense—In this the very essence of true Liberty consists, viz in every free state the Constitution is adopted by the Majority. (SB, 377)
\end{quote}

\textsuperscript{432} Parsons, "The Essex Result, 1778," 330. Similarly, the Berkshire town of New Salem, explained that: "Religion must at all times be a matter between GOD and individuals, then we see not the least propriety or fitness, in the Peoples Investing their Legislature with any spiritual Jurisdiction Over the Subject." Returns of the Towns on the Constitution of 1780, 482-83.
We have already considered many of these claims. However, looking at the entirety of this passage helps us better understand how they fit together to form a coherent explanation for why constituent power cannot be alienated.

Reconstructed, the Constitutionalists’ main argument tracks and expands their argument against non-constitutional government. An entity entrusted with constituent power, i.e. entrusted with the right to authorize the constitution before its final enactment, might authorize a constitution and form of government directly harmful to the people, and be completely within its power when doing so. Moreover, there is no way to prevent this occurrence, for the Constitutionalists believed that individuals in civil society cannot reliably control or check governing bodies in the absence of a constitution. In this sense, the dominion of those endowed with constituent power is indeed, as Allen suggests, uncontrollable. For example, a constitutional convention might be created for the restricted purpose of creating a particular kind of constitution, with explicit instructions that it would dissolve upon the completion of its task. Nonetheless, if entrusted with the power to create a constitution without consulting the majority, this convention could write and draft any constitution it wanted, including one that turned the convention into a perpetual government with near absolute powers, and then authorize and implement it. In the absence of a higher law document and a pre-existing means of regulating its behavior, it would be either difficult or impossible for individuals in civil society to prevent it from doing so.

433 These concerns are especially applicable in instances where non-civil society authorizers also serve as drafters, and these, it appears, are the only instances the Constitutionalists considered.
Moreover, just as the Constitutionalists recognized the sociological truth of Whiting’s and the General Court’s acquiescence argument, i.e. that the passage of time made an illegitimate government appear legitimate, they must have also recognized that the authorization of a constitution by a body endowed with constituent power would make the constitution appear legitimate, even if the authorizers violated the terms of their trust. This effect would only be heightened by the tradition of covenanting and the general popularity of contractual and constitutional thought in Massachusetts at the time, which likely made anything resembling a social contract appear somewhat legitimate. Thus, alienating the right to ratify a constitution, which amounts to alienating constituent power, involves giving an external body the moral power to take actions the effects of which are either long-lasting or permanently harmful to civil society, in a context in which institutional safeguards and regulatory mechanisms are absent. To the constitutionalists, no potential benefit could offset such risk, and therefore constituent power is unalienable.

The results of this argument are clear. Regardless of the identities of the drafter or authorizer, any attempt at enacting a constitution without direct popular authorization is an example of a minority attempting to impose its will on the majority and, as Allen writes, “That the Majority should be governed by the Minority in the first Institution of Government is not only contrary to the common apprehensions of Mankind in general, but it contradicts the common Law of Justice and benevolence” (SB, 375). Enacting any constitution without popular ratification means that a minority governs the majority, something that not only vio-

434 As Lutz explains, colonial Americans in general tended to assume that majority rule was the only reasonable way to determine and enact the common good. Lutz, The Origins of American Constitutionalism: 29.
lates intuition, but also contradicts natural law. Here, natural law, the ‘common law of justice and benevolence’ mentioned by Allen, can be understood as the entire set of ideas that shapes and supports the simple contractual narrative. This meant that to refuse the Constitutionalists’ demand was to deny that all political power comes from the people, that individuals cede it to the majority, and that it is this majority alone that can create a constitution.

4. CONCLUSION

On its face, the concept of constituent power seems to be a likely candidate for justifying ratification. Constituent power is popular sovereignty applied to constitution-making, and ratification appears to be the perfect example of the popular sovereign expressing its will by accepting a constitution. However, as seen in the previous chapter, this intuition is complicated by focusing on the actual steps constitution-making entails and trying to identify exactly where and when the people exercise this unique power.

The most famous articulation of constituent power—that of Emmanuel Joseph Sieyès—leaves no room for conceiving of ratification as a moment of constituent power. Sieyès’ extraordinary representatives write the constitution, and their actions are the actions and expression of the popular will. This makes a separate moment of constituent power via ratification redundant in cases of constitutional approval and incoherent in cases of constitutional rejection. If extraordinary representatives speak as the people, there is no need for the people to

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435 The law of Justice and benevolence’ was a common description given to natural law. For instance, George Turnbull wrote: “What rules does the law of nature prescribe to him? Doth it not prescribe to him these very immutable, universal laws of justice and benevolence, which have been already explained?” Johann Gottlieb Heineccius, *A Methodological System of Universal Law: Or, the Laws of Nature and Nations, with Supplements and a Discourse by George Turnbull*, trans. George Turnbull (Indianapolis: Liberty Fund, 2008). 461.
review their own creation. Similar problems of redundancy and incoherence belie any form of such a multiple moment justification of ratification.

Other constituent power justifications that attempted to make room for moments of constituent action preceding ratification failed to persuade for other reasons. The ameliorative function justification, which claimed that ratification was a moment of constituent power made necessary by prior deficiencies in the constitution-making process, turned ratification into an ad-hoc solution rather than an essential aspect of the constitution-making process. The multiple attempts justification conceptualized ratification as one of several attempts to create, make manifest, and harness constituent power, but in the process contradicted both itself and the core of constituent power theory.

In this chapter I argued that the Berkshire Constitutionalists developed a theory of constitutionalism and constitution-making that combines constituent power and ratification without producing these problems. To this end, after sketching the history of these Western dissidents—important in its own right as the history of the first instance of ratification in the world—I reconstructed their theory, filling in the gaps and interpreting some of their vaguer statements by reference to the political and intellectual context in which they were enmeshed. The Constitutionalists, I argue, held that the basics of Lockean contractualism were true: the protection of liberty requires government, all political power comes from the people, and government must obtain its authority through a process consisting of two voluntary contracts. To this they added the idea of a written constitution, a document that formally structures and empowers the institutions of government and protects civil society from the effects of power combined with man’s innate corruptibility. The adoption of this constitution became the se-
cond Lockean contract, and thus the Constitutionalists claimed that constituent power—the ability to create a legitimate constitution—belongs solely to the people in civil society.

Creating a constitution involved two steps, writing and authorizing, and according to the Constitutionalists constituent power resided solely in the second. In other words, the people only exercise their unique ability to create a constitution when reviewing and approving or rejecting an already written constitution, i.e. when ratifying. This means that the identity of the drafters and the details of the drafting process are irrelevant in terms of constituent power, and helps explains why, at least initially, the Constitutionalists had no problem with previously constituted authorities such as the General Court writing the constitution, just so long as they eventually submitted their creation to the people.

This division of the constitution-making process into two steps, and the confinement of constituent power to the second, is why the Constitutionalists’ theory escapes the problems that afflict all other constituent power justifications. The drafters of the constitution are neither identified with nor taken to embody the people in civil society, and their actions do not constitute the exercise of constituent power. At no point in the constitution-making process does constituent action occur prior to ratification. Thus, there is no possibility of redundancy or contradiction and ratification is neither reduced to an ameliorative function nor cast as one of several attempts at ascertaining the constituent will.

Perhaps, one might want to conclude that even if authorization is the proper site of constituent power, it can be carried out by extraordinary representatives, delegates, or some other entity distinct from the people acting in a referendum. The Constitutionalists’ conception of the people’s right to authorize their constitution as unalienable rebuts this objection. Alienat-
ing constituent power, which non-popular ratification entails, necessarily harms civil society; this is why the right to exercise constituent power is unalienable. Not only must a constitution be ratified to go into effect, but the ratifying authority, according to the Constitutionalists, must always be the people directly.

Framing constituent power as unalienable was the final theoretical move that allowed the Constitutionalists to place the full weight of contractualism behind their specific demand for popular ratification. As has already been mentioned, views on the state of nature, popular sovereignty, contracting, and the like abounded in the press, sermons, speeches, and pamphlets at the time, and Allen and his Constitutionalists successfully articulated a theory that integrated all of them into an argument supporting one simple demand: submit the constitution to the people before formal enactment. While their larger political theory allows for the delegation of rights and powers between individuals and civil society and government, and while their support of representative government makes their belief in representation and fiduciary relationships clear, the authorization of a constitution was something that the majority of civil society had to do for itself. As Allen starkly put it: "Representatives are the people as to Legislation; but as to the formation and Imposition of the Constitution upon the people they cannot be" (V, 525).436

Thus, at the beginning of popular constitution-making in America, and perhaps the world, ratification procedures played a critical role. While the identity of framers and the manner in

436 Condorcet would express this position precisely less than twenty years later: "The people, in truth, delegated only the task of drafting a constitution, a task that they are unable to accomplish. Thereafter, their refusal or their acceptance expresses their general will." Jean-Antoine-Nicolas de Caritat marquis de Condorcet, "The Principle of, the Justifications for, the New Constitution," in Social and Political Thought of the French Revolution, 1788-1797: An Anthology of Original Texts, ed. Marc Allan Goldstein (New York: Peter Lang, 1997), 417.
which they drafted constitutions were important, insofar as the right kind of framers would prevent vested interests from distorting the foundations of the government and lead to well-structured fundamental law, the people only fully exercised their constituent power when voting up or down the proposed constitution. Under this formulation, ratification receives justification from its function, i.e. as the sole means through which constituent power is exercised.\textsuperscript{437} In the next section, the strength of this \textit{single moment justification} (SMJ)—the final means through which a theory of constituent power might give reason to implement a ratification procedure—will be tested.

\textsuperscript{437}Schmitt’s position on ratification constantly changes in Constitutional Theory. However, at one point he says something very similar to what I am describing here: “The people’s constitution-making will always express itself only in a fundamental yes or no and thereby reaches the political decision that constitutes the content of the constitution.” Schmitt, \textit{Constitutional Theory}: 132.
5.

THE FATE OF SMJ: Meaningful Choice & Voter Ignorance

“If a nation retained the power to ratify the constitution, it still would not really exercise this power. ...Direct ratification would therefore not be true ratification, and the nation would seem to have exercised a right when it had not actually done so.”

Marquis de Condorcet

“To most voters, constitutional revision is a highly esoteric subject, involving hazy abstractions that appear to have little direct relation to their personal affairs.”

Albert Sturm

As we have seen, the Berkshire Constitutionalists articulated a robust justification for ratification based on constituent power. Starting from two premises, that authoritative constitutions must be created through the exercise of the people’s constituent power and that this power is inalienable, this Sole Moment Justification (SMJ) holds that ratification is necessary because it is the sole opportunity in the constitution-making process for the constituent power to act. Since this argument isolates constituent power in the ratification process, and conceptualizes ratification as an actual moment in which the people can act, it avoids the redundancy, incoherence, and theoretical inconsistencies that bedevil other attempts to justify ratification by appealing to constituent power.

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In this chapter I argue that despite its pedigree and immunity from the problems that weakened other constituent power justifications, SMJ faces its own limitations and ultimately fails to justify the implementation of ratification. I make this argument in six steps. First, I show that SMJ only justifies ratification procedures in which the ratifying agent is a popular ratifier, i.e. the people voting in a national or provincial referendum. Second, I argue that the logic of constituent power requires that the people make a meaningful choice when exercising their constituent power. This means that, at a minimum, the people must be capable of understanding the constitution and making their decision on the basis of its contents. Third, I claim that we should expect the average person to be too ignorant to make a meaningful choice in a ratification referendum, and that this expectation undermines SMJ. In the fourth, fifth and sixth sections I explain and rebut three objections to my dismissal of SMJ: that constitutional framers will fall short of the meaningful choice threshold; that information shortcuts eliminate the problem of constitutional ignorance; and that education programs can eliminate information deficits. I conclude summarizing my argument and explaining why it is not anti-democratic.

Throughout this analysis I assume, with the Berkshire Constitutionalists, that constituent power is unalienable and that it cannot operate earlier in the constitution-making process. Both of these assumptions might be challenged. The inalienable nature of constituent power stems from the claim that alienating it directly and unavoidably endangers the people, which itself lies on a Lockean and natural rights foundation that is considerably less stable today than in revolutionary America. Similarly, the Constitutionalists’ belief that constituent power cannot operate prior to the ratification process seems weakened by the development of new pro-
cedures and institutions that give the people a direct role in constitution-making before and
during the drafting process itself. Nonetheless, I leave these assumptions unchallenged and
instead focus on the claim that constituent action is even possible during popular ratification.
In doing so, I both test the strongest version of SMJ possible and concentrate on its central
proposition.\footnote{Note that relaxing the inalienability claim of SMJ means that the constituent power can be represented. This allows constituent power to act earlier in the constitution-making process, where it can actually have a greater effect on the contents and design of the constitution. This seems intuitively desirable, and without some independent reason for confining constituent action to the ratification process, there seems little reason to postulate something like SMJ. Thus, in some sense, SMJ needs an inalienability requirement, whatever its basis might be.}

1. **Scope**

SMJ only applies to those ratifying procedures in which the ratifying agent is the future citi-
zenry voting in a referendum; all other forms of ratification contradict the claim that constitu-
ent power is inalienable. Consider the procedures used to ratify the US Constitution, the
*Grundgesetz*, and the Constitution of Eritrea. State legislatures submitted the draft US Constit-
tution to “a Convention of Delegates, chosen in each State by the People thereof,” with the
understanding that “the Ratification of the Conventions of nine States,” would “be sufficient
for the Establishment.” The Constitution became operational in March 1789, having been rat-
tage (state parliaments) of West Germany. All of the Landtage, except for Bavaria, approved
the draft and the German Basic Law went into effect in 1949. Finally, in Eritrea, the Constitutional Commission submitted the constitution to an elected Constituent Assembly “mandated to ratify the Draft Constitution.” Though the Assembly ratified the constitution in 1997, it has yet to go into full effect.

In each of these cases an agent or agents spoke for the people. Provincial conventions accepted the US Constitution in the name of the citizens of each state; in West Germany provincial legislatures did the same for the Basic Law; and in Eritrea a single constituent assembly approved the constitution. For these ratifying agents to have exercised constituent power by approving the constitution, they must have received it from the people through a prior process of alienation and delegation. This is the only way for a small subsection of the citizenry to serve as the constituent power and give life to the constitution. However, this renders SMJ inapplicable, for the inalienability of constituent power is not only a central tenet of the justification, but also the primary reason for confining constituent power within the ratification process. SMJ therefore not only fails to apply to any ratification procedure in which the ratifying authority is an agent of the people—this includes provincial assemblies, preexisting governmental organs, constituent assemblies, and conventions—but also invalidates them completely.


Government of Eritrea, "Proclamation No. 92: The Constituent Assembly Proclamation," (1996); Bereket Habte Selassie, "Constitution Making in Eritrea: A Process-Driven Approach," in Framing the State in Times of Transition: Case Studies in Constitution Making, ed. Laurel E. Miller (Washington, DC: United States Institute of Peace Press, 2010), 73. Admittedly, the Eritrean Constituent Assembly were not ratifiers according to my earlier definition, insofar as they were given amending power, which they exercised, in addition to approval and rejection powers.
Put simply, SMJ characterizes ratification as a procedure designed to allow the direct exercise of inalienable popular sovereignty by the people. It therefore must provide a way for the people to act directly on a constitution without making use of intermediary ratifying agents. The only ratification procedures that meet this requirement are those involving some sort of constitutional referendum. As Arato and Miklosi write, “the empirically available ‘people,’ as a mere multitude of individuals, is incapable of being drawn into the making of a constitution otherwise than ratifying it through a referendum.” Such a ratification procedure might employ numerous provincial referenda and aggregate the results, as Massachusetts did with the towns in 1780, or it might simply make use of one national referendum. This reduced scope does not undermine SMJ, but simply means that representative forms of ratification cannot be justified by claiming that ratification is the unique site at which constituent power is exercised. Practically, this restriction in scope has minimal effects, for most ratification procedures, as mentioned earlier, involve popular referendums.

2. REFERENDA AND CHOICE

SMJ is a normative argument that justifies ratification by construing the procedure as the sole and necessary means through which the people authorize their constitution. In other words, SMJ claims that the constituent power only takes action on the constitution during ratification and that when choosing whether to approve or reject a constitution the people create it and mark it as their own. Ratification is thus the moment when the popular sovereign enters the

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constitution-making process, a moment that, for constituent power theorists, separates an authoritative constitution from one without any authority at all.

The individual votes of all those citizens participating in a ratification referendum determine its outcome and therefore the ‘action’ taken by the constituent power. The choice a voter makes in the voting booth when presented with a draft constitution is therefore an essential one for SMJ. What must this choice look like? What conditions must be met? In other words, in order for ratification to play the role ascribed to it by SMJ, what kind of choice must the relevant portion of the population (majority or supermajority) make or be capable of making when they vote on the constitution?

2.1 CHOICE NOT OUTCOME

At the least, a choice must be physically possible. A referendum making use of a single option ballot, like a referendum during which armed soldiers demand that citizens vote a certain way, cannot reasonably be construed as the expression of the constituent power. Voters must be able to choose whether or not they wish to accept the proposed constitution if their decisions are to be aggregated and understood as the exercise of constituent power. To say otherwise would be to vacate constituent power theory of any meaning at all.

Beyond being physically possible, what other requirements must the referendum vote meet in order to satisfy the logic of SMJ and constituent power more generally? Consider the following hypothetical situations:
H1. Citizens vote on a constitution that was never publicly discussed or distributed.

H2. Constitution-makers discuss, distribute, and educate the populace on Constitution A. On the day of the referendum, Constitution A is secretly replaced with or amended into Constitution B. Most voters are unaware of the switch.

H3. Citizens vote on a constitution written in a language that they cannot understand.

Could these referenda be understood as the expression of constituent power? Our intuition, rightly, suggests no. The people cannot exercise constituent power by voting on a constitution the contents of which they neither know nor understand; they cannot express their will through a referendum and create a constitution if they do not know what it is that they are voting on. Thus, it seems, voters must be able to access the contents of the document they are tasked with evaluating.

Would knowledge of the outcomes of these referenda change our evaluation? For instance, if voters approved the constitutions in H1 and H3, and would have voted identically had they read and understood the constitutions, would H1and H3 then be expressions of the constituent power? Similarly, if voters approved Constitution B in H2, but meant to approve Constitution A, and Constitution B turns out to be objectively superior to both A and the status quo, does H2 become a moment of constituent action? Again, our intuitions suggests no. For the purposes of evaluating whether or not the constituent power took action during a referendum, the fact that voters accidentally made a choice that happened to align with their considered opinions, preferences, and values, or unknowingly voted for the objectively superior constitutional outcome, seems immaterial.
Outcomes are irrelevant for our evaluation because of the task and meaning assigned to the referendum vote by SMJ. Constituent power theorizing emphasizes that only the people have the power and authority needed to create the extraordinary law that will govern them in the future, and SMJ claims that ratification referenda are necessary because they provide the sole means of enabling the constituent power to exercise this authority—to act—during the constitution-making process. This moment of creative action is vital for constituent power theorizing. The above hypotheticals can never be construed as moments of constituent action, for the decisions made by the voters within them are not acts of creation. Voters cannot create a constitution by voting on one they have not seen; their choices are inevitably arbitrary relative to the content of the constitutions.

Outcomes might be helpful to the task of evaluating whether or not the constituent power acted during a moment in the constitution-making process if the nature of the choice was a mystery. In other words, without any knowledge of what occurred during H1, it might reasonably be claimed that we can suspect that the constituent power acted, that voters evaluated the contents of the constitution and decided that it was to their liking, on the basis that the outcome reflects their interests, beliefs, and preferences. However, we know that voters did not see let alone understand the constitution in H1, and thus the outcome is irrelevant because a creative choice was impossible. The outcomes of the referenda for the hypotheticals as written would only be important if we were justifying ratification or the exercise of constituent power because it creates better constitutions, or constitution more closely aligned to the desires of the electorate. CPJs, including SMJ, do not make such arguments. Thus the outcomes
of referenda are neither necessary nor sufficient when determining whether constituent action occurs. It is the nature of the choice made by voters that matters.

This is similar to the consent theorist critique of hypothetical contractarian arguments. For consent theorists, consenting involves the according to another by the consentor of a special right to act within areas normally prohibited to everyone other than the consentor.\textsuperscript{445} Thus, if $x$ fairly consents to $y$, this act of consent creates a new reason for $x$ allowing $y$ to occur. Hypothetical consent arguments claim that $x$ should allow $y$ because $x$ would have consented to $y$ if he were able or had the opportunity. Traditional consent theorists criticize these arguments, claiming that they “do not supply an independent argument for enforcing their terms” and “illicitly appropriate the justificatory force of voluntarism while being...in no real way motivated by it.”\textsuperscript{446} In other words, hypothetical consent arguments have nothing to do with consent, do not provide independent consent-based justification, and cannot substitute for the presence of real consent. Instead, they simply mask straightforward paternalistic claims in the guise of consent arguments. Similarly, pointing out the positive outcome of a ratification referendum adds nothing to our discussion of the importance of the actual exercise of constituent power and whether or not ratification referenda serve as the moment when this action occurs. Just as hypothetical consent arguments rely on paternalistic claims and thus miss the core of consent theory, worrying about referenda outcomes mistakenly focuses on the conclusion of


constitution-making instead of the presence or absence of the constituent action central to constituent power theorizing.

2.2 MEANINGFUL CHOICE

As we have seen, what is crucial for constituent power theorizing is how voters decide and choose in a referendum, not the outcome of the vote. Specifically, in order to satisfy the logic of SMJ, voters must be capable of making what I call a meaningful choice. I define meaningful choice based upon the purpose of the referendum vote. For SMJ, the primary function of a ratification referendum vote is to allow the constituent power to consciously create and uniquely authorize a constitution, thus making it a product of their action and will. Since this is the central purpose of ratification, the subjective viewpoint of voters towards the constitution when making their decision becomes paramount. Voters must be aware of what they are creating; the constitution cannot be an accident. Voters must understand what they authorize; they cannot give higher lawmaking power to something they do not comprehend.

Thus, as much as possible, the choice voters make in a referendum should reflect how they evaluate the constitution and compare it to the likely outcome of constitutional rejection. In order to do this, voters need to apply their own values, beliefs, interests, and knowledge when making their choice. The logic of constituent power, in other words, requires that actions taken by the constituent power are not merely an exercise of will, but an exercise of will augmented by reason.

A voter therefore makes a meaningful choice while voting on a ratification referendum: if she understands that she is voting on a constitution and that her vote will help determine whether not the proposed constitution goes into effect; if she comprehends what the constitu-
tion says and what kind of government it will likely create; if she can reasonably imagine the likely results of constitutional rejection, whether this be a continuation of the status quo, the resumption of civil war, or the beginning of another constitution-making process; and if she then compares the constitution with the possible results of rejection and, in accordance with her interests and beliefs, chooses the alternative that she prefers.

According to SMJ, the referendum is an instance in which, in the words of Lindhal, “the collective acts in the strong sense of exercising its constituent power in view of enacting a legal order ex novo.” For this to be possible, individual voters must be capable of making a decision on a constitution that stems from reasons relating to the actual contents of that constitution; the requirements of a meaningful choice are the minimum needed to ensure this possibility. That is, for SMJ to plausibly justify ratification, a majority or supermajority of the people must be capable of making an agent-relative sensible choice about their future constitution, i.e. a choice in keeping with their own values and interests as they perceive them. When this is possible, we can say that a constitution ratification referendum satisfies the threshold of meaningful choice.

2.3 OTHER CHOICE THRESHOLDS

The nature of the meaningful choice threshold becomes clearer upon comparison with other more well-known choice situations and requirements. Consider for example the demands placed on voters by minimalist conceptions of democracy. According to Schumpeter, the “democratic method is that institutional arrangement for arriving at political decisions in

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which individuals acquire the power to decide by means of a competitive struggle for the popular vote.” In other words, democracy is the institutional arrangement under which elites make decisions, the people select the elites, and the people compete to become one of these elites.\footnote{Joseph A Schumpeter, *Capitalism, Socialism, and Democracy*, Third ed. (New York: Harper & Row, 1950). 242, 69, 62.}

Minimalists relegate political questions and issues to elites, believing that the “psychic economy of the typical citizen” is unfit to handle such complexities.\footnote{Ibid., 285.} Thus, the sole requirement of citizens is to vote during elections, “to cast his vote to the party he believes will provide more benefits than any other.”\footnote{Downs, *An Economic Theory of Democracy*: 36.} Whether voters know anything about the issues their representatives will have to address and how they are likely to address them is unimportant. Instead, voters simply need to vote, on the basis of something that makes sense to them, and the chosen elites will govern in a manner that benefits them personally without leading to their removal.\footnote{See also Adam Przeworski, “Minimalist Conception of Democracy: A Defense,” in *Democracy’s Value*, ed. Ian Shapiro and Casiano Hacker-Cordsn (Cambridge: Cambridge University Press, 1999).}

As we can see, the threshold of meaningful choice is significantly higher than that required by minimalist conceptions of democracy. For SMJ, voters need to be able to understand the constitution, the nature of the choice they must make, and the likely repercussions of their actions. Ratifiers must be able to decide whether or not they want to live in a state structured by a specific proposed constitution on the basis of their comprehension of what such a state would look like. For democratic minimalists, no such requirements are in place. A voter needs to be able to make a free choice in an election, but it matters not whether this choice is based
on a understanding of the ideology and political records of all candidates or a split-second evaluation of their haircuts.

The requirements of the doctrine of informed consent are as robust as the previous were minimal. According to this doctrine in health care law and bioethics, physicians cannot administer treatment to patients unless they receive informed, voluntary, and decisionally-capacitated consent. A patient is informed about the medical choice only if they appreciate the medical situation and prognosis, the nature of the recommended care, the potential alternatives, and the risks and benefits, and conclusively demonstrate their comprehension. Furthermore, this knowledge cannot be merely abstract and technical, for patients must also apply it to their own situation. As one author writes, “it is not enough to understand…that angioplasty or bypass surgery will probably relieve chest pain but there is considerable perioperative mortality. In addition, the patient…must realize that her chest pain and shortness of breath might be improved by angioplasty or surgery but that she might die because of surgery.”

A patient’s consent is voluntary if it is free from coercion, which includes explicit and implicit threats as well as any potential curtailment of options that arise from the patient’s belief

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452 “This is similar to the standard set by The U.S. Department of Health & Human Services for human subjects testing guidelines for all research conducted or supported by the HHS. The guidelines contain three basic requirements for obtaining informed consent: (1) disclosing all relevant information needed to make the decision, and doing so in an accessible manner; (2) enacting a process during which the subject’s actual comprehension of the relevant information is checked; and (3) the elimination or minimization of coercion or undue influence that might effect a subject’s decision to cooperate. 45 CFR part 46.


that she will be harmed or deprived of benefits, even when such fears are unfounded. The consent must also take place in the absence of undue inducement, where the possibility of a potential reward for agreeing to treatment might cloud individual judgment. Finally, informed consent requires that patients possess an active decisional capacity, i.e. they must have the capacity to understand and communicate, the ability to reason and deliberate, be in possession of a set of values and goals that can be applied directly to the medical choice at hand, and genuinely understand that they have a choice.

The threshold required for a choice to be considered an instance of ‘informed consent’ is considerably higher than that required for it to be meaningful. Meaningful choice does not require individual voters to demonstrate their sustained contemplation of the issue in question or their personalization of what it otherwise abstract and technical information. It is simply sufficient for a voter to understand what a constitution means and to decide whether she prefers the likely result of its rejection or the system of government she imagines it will create. This decision might be based on un-interrogated values, weak preferences, or beliefs created in the absence of considering all known alternatives, but as long as it stems from considering the contents of the constitution, the voter’s choice is acceptably meaningful.

The threshold for meaningful choice is similarly lower than that demanded by certain theories of deliberative democracy, which claim that truly legitimate expressions of the will of the

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people must be preceded by authentic deliberation.\textsuperscript{458} Such authentic deliberation entails sincere citizens presenting and arguing their viewpoints, employing reasons potentially acceptable to all, listening to others, recognizing each other as equals, and respecting different conceptions of the good, all in a condition of actual substantive equality.\textsuperscript{459} None of this is demanded by SMJ and the meaningful choice ratification referenda must involve.\textsuperscript{460} A voter entirely ignorant of any competing constitutional viewpoints to her own and who refuses to acknowledge the equality of her fellow citizens is still fully capable of making a meaningful choice on a referendum.\textsuperscript{461}

\textsuperscript{458} [Cohen; Chambers

\textsuperscript{459} [Cohen; Knight and Johnson; Bohman]

\textsuperscript{460} This is important, for Walzer notes, "Deliberation is not an activity for the demos...100 million of them, or even 1 million or 100,000, cannot plausibly 'reason together.'" Michael Walzer, "Deliberation and What Else?," in \textit{Deliberative Politics: Essays on 'Democracy and Disagreement'}, ed. Steve Macedo (New York: Oxford University Press, 1999).

\textsuperscript{461} The threshold of meaningful choice is quite similar to the 'deliberative' requirements supported by Stephen Tierney in his recent book on constitutional referendums. Adhering to a civic republican deliberative conception of democracy, he claims that "the very idea that a constitutional referendum can be an act of constitutional authorship by a public acting together hinges on the idea that millions of people can and will deliberate on the question. However, because "the kind of discursive deliberation that can take place within a small group is not possible...at the macro level," he goes on to adopt a less demanding conception of deliberation tailored for macro rather than micro political contexts. Specifically, he embraces Goodin's idea of 'internal-reflective deliberation,' which means voters learning about the issues in question, reflecting upon them, and reaching an informed decision. While it is contestable whether or not this should count as deliberation at all (I believe it does not), the demand that citizens internally reflect upon a referendum that they understand is quite similar to what it takes for a choice to be meaningful. Tierney, \textit{Constitutional Referendums: The Theory and Practice of Republican Deliberation}: 210-25; Robert E. Goodin, \textit{Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn} (Oxford: Oxford University Press, 2008); Robert E. Goodin and Simon J. Niemeyer, "When Does Deliberation Begin? Internal Reflection versus Public Discussion in Deliberative Democracy," \textit{Political Studies} 51(2003).
3. VOTER IGNORANCE

In his brief essay on ratification, Condorcet writes: “Given the current state of education, there is no doubt that most citizens are not sufficiently enlightened to judge a constitutional plan. In order to do so, they would need to know the reasons behind each clause and be able to work out their consequences. Most citizens lack the ideas needed to do this. Direct ratification would therefore not be true ratification, and the nation would seem to have exercised a right when it had not actually done so.” Condorcet’s claim, I argue, is as true today as it was in 1789, and will likely remain true for the foreseeable future. SMJ thus fails because the average voter in a constitutional referendum will be too ignorant on constitutional matters to satisfy even the most minimal conception of meaningful choice.

The sort of knowledge needed to make a meaningful choice in a ratification referendum is specialized, takes significant time and effort to learn, and the average person, whether in a stable democracy, post-conflict territory, or deteriorating autocracy, has little reason to set about acquiring it. For instance, we should no more expect the average person to know how to rebuild a car engine or perform a pneumonectomy, than to understand the meaning, advantages, and disadvantages of including a minimum threshold for representation within a proportional representation electoral system. This makes ratification referenda unable to serve as the sole moment of constituent action within constitution-making. In this section I explain why this expectation of ignorance is warranted, and explore relevant empirical work supporting this claim.

From the start, two clarifications are in order. First, in claiming that the average person lacks sufficient knowledge about constitutional-design to make a meaningful choice, I am not making the anti-democratic argument that individuals are too stupid for self-government. On the one hand, I am only pointing out that the information needed for constitution design is neither common knowledge nor something we should expect an ideally active, participatory, civic-minded citizenry to possess. Perhaps those in healthy constitutional democracies should be familiar with the details of their own constitution, for this equips them with the appropriate tools to monitor those in power and protect themselves and each other from government mischief. However, even if this were true, this sort of knowledge does not translate into the same information needed to evaluate a newly proposed constitution and compare it with the likely result of rejection.

On the other hand, the criterion of meaningful choice, and the level of comprehension and knowledge it demands, applies only to ratification referenda conceptualized as the sole moments of constituent power. If voters fail to meet the demands of meaningful choice in ordinary elections, initiatives, or referendums, this does not necessarily signal a problem. Thus, claiming that voters are too ignorant to vote meaningfully in a ratification referendum, due to the high information constraints stemming from the logic of constituent power in SMJ, does not mean that voters are too ignorant to govern themselves in any other context.

Second, when talking about the level of knowledge and information needed to make a meaningful choice, I am not suggesting that an informed voter is one who has the right constitutional preferences or makes the best constitutional decisions. Rather, I simply mean a person
who possesses sufficient information to understand the constitution and form preferences on constitutional design.

### 3.1 EXPECT CONSTITUTIONAL IGNORANCE

Why are voters likely to be too ignorant to make a meaningful choice? To answer this, we need clarify what exactly a voter needs to know in order to vote meaningfully in a referendum. As mentioned, the task of a ratifier is to determine whether he or she prefers a proposed constitution to the status quo or whatever else is likely to result from constitutional rejection. Such a ratifier must “have sufficient knowledge and judgment to reject a proposed constitution that is inferior and accept one that is not.”463 This, as McWhinney puts it, is “an inherently technical domain, demanding some degree of constitutional expertise.”464

Specifically, a ratifier needs to know everything necessary to: comprehend the purpose and function of constitutions; understand the basic implications of most provisions; anticipate their likely outcome alone and in combination with other provisions; approximate the fit between the constitution and the current political and social context; judge the internal legal coherence of the constitution; and understand how the text compares to other possible alternatives. Voters can only decide whether a proposed constitution or the likely outcome of rejection best matches their existing values by possessing such knowledge. Without it, it is hard to see how the people’s approval or rejection of a constitution is a meaningful decision reached by

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463 [Mueller@322]

the constituent power regarding self-government, for it would represent a judgment on a matter not understood.465

The complexity of merely evaluating a constitution, which is only half of the task facing the ratifier (the other is anticipating and evaluating the likely result of rejection), can be demonstrated by considering the Venezuelan Constitution approved in 1999. On its face, it seems like a strong example of a modern progressive constitution. It declares that Venezuela is both a state of law and justice, incorporates an extensive list of civil and social human rights, and makes women’s rights a central focus. It creates an innovative system of five governmental powers by creating an ‘electoral power’ and a ‘public power’ in addition to the legislative, executive, and judiciary. The electoral power consists of a national electoral council in charge of regulating and safeguarding proper electoral procedures in state elections as well as civil society and union elections when invited or ordered by the Venezuelan Supreme court. The citizen power assures that each of the other four powers adhere to their constitutionally determined functions, and consists of the attorney general, the defender of the people, and the comptroller general.466

However, lurking beneath these cheery provisions lays several dangerous constitutional features. The constitution grants the legislative branch the power to appoint and remove the justices of the highest court as well as most members of the fourth and fifth branch, frequently

465 Interestingly, court cases exist in which the judiciary has struck down referendum-based laws on the grounds that the people did not understand the implications of the proposition on which they voted. For example, in Bates V. Jones, 127 F.3d 839 (9th Cir. 1997), Judge Reinhardt invalidated a terms limit measure created through referendum because “a state initiative measure cannot impose such a limitation when the issue of whether to impose such a limitation of those rights is put to the voters in a measure that is ambiguous on its face and that fails to mention in its text, the proponents’ ballot arguments, or the state’s official descriptions, the severe limitation to be imposed.”

by simple majority vote and without having to provide proof of misconduct or other objective grounds for removal.\footnote{Allan R. Brewer-Carias, "The 1999 Venezuelan Constitution-Making Process as an Instrument for Framing the Development of an Authoritarian Political Regime," in \textit{Framing the State in Times of Transition: Case Studies in Constitution Making}, ed. Laurel E. Miller (Washington, DC: United States Institute of Peace Press, 2010), 519.} This effectively eliminates the independent power of the heads of the nonelected branches and thus reduces any balancing effect three of the branches of government might have on the other two. The legislative branch is explicitly given the option of delegating lawmaking power to the president without limit, and the president obtains the power to dissolve the national assembly in the event of three votes of censure against the executive appointed vice-president.\footnote{"The Constitution of the Bolivarian Republic of Venezuela," art. 203, 36 § 8 and 21.} Moreover, the constitution exempts the military, for the first time in Venezuelan constitutional history, from any civilian control other than the executive itself.\footnote{Brewer-Carias, "The 1999 Venezuelan Constitution-Making Process as an Instrument for Framing the Development of an Authoritarian Political Regime," 519-20.} In sum, amidst the 360 articles and over 100 pages that compose the Venezuelan constitution, are a series of provisions that taken together create a constitutional blueprint for what became Chavez’s effectively authoritarian regime. This conclusion would remain hidden, however, to all those without a relatively high level of knowledge and expertise about constitutional design and comparative institutions.

Thus, at a minimum, ratifiers need to know the basics of constitutional and democratic theory, institutional design, jurisprudence, the current distribution of power and interest, and the foundations of the existing political order if present. Only with such information can a voter actually make a decision on the merits. Unfortunately for SMJ, there is no reason to believe that the average citizens anywhere will possess such esoteric or arcane knowledge. No
public education system has implemented such topics into their curriculum and it is hard to imagine one doing so in the future. There is little personal incentive and opportunity for individuals to acquire such information. In a stable democracy, as mentioned, there is little reason for the average citizen to acquire comparative constitutional knowledge. Most struggle with understanding their own constitution. As one scholar notes, “Few voters have more than a cursory knowledge of their...constitution, and it is hard for them to develop an interest in abstract principals that do not seem to have a direct bearing on day-to-day, bread-and-butter issues.” For citizens in other regimes, such information is likely hard to access and still relatively unimportant for all but the most engaged revolutionaries. This expectation of voter ignorance is further supported by several empirical studies.

3.2 VOTER IGNORANCE IN FACT

The ignorance of voters when it comes to general political issues is a well-established object of study. Political scientists began focusing on the political ignorance of the average U.S. citizen in the mid-twentieth century. Assuming a democratic ideal of an electorate able to choose between parties and pick out candidates on the basis of a comprehensive understanding of platforms and issues, they found that “by such standards voters fell short.” Contemporary work supports and expands upon these initial observations: Sniderman et al notes that “large number of citizens plainly lack elementary pieces of political information;” Delli Carpini and Keeter conclude that most citizens are largely ignorant when it comes to what government is,

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\[\text{470} \text{ Sturm, Thirty years of State constitution-making, 1938-1968; with an epilogue: developments during 1969: 79.}\]

what it does, and who it consists of; Lupia and McCubbins note that “study after study documents the depth and breadth of citizen ignorance;” and Neuman reports that “even the most vivid concepts of political life…are recognized by only a little over half the electorate.”

While the methodology of some of these studies is controversial, and the relevance of their findings for functioning democracies remains in dispute, it nonetheless remains true, as Bartels writes, that “the political ignorance of the American voter is one of the best documented features of contemporary politics.” Put simply, the average American is far too ignorant when it comes to basic political facts and the fundamentals of government to independently make informed choices during ordinary elections. Of course, though the most documented, political ignorance is not the unique domain of American voters. A study by the Australian government in 1994 concluded that there exists “widespread ignorance and misconceptions of Australia’s system of government, about its origins, and about the way in which it can serve the needs of citizens.” MacAllister notes that most Australian citizens remain ignorant about the operation of parliament, the nature of the legal system, and especially how different institutions of gov-

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474 This does not mean that they are unable to vote competently. I fully subscribe to the ability of voters to rely on cue-givers and other heuristics to vote as if they were full informed. I address these sorts of arguments, and how they relate to constitutional ratification referenda and SMJ, below.
ernment relate and interact with each other."

Denver and Hands demonstrated similar levels of political ignorance in Great Britain.476

Two things are worth noting here. First, the type of information these studies test for concerns, at least partly, details about institutional structure and the basic workings of government. While some claim that such knowledge is irrelevant for voters in functioning representative systems, it is precisely the sort of information a ratifier would need in order to compare a draft constitution with his current political situation. Second, the United States, Australia, and Great Britain are all long-standing and stable functioning democracies characterized by high levels of transparency, national civic education programs, high levels of general education, a well-developed civil society, and an independent media, all of which make it easier for the average citizen to acquire basic political knowledge. Citizens of countries or territories emerging from autocracy, civil war, frequent regime changes, or sustained political instability, without a tradition of democracy or constitutionalism, i.e. citizens in territories most prone to constitution-making today, are even less likely to have the opportunity to acquire political knowledge of this kind.

Now, the studies mentioned above mainly focus on the claim that many voters are too ignorant to independently make decisions in normal elections. When it comes to referenda and initiatives, ignorance appears to be as or even more widespread.477 This should come as no


477 By referenda and initiative I refer to the basic tools of direct democracy present in many representative system of government. A referendum is procedure that allows citizens to approve or reject laws proposed by the government, while an initiative is a procedure that allows citizens to propose new laws by petition. A constitutional
surprise, for as Bowler and Donovan note, "If...voters lack factual information, a constraining ideology and an ability to deal with issues in highly publicized candidate races, how can they be expected to sort through the complex policy choices they face in the low information setting of direct democracy?" In other words, referenda often address unfamiliar topics and pertain to particular policies and issues that require a great degree of technical information to comprehend. And, as scholars from Weber to Schumpeter to Dahl have noted, citizens do not and should not be expected to obtain the levels of expertise needed to decide on the complex issues that make up even that average policy question tackled by politicians day to day. Complicating matters further, referenda usually fall outside the normal schedule and machinery surrounding elections and their corresponding campaigns. Thus, when compared to election votes, referenda demand a more complex decision, require uncommon political knowledge, and take place in an environment where information channels are unfamiliar, less available, or both.

Examples of voter confusion in referenda abound. In 1998, 79% of polled Californians agreed that ballot measures were often too complicated and confusing for voters to understand
what happens if the initiative passes. Cronin reports that a large majority of voters in Colorado, Oregon, Washington, and California agreed that “the initiative and referendum measures on the ballot are usually so complicated that one can’t understand what is going on,” while Qvorthup notes that 90% of voters on a New Zealand referendum on electoral reform were unable to give reasons for their decision to vote for or against the introduction of proportional representation. Magleby demonstrates that over ¾ of the electorate of California Proposition 10 either wrongly voted for rent control when they intended to oppose it or wrongly voted against rent control when they intended to support it. Similar findings exist even for Switzerland, where referenda are frequent political occurrences. For instance, on the basis of their analysis of 41 ballot measures, Gruner and Hertig concluded that less than 20% of the voters were well-informed of the issues at hand. Christin, Hug and Sciarini, looking at ballot measures from 1981 to 1999, found that 30% of all voters could not give reasons for their votes, while 50% were unable to give more than one.

The general ignorance of voters in referenda is so well-attested that it forms the basis of most recent discussion of referendum voting. As Luskin notes, “with the fact of widespread public ignorance now firmly established, there has been a shift from ‘denial’ to ‘extenuation.’”

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484 Christin, Hug, and Sciarini, “Interests and information in referendum voting: An analysis of Swiss voters.”

Scholars interested in defending the practical and normative advantages of direct democracy no longer argue that voters fully or even partially comprehend the relevant issues. Instead, they concentrate their efforts on explaining how “relatively uninformed voters…cast the same votes they would have cast if better informed” and how voters uninformed about the details, specific subject matter, and consequences of most referenda nonetheless figure out what outcomes match their preferences.\textsuperscript{486}

As discussed, ignorance is often greater for ordinary referenda in comparison to elections because the former fall outside the main currents of politics, concern less familiar issues, and involve decisions of greater complexity than selecting a representative. This is even truer for constitutional ratification referenda. Constitutional design issues are further away from the daily lives of voters and the ordinary course of politics.\textsuperscript{487} Political agents and institutions normally operate in accordance with the extraordinary law that governs and creates them. When pieces of this extraordinary law become the center of conflict, the issue is usually narrow and rarely rises to a question of major institutional change. Moreover, “constitutional


matters tend, under most circumstances, to be the exclusive preserve of political elite,” and thus escape the attention of average voters.488

Comparing a proposed constitution to the status quo or likely result of constitutional rejection is undeniably more complex than evaluating the likely consequences of even the most technical referendum. Constitutions can contain hundreds of provisions on almost every aspect of political life, and evaluating them requires imagining what sort of government they would create in combination, while referenda usually pertain to a few specific issues and pose narrow alteration to existing law and policy. In other words, “the issue decided by... [a ratification] referendum relates to multi-dimensional rather than single issue choice. Choosing a constitution involves several issues including institutions of government, decision-making rules, political rights, and so on.”489

Moreover, as we will see, the usual means of obtaining information and becoming informed are even more fractured and unreliable in the context of a ratification referendum when compared to elections or ordinary referenda. Cue-givers are usually new, confused, or ill-informed. Objective information campaigns are frequently absent or dubious, and voters are subjected to “sharply contested, but ill-defined and unsubstantiated, visions of alternative political futures,” and “bombarded by conflicting claims about the costs and benefits of accepting or rejecting a referendum proposal.”490


490 Luskin, Fishkin, McAllister, Higley, and Ryan, "Deliberation and Referendum Voting," 1; Clarke, Kornberg, Stewart, "Referendum Voting as Political Choice: The Case of Quebec," 346. See Jeffrey Lenowitz, "Rejected
The limited empirical work on ratification referenda supports this expectation of ignorance. For instance, Eurobarometer 214 indicates that 1/3 of European voters had not heard of the Constitution for Europe after its signing in 2004, and over half got basic questions wrong regarding its content.\textsuperscript{491} Hobolt demonstrates that a third of Dutch voters and a quarter of Spanish voters attributed their negative vote on the referendum to lack of information and subsequent confusion.\textsuperscript{492} Similar findings exist for constitution ratification referenda on the country level. For instance, Higley and MacAllister reveal that a large portion of voters on the Australian Constitutional Referendum of 1999 not only had “dim knowledge about how the existing constitutional system works and little or no insight into what the proposed changes would involve,” but that the competing campaigns recognized “voter ignorance of the complex institutional issues involved” and thus “aimed at basic voter sentiments.”\textsuperscript{493} In addition, 81\% of a representative sample of voters on the Charlottetown Accord of 1996, which was effectively a vote on a new Canadian constitution, or at least a major restructuring of the original document, agreed that “most people didn’t understand what the referendum was all about.”\textsuperscript{494}

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\textsuperscript{491} CITE


\textsuperscript{492} Higley and McAllister, "Elite Division and Voter Confusion: Australia’s Republic Referendum in 1999." Luskin et al shows the effects of voter ignorance in the referendum by demonstrating how a sample of voters, after engaging in deliberative and educative processes, expressed a desire to change their votes. See Luskin et al., "Deliberation and Referendum Voting."

Because of the likelihood of such voter ignorance, SMJ fails. The justification requires that ratification referenda be capable of serving as the sole moment of constituent power in the constitution-making process, but the likely presence of uninformed citizen ratifiers incapable of making a meaningful choice on the proposed constitution undermines its capability to do so. Ratification referenda cannot be relied upon to give voice to the constituent power, and therefore SMJ cannot justify their implementation. However, before we can accept this conclusion, which means giving up on the capacity of constituent power to justify ratification altogether, several objections must be addressed. Specifically, three powerful defenses of SMJ might be made against my claim that voters are too ignorant to make a meaningful choice when voting in a ratification referendum: (1) the threshold of knowledge is so high that even constitutional framers will fall below it; (2) information shortcuts allow citizens to vote competently even without the required level of information; and (3) education campaigns can and are used to sufficiently educate voters. In the following sections I address each one of these objections.

4. IGNORANT FRAMERS

The first defense of SMJ claims that the level of knowledge demanded by the meaningful choice threshold is so unreasonably high that the actual framers of the constitution will not meet it. Most constitution-makers are not constitutional scholars and experts in institutional design, and we should not expect future framers to be any different. Thus, the standard of meaningful choice is an indefensible basis for criticizing SMJ, for it faults citizens for not being more informed than the authors of the constitution. Here, framers or authors refer to all those...
who have a direct hand in writing, debating, amending, and voting on the constitution before it reaches its final form. This includes members of some roundtables, constitutional conventions, constitutional commissions, and national assemblies.

This claim gains traction because there is little reason to think that most members of a democratically elected or representatively appointed constitution-making body will be sufficiently knowledgeable to make a meaningful choice. Mueller mentions an extreme case of this when he notes that “in this age of television and mass-media dominance,” there is a danger of a “convention filled with pop singers and athletes who, among other deficiencies, lack expertise on constitutional matters.” In fact, this intuition of framer ignorance seems to be true for members of many known democratic constitution-making bodies. Consider the 1991 Constituent Assembly in Colombia; its members ranged from traditional party delegates, ex guerillas, Indian leaders, businessmen, social and labor leaders, peasants, journalists, academics, lawyers, and clerics. Similarly, the members of the 25 person Stjornlagarad, Iceland’s 2011 Constitutional Council, included an Economics professor, ethicist, farmer, pastor, theatre director, physician, and a consumer spokesperson.

Discounting the relatively small group of delegates with significant legal and political knowledge—the academics, the constitutional lawyers, and the particularly informed politi-

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cians—most of the delegates in both constitution-making processes knew too little about the purpose and role of constitutions, the basics of institutional design, and the exact working of their existing government to meet the threshold of meaningful choice. This diversity and lack of constitutional and institutional design knowledge is not unique to the Colombia and Uganda framers, and will likely characterize future constitution-making bodies as well. 498

However, this level of ignorance will only be true for members of constitution-making bodies before the drafting process begins. The process of creating a constitution is usually highly educative, and can be designed to ensure and encourage this result. The education of framers during constitution-making can be divided into two phases: training and drafting. By training, I refer to the period within the constitution-making process when framers receive, seek out, and process massive amounts of relevant research and information. These include information and records of constitution-making in other countries and states; issue papers prepared by volunteer and hired constitutional consultants; and constitution-making handbooks produced by NGOs, IGOs, and academic institutions. 499 For instance, members of the

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498 This might be prevented by appointing only experts to become framers, or only allowing experts to put themselves forward in constitution-making body elections. However, such a restriction would be anti-democratic, patently elitist, and most likely unacceptable to the public. At the same time, it is worth noting that certain selection processes used to choose framers likely select those that are more informed or at least receptive to learning than the average citizen. The exact mechanism varies depending upon the type of drafting body and how its members are selected. For instance, if an existing legislature turns itself into a constituent body, the framers will have knowledge about the operation of the present political system gained through their legislative experience. If framers are appointed by the executive, the legislature, or parties, knowledge is likely to be a criterion of selection. If framers are elected by the people, the curious and informed are more likely to put themselves forward for election, and knowledge is once again likely to be a selection criteria. In addition, assuming transparent or semi-transparent procedures, framers will have reason to become informed due to reputation effects. Nonetheless, let us assume that this defense of SMJ is correct in the sense that freshly chosen framers are as ignorant as everyone else.

499 Recent examples of such manuals include: Brandt et al., Constitution-making and Reform: Options for the Process; Markus Bockenforde, Nora Hedlin, and Winluck Wahiu, A Practical Guide to Constitution Building, (Stockholm: International Institute for Democracy and Electoral Assistance, 2011); Benomar, "Constitution-Making and Peace Building: Lessons Learned From the Constitution-Making Processes of Post-Conflict
Nepali Constituent Assembly received a book entitled *Creating the New Constitution: A guide for Nepali Citizens*, prepared by International IDEA, which explains Nepali constitutional history and “provides an analysis of different options that emerge when making a new constitution.” In addition, framers receive demographic data, local constitutional and political histories, and reports on the strengths and weaknesses of present and past institutions. The members of the 1867 New York Constitutional Convention, for example, received two large convention manuals detailing all contemporary American state constitutions and comprehensive statistics on every aspect of New York State.\(^{501}\)

Much of this training and reception of constitutional information takes place during within structured educational programs. For instance, during the Namibia constitution-making process “lectures, seminars, discussions, and workshops were held on a wide range of topics pertaining to constitutions, systems of government, the role of political parties in a multiparty democracy, and the international protection of human rights.”\(^{502}\) Framers in Rwanda underwent similar training in constitution building seminars.\(^{503}\) These programs, according to IDEA’s instructions for them, serve as a means of educating framers on the nature and pur-

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\(^{503}\) Dann and Al-ali, *The Internationalized Pouvoir Constituant - Constitution-Making Under External Influence in Iraq, Sudan and East Timor*.
poses of constitutions generally, the possible scope of constitutions, how constitutions are used, the legal language of constitutions, the importance of the structure of a constitution, the main elements of constitutions, the main variations and options for designing key elements of the constitution, international law and constitutions, and how the existing or any previous constitutions functioned. However, “the purpose of educating constitution-makers about these issues is not to turn them into constitutional lawyers...the aim is to help them translate their aspirations into constitutional terms.”

In addition, constitution-making bodies sometimes invite international and local constitutional experts to give testimony or guidance and tour other countries for constitutional advice. International advisory boards visited Eritrea; the Nicaraguan Constitutional Assembly consulted local constitutional scholars; and the secretariat to the Constitutional Loya Jirga in Afghanistan prepared background papers with assistance from NATO and UN. Ugandan constitutional commissioners visited the United States and several European countries to discuss constitutional options; members of the Nepalis Constituent Assembly observed direct democratic processes in Switzerland; and delegates from the Indonesian People’s Consultative Assemblies observe the working of constitutional courts in Thailand and South Korea.

Finally, through a variety of inclusive procedures including travelling commissions, nationwide surveys, comment solicitation, town-hall meetings, and the submissions of drafts for pub-

504 Brandt et al., Constitution-making and Reform: Options for the Process. 56.

lic review, constitution-makers seek out and obtain public opinion data related to constitutional desires and previous experience with political institutions. For instance, the Ugandan Constitutional Commission received memoranda summarizing the viewpoints expressed in over 800 local government council meetings attended by the public, toured the country holding town-hall meetings, solicited essays on the constitution by primary and university students, and collected relevant newspaper op-eds and general comments by interested individuals. In all, over 25,000 submissions were received and processed by the commission.\textsuperscript{506} Similarly, Zimbabwe's commission held 5,000 meetings, conducted a nationwide poll, and administered a questionnaire.\textsuperscript{507} Framers not only receive such massive amounts of relevant constitution-making information, but they are given the time and resources to process it. Framers usually create the constitution on a full-time basis and are paid for doing so; this allows them to devote themselves to becoming competent. They are also supplied with legal assistants and researchers to assist them.

Framers also learn while drafting, i.e. the process during which constitution-makers actually make the constitution. Drafting a constitution requires that framers interact, for a group with diverse preferences cannot draft a complex document in isolation from one other. Well-designed democratic constitution-making processes involve a diverse group of delegates that disagree with one another on several levels. They have differing preferences in regards to constitutional issues such as the design of the branches of government, the balance of power be-


tween them, the rights to be guaranteed, and future amendment processes. For each of these issues there are numerous possible provisions upon which delegates may disagree. Also, conflict may arise over the precise wording of provision, even if there is no substantive disagreement.

Since the delegates’ task is to create and agree upon a single constitution meant to be long lasting and stable, and such multi-layered disagreement exists, the convention becomes the site of a cooperative mixed motive conflict, i.e. a situation in which the delegates have conflicting motives to cooperate (they need to produce a constitution) and to compete (they each want the final constitution to be as close to their ideal constitution as possible). The convention thus involves arguing, bargaining, learning, and voting, and stops only when the required number of delegates agree to one of potentially many equilibria, i.e. to a particular draft of the constitution that contains numerous provisions which were once the subject of dispute.

Most or all of the delegates supporting the final text do not endorse a constitution that perfectly aligns with their ideal preferences either before or after deliberation, but rather support the draft constitution because they believe that it is the best version (or one of several equally optimal constitutions) that can be produced by the convention given the preferences of the participants and external constraints, and because they prefer it to the expected outcome of

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convention failure. In other words, an agreed upon constitution embodies a mutually acceptable allocation of concessions.\footnote{Douglas D. Heckathorn and Steven Maser, "Bargaining and Constitutional Contracts," \textit{American Journal of Political Science} 31, no. 1 (February 1987): 153.}

This arguing, bargaining, and voting process, made necessary by the need to create an agreed upon constitution, promotes further learning. Constitution-makers are basically forced to listen to differing values, opinions, interests, and beliefs. This grants them new perspectives on issues and enables them to see the complexities of every constitutional decision. After education programs, “most constitution-makers understand some of the constitutional issues as stake, but likely only those issues that affect them and their own communities.”\footnote{Brandt et al., \textit{Constitution-making and Reform: Options for the Process}. 57.} Through deliberation, these information imbalances can be remedied. Furthermore, the need to persuade and compromise forces framers to refine and become more familiar with their own intuitions, knowledge, and preference set, as well as become acquainted with those of their allies and opponents from one discussion to the next.

Constitution-makers need to be far more informed than a citizen ratifier capable of making a meaningful choice in a ratification referendum. This is generally true of any creator compared to those tasked to evaluate their creation. A meaningful choice requires that one possess sufficient information to roughly evaluate a constitution, understand its provisions, envision the sort of government it will create, and compare this to a similar evaluation of the present political system or whatever else is likely to emerge from constitutional rejection. Framers need to know much more than this; in a sense their task is to compare the status quo to all possible constitutional alternatives rather than just one.
Though they might start out as ignorant as the average citizen ratifiers, the constitution-making process provides many opportunities for framers to become so informed. Constitution-making manuals, expert advice, demographic information, public comments and meetings, issue papers, educational seminars and classes, all of these combine to ensure that framers become competent enough to complete their task. Furthermore, the arguing, bargaining, voting, and learning process necessitated by the need to create and compromise on a single draft constitution forces further learning.

Citizen ratifiers do not undergo the educational experience of drafting a constitution. They do not argue and bargain and compromise with each other, for they are not involved in creating a constitution. Instead, they simply have to vote yes or no on a referendum. Ratifiers might be exposed to some of the educational material given to framers during training, but they likely have insufficient time to read, reflect, and process the received information. More importantly, as I will discuss in section 6, designers of constitution-making processes have some degree of control over the education of constitutional framers. The same is not true for citizen ratifiers. No one can guarantee that ratifiers will read the education material given to them, attend constitution-making seminars, and differentiate between relatively objective educational resources and referendum propaganda. In the end, many constitution-makers in previous instances of constitution-making have emerged from the process far more competent than a citizen ratifier must be to make a meaningful choice, and future constitution-making processes can be designed to have similar effects. This defense of SMJ thus fails.
5. INFORMATION SHORTCUTS

The second defense of SMJ against voter ignorance claims that citizen ratifiers do not need detailed factual or encyclopedic knowledge about the constitution or the likely effects of its rejection. Instead, they can employ information shortcuts to arrive at the same decision they would reach if fully informed. This objection makes use of recent studies of information and voting that arose in response to the findings of political ignorance mentioned above and their use by critics of democracy. The central point of these studies, the authors of which I call ‘the heuristics school,’ is that even with limited factual knowledge, voter can make competent political decisions by using rules of thumb "to figure what they are for and against in ways that make sense in terms of their underlying values and interests." These rules or heuristics include such things as partisan cues, candidate ideology, elite or interest group endorsement, likeability and appearance, polls, and past election results.


5.1 HEURISTIC SCHOOL

Drawing from findings in behavior decision theory and cognitive psychology, the heuristics school begins from the premise that individuals are “limited information processors” who necessarily use shortcuts to make reasonable decisions while preserving cognitive resources. In other words, individuals use heuristic principles to decide most of their choices, from the undemanding and trivial to the complex and important, on the basis of very simple types of information. As Kahneman, one of the progenitors of heuristic research in cognitive psychology recently wrote: “people who are confronted with a difficult question sometimes answer an easier one instead.” Though imprecise, making decisions in this way is necessary because it is impossible for individuals to know detailed information about or conduct research on the consequences of the thousands of choices that confront them daily. When used appropriately, these heuristics enable individuals to successfully accomplish the tasks confronting them without having to worry about every little factual detail.

The heuristics school applies this insight to the realm of political decision, finding that “limited information need not prevent people from making competent vote choices since voters rely on cues and heuristics to overcome their information shortfalls.” Here, a vote is deemed competent or correct if it “is the same as the choice which would have been made under cond-

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515 The foundations of this school can be traced to Amos Tversky and Daniel Kahneman, "Judgment under Uncertainty: Heuristics and Biases," Science 185, no. 4157 (Sept., 1974).
Central to this argument is the distinction between knowledge and information. “Knowledge is the ability to predict accurately the consequences of choices,” i.e. to determine which candidate will most likely maximize a voter’s personal utility, and “information is the data from which knowledge may be derived.” Moreover, “many kinds of information can lead a voter to reach the same conclusion.” The heuristic school argues that while knowing the sort of detailed political facts tested in political information surveys might make a voter knowledgeable to the extent that she can choose candidates and support referenda that align with her interests, preferences, and believes, the same is true for knowing a different sort of information, i.e. the type of data—elite cues, partisan alignment, interest group preferences, etc.—processed in accordance with heuristic principles.

Thus, proponents of heuristics and cues claim that “limited political knowledge [information] in the part of the citizenry need not present an insurmountable barrier for democratic governance.” In the right conditions, a voter who does not know what the New York City Comptroller does, let alone anything about the candidates running for the office, might vote along partisan lines and reach the same decision she would reach after weeks of research on the

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519 Lau and Redlawsk, “Voting Correctly,” 586. Though I cannot discuss it in detail here, there are severe problems with this definition of competency and the ways in which it is measured. For instance, many attempts at surmising how a person would behave if they were properly informed slide into paternalism, assume an unrealistic separation of values and factual information, and falsely equate full information with the capability of making reasonable inferences. Similarly, measuring competent voting behavior by looking at the actions of those voters who are the most informed has at least two deficiencies. On the one hand, it equates better informed with actually informed. That is, it overlooks the possibility that the most informed group of voters in a population may nonetheless be extremely confused and ignorant. On the other hand, it assumes away differences between informed and uninformed voters that might resist statistical measure, i.e. cultural backgrounds, moral standards, cognitive styles, etc.


matter. A voter might not know or comprehend the details of a referendum requiring firearm manufacturers to install a new safety feature on their weapons, but by simply following or doing the opposite of what the NRA recommends, they can arrive at a vote that reflects their existing values, interests, and beliefs on the issue.522

Applying these arguments to ratification referendum, this second objection defends SMJ by claiming that voters can rely on partisan cues, elite endorsements, and other such simple types of information to vote as if they were fully aware of the provisions of the proposed constitution and capable of comparing a proposed system of government to their present political situation. This argument appears to be supported by studies on Quebec’s sovereignty referendum of 1992, the 1994 Norwegian referendum on EU membership, and the various referenda on the 2005 Constitution for Europe.523 Though none of these are ratification referenda for a national constitution, each are high stakes referenda concerning constitutional issues that would have significantly readjusted their respective constitutional order and thus are useful comparisons.

In all of these instances, voters appear to have relied on heuristics to reach a decision on the complex referendum in front of them. In an explanation that applies to all of these cases, as

522 In one of the landmark studies of voting heuristics, Lupia studies voting on a referendum designed to regulate the insurance industry in California and found that voters “who possessed low levels of factual...knowledge about the initiatives,” used shortcuts to “emulate the behavior of those respondents who had relatively high levels of factual knowledge.” Lupia, “Shortcuts Versus Encyclopedia: Information and Voting Behavior in California Insurance Reform Elections,” 72. See also Christin, Hug, and Sciarini, “Interests and information in referendum voting: An analysis of Swiss voters.”

well as ratification referenda, Clarke et al write that: “Decisions on 'big' issues...are not ab-
stract exercises in constitutional design using copious information about the payoffs of alterna-
tive outcomes. Rather, operating in situations of great uncertainty, voters use heuristics pro-
vided by the political context in which the referendum occurs. Prime candidates are party
identifications, party leader images, and governance performance evaluations.”

5.2 THREE PROBLEMS WITH THE HEURISTIC DEFENSE

Appealing to information shortcuts cannot save SMJ for three main reasons. First, the heuris-
tics school might be wrong. Those generally critical of the heuristics school, particularly its use
of information shortcuts to downplay the implications of factual political ignorance, claim that
voters might not rely on information shortcuts regularly, that there is no evidence that voters
actually vote competently when using them, and that if used, heuristics are only helpful to in-
formed voters. Bartels, for instance, notes that “it is easier to assume than to demonstrate
that cues and shortcuts do, in fact, allow relatively uninformed voters to behave as if they were
fully informed,” and on the basis of six presidential elections in the US, concludes that “the
behavior both of individual voters and of the electorate as a whole deviates in significant and
politically consequential ways from the projected behavior of a ‘fully’ informed electorate.”

525 Sniderman, Brody, and Tetlock, Reasoning and Choice: Explorations in Political Psychology; Bartels,
"Uninformed Votes: Information Effects in Presidential Elections."; James H. Kuklinski and Paul J. Quirk,
"Conceptual Foundations of Citizen Competence," Political Behavior 23, no. 3 (2001); Mary N. Franklin, Cees
van der Eijk, and Michael Marsh, "Referendum Outcomes and Trust in Government: Public Support for
Europe in the Wake of Maastricht," West European Politics 18(1995); Delli Carpini and Keeter, What
Americans know about politics and why it matters.
Supporting these critics are studies purporting to show that referendum outcomes “become tied to the popularity of the government in power, even if the ostensible subject of the referendum has little to do with the reasons for government popularity (or lack of popularity).” Thus, Clarke et al demonstrate that the outcome of the 1992 constitutional referendum in Canada indicated the citizens desire to sanction the ruling political party more than their preferences on the subject matter of the proposed amendments. In general, much research indicates that referenda frequently devolve into “second-order elections,” where voters “make extensive use of irrelevant cues such as long term party loyalties or momentary rough evaluations of the party in government” and thus arrive at decisions divergent from fully informed citizens voting on the issues. In other words, it is entirely possible that citizens might use information shortcuts to make complex voting decisions, but that the shortcuts they use are unrelated to the vote and in no way correlated with what their informed decision would be. If such criticisms of heuristics are right, information shortcuts become a weak defense for SMJ.


528 These included enlarge house of commons with 25% of the seats allotted to Quebec, equal Senate representation, More power to provinces, recognition of Quebec as a distinct society, and aboriginal self-government. Clarke and Kornberg, "The Politics and Economics of Constitutional Choice: Voting in Canada's 1992 National Referendum." Another example of this phenomenon is the 1962 French referendum on changing the constitution, which was more a plebiscite for de Gaul than anything else. See David B. Goldey, "The French Referendum and Election of 1962," Political Studies 11, no. 3 (1963). I thank Jon Elster for pointing me to this example.


530 In fact, such a worry seems supported by the original psychological research on heuristics, which emphasized the inevitable introduction of bias and miscalculation into individual decision-making reliant on shortcuts. Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, "Anomalies: The Endowment Effect, Loss
Second, even members of the heuristic school admit that information shortcuts sometimes fail to guarantee competent decision-making. This occurs when they misfire, are used incorrectly, or become inaccessible, and, I argue, the context of ratification referenda increases the likelihood of such malfunction. Shortcuts misfire when applied appropriately but nonetheless lead to non-preferred outcomes, are used incorrectly when applied to an incompatible domain or different setting, and are inaccessible when one cannot decipher or identify the simple information normally processed with the heuristic principle. For example, consider that Ted, my neighbor, is a contractor, and that I make home-improvement decisions using the heuristic that I will just do what he recommends. If Ted gives me bad home improvement advice, the heuristic misfires. If I consult Ted on automotive repair, or if I consult a different neighbor, I misapply the heuristic. If Ted moves, slips into a coma, or becomes incomprehensible, the heuristic is inaccessible.

Certain conditions make political shortcuts more likely to fail in these ways. Heuristics are likely to misfire when cue-givers are ignorant about the subject matter in question. This is why Lupia and McCubbins emphasize the importance of reliable advisors and advocate for the implementation of legal and institutional solutions designed to ensure such reliability.


532 Lupia and McCubbins, The Democratic Dilemma: Can Citizens Learn What They Need to Know. In addition, Lupia and Johnson explain that heuristics might misfire when experts are themselves not well informed, and this is especially likely in closed societies, where effective channels of communication do not exist. Arthur Lupia and Richard Johnston, “Are voters to blame? Voter competence and elite maneuvers in public referendums,” in
ers tend to misapply heuristics when they do not possess particular sorts of background information. As Delli Carpini and Keeter note, “the heuristics model is based on low information rationality, not no information rationality.”

Lau and Redlawsk make this point more clearly, using dynamic process tracing to show that “heavy reliance on political heuristics actually made decision making less accurate among those low in political sophistication,” where political sophistication is defined as general knowledge of the political landscape. Thus, voters are likely to misapply heuristics when they lack the contextual and historical information needed to know which elites, interest groups, parties, or media source supports outcomes conducive to their own values and preferences. Finally, heuristics are likely to be unavailable when regular cue-givers are either absent, fail to send signals on the subject matter at hand, or contradict each other.

The context of ratification referenda makes the misfiring, misapplication, and indecipherability of heuristics highly likely. Most generally, shortcuts operate when politics resembles a repeated game. Here, even without being fully informed, players can make competent political decisions because experience has taught them or their community that relying on specific decision-making proxies leads to desirable outcomes in context of low information. However, constitution-making occurs in moments of disruption—when the game is not repeating but deteriorating, breaking, or already broken. Thus, reliable heuristics lose their reliability. Specifically, the subject matter of a ratification referendum—the evaluation of a constitution—is com-

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533 Delli Carpini and Keeter, What Americans know about politics and why it matters: 52.
plex and deals with issues unfamiliar to both average citizens and most standard elites and advisors. A local newspaper, ethnic interest group, tribal or community leader, or informed neighbor might competently understand elections or an ordinary referendum and give more or less consistent voting advice that matches an individual’s preferences, but be wildly confused and hence unreliable when it comes to constitutional evaluation, a subject matter outside of its normal purview.

In addition, constitutional referenda concern the rules of a new political system, and thus do not necessarily align with the interest groups and political parties that formed within an old one. Parties and interest groups frequently split over proposed constitutions as a result, making their normal cues hard to decipher. Moreover, the coalitions that favor or oppose a draft constitution are likely to be new and unpredictable, for constitutions unsettle vested interests, benefiting and harming groups with little or nothing in common previously. For instance, the coalition that opposed the 1970 Arkansas draft constitution consisted of local judges and prosecutors, minor county officials, and the liquor industry, making any signals sent by them hard to interpret.535 More generally, constitutional ratification referenda are relatively infrequent, in that save for a few exceptions, most individuals will be unable to look at history and experience to understand patterns and form reasonable heuristics. This means that there is a lack of accumulated experience and reliable expectations with which individuals can form heuristics, or apply to existing heuristics. Finally, constitution-making frequently occurs in politi-

cal contexts of great instability, meaning that previous systems of information shortcuts are likely disrupted and new ones yet to form.

Direct evidence of such heuristic failure in constitutional ratification referenda does not exist for lack of study, but evidence from normal constitutional referenda provides some support for this claim of heuristic failure. The Australian Republican Referendum in 1999, one such example, concerned two questions: the first asked voters if they wanted Australia to become a Republic with the Queen and Governor General being replaced by a President appointed by 2/3 of the Commonwealth parliament; the second asked whether a preamble should be placed at the beginning of the constitution.\textsuperscript{536} 55\% of those voting in the referendum rejected it, though opinion polls showed voters favoring the creation of a republic two to one throughout the 1990s.

Luskin et al claim that “voters got the referendum quite wrong,” in that if fully informed they would not have favored rejection.\textsuperscript{537} The authors base their conclusion on the outcome of a Deliberative Poll held two weeks prior to the referendum, where a random sampling of voters strongly favored the referendum once exposed to extensive information and deliberative opportunities.\textsuperscript{538} This suggests that if used, heuristics did not lead voters to a competent decision. A study by Higley and McAllister provides a partial explanation for the shortcut failure. They explain that voters lacked knowledge on the existing constitutional system and how the

\textsuperscript{536} Though this constitutional referendum did not amount to a ratification referendum, the changes were substantial and many of the same conditions that would weaken heuristics for ratification referenda were present.

\textsuperscript{537} Luskin et al., “Deliberation and Referendum Voting,” 10.

\textsuperscript{538} For more about Deliberative Polling, see 3-4 of this article and Robert C. Luskin and James S. Fishkin, “Deliberative Polling, Public Opinion, and Democracy,” in American Association for Public Opinion Research Annual Meeting (Saint Louis, MO1998).
proposed change would work, and that the normal heuristics they used were indecipherable. Specifically, party and leader cues were contradictory; “Labor were divided on the method of election for the head of state, and the Liberals were divided on the republic issue itself. Moreover, the Prime Minister…opposed the referendum that his government had proposed.” In the absence of knowledge or comprehensible heuristics, “though perhaps supportive of the principle at issue, [voters] choose a cautious stance and vote NO.”

The 2000 Danish national referendum on the euro provides further evidence of cue-giver confusion and subsequent heuristic inaccessibility and misfiring. Political parties at the extreme left and right joined forces in a No campaign, leaving the centrist parties weakly united for a Yes. Campaign messages were confused and vague, and voters received no clear heuristic data to act upon. Like the Australian case, this confusion resulted from the subject of the referenda, which like the subject of constitutional ratification referenda, fell outside the normal political landscape. LeDuc sums up the results of such heuristical malfunction in European referenda when he writes: “numerous examples in the comparative literature on referendums showing that the outcome of a referendum can be quite different than the actual division of public opinion on the underlying issue, sometimes even when opinions are strongly held.”

Third, and most importantly, even if we magically knew that most voters in future constitutional ratification referenda would rely on information shortcuts, and that these shortcuts would always lead them to a competent vote, this still would not rescue SMJ. As discussed above, SMJ requires that referenda meet the threshold of meaningful choice, which concerns how a voter makes her choice—by her ability to vote on a constitution for reasons relating to her evaluation of its contents in comparison with the likely result of constitutional rejection, and not on the outcome of referendum.

The claim that heuristics enable ignorant voters to make the same decisions as informed voters is comforting in the face of worries about the health of democracies filled with ignorant citizens, for it explains how even if politically ignorant, voters are still making choices that they want, still arriving at political outcomes that they prefer, and that therefore democracy still provides a way of ensuring that a government rules in accordance with the will of its citizenry.

However, as mentioned, this outcome-based focus is anathema to the logic of constituent power underlying SMJ, where primary importance is ascribed to the direct intentional exercise of the people’s sovereign power for non-consequentialist reasons. This is why a happy outcome to a referendum in which voters never looked upon the constitution did not satisfy SMJ, for voters cannot create a constitution they never see. In addition, if consequentialist reasons motivated SMJ, there would be no room for the inalienability claim. Thus a representative form of constitution-making guaranteed to arrive at a constitution acceptable to the people would eliminate the need for ratification, as would an accurately representative ratification process. Thus, even if heuristics allowed constitutionally ignorant voters to make agent-relative sensible ratification decisions, the votes would not be an adequate instance of the people deciding upon
their constitution, for they would still be unable to comprehend and own their decision. In other words, heuristics do not enable an unaware voter to make a meaningful choice.

6. EDUCATING THE PEOPLE

The third objection to the claim that voter ignorance defeats SMJ is perhaps the most obvious. If the people are too ignorant to evaluate the constitution on its merits, we should simply educate them beforehand. Of course, educating citizens to combat voter ignorance is not a new idea. This is why most ordinary referenda and initiatives include education efforts, and why civic education is an essential component of public education. When it comes to constitution-making, framing bodies, along with the assistance of sitting governments, NGOs, IGOs, civil society organizations, the media, and constitutional consultants, frequently design and implement massive voter outreach and education programs.\(^{542}\) In fact, over half of the last 194 instances of constitution-making involved such programs, many of which coincided with the consultative procedures used by framers to surmise public opinion. The recent advent of participatory constitution-making has increased the importance of these campaigns, for advocates of participation emphasize that only an informed and educated public can form and express coherent opinions on the constitution.

Constitutional education programs employ a wide variety of tactics to educate the public over the course of the constitution-making process, making use of print materials, television and radio programs, cultural events, websites, social networking channels, civic workshops, town hall meetings, public hearings, and travelling information panels. Consider the education

\(^{542}\) For instructions on how to organize such a process, see Interpeace@91-107
efforts made during the most recent constitution-making events in Brazil, South Africa, Eritrea, and Uganda. In Brazil, the entire proceedings of the constituent assembly were broadcast on public television. The acting congress set up a media center to ensure that news outlets explained everything to the public; this resulted in 716 television programs, 700 radio programs, 3000 hours of video, and 4,871 interviews with members of the assembly. South African framers distributed posters, brochures, leaflets, a biweekly newsletter entitled “Constitutional Talk”, booklets, and comic books. They produced a weekly television program and radio show, set up a multi-lingual “Constitutional Talk Line,” held 486 workshops targeted at disadvantaged communities and numerous constitutional public meetings, set up an official website, and distributed 4.5 million copies of the draft constitution.

Eritrean framers launched an extensive educational program specifically tailored to address the country’s 80% illiteracy rate. Using songs, travelling plays, concerts, poetry, and illustrated books, the program engaged with an estimated 500,000 members of the population. In Uganda, the education process lasted four years and included seminars for 10,000 community leaders, the dissemination of previous constitutions and specially prepared information packets, 800 educational seminars led by constitution commissioners, seminars for government employees, over forty multi-lingual radio programs, twenty television programs, 15 press con-


ferences, countless information seminars held by previously trained leaders, and meetings organized by local council officials aimed at engaging all members of the population.\textsuperscript{546}

Despite the prevalence and extent of these educational programs, claiming that they can sufficiently lower voter ignorance and confusion is farfetched for two reasons. First, these programs have yet to accomplish this, or at least there is no evidence to suggest that they have. In other words, the long standing practice of educating voters about elections and referenda has yet to do much about lessening voter ignorance. Most of the findings on voter ignorance mentioned in section 2 measured voter knowledge after the implementation of such programs. Elections and ordinary referenda usually take place after comprehensive elections but voters remain in the dark about the relevant issues.

Expensive and extensive multi-media educational programs preceded the referenda on the EU constitution, yet a third of respondents in a Eurobarometer survey reported never having heard of the constitutional treaty, and over half said they knew little about its substance. Similarly, 54\% of survey respondents in Uganda agreed that the constitution was too complicated for them to understand, and 33\% could not answer a question about the purpose of the constitution, despite its lauded and comprehensive campaign.

In both South Africa and Eritrea, where comprehensive education programs sought to prepare citizens for participation, most public suggests received by framers were unrelated to constitutional issues or “not susceptible to being translated into the language of a modern constitution.”\textsuperscript{547}

\textsuperscript{546} Moehler, Distrusting Democrats: Outcomes of Participatory Constitution Making: 55-57.

Admittedly, it is impossible (and likely incorrect) to say that voter education programs have no effect. Sufficient comparative studies do not, to my knowledge exist. Nonetheless, it is enough to observe that previous educational programs did not educate voters sufficiently to make a meaningful choice possible, and there is little reason to think that more extensive educational programs could do any better in the future. The level of political ignorance such programs would need to overcome is simply too massive. A meaningful choice requires that voters know enough about constitutionalism and institutional design to evaluate a constitution, compare it to the likely result of rejection, and make a decision based upon this comparison. The fact that educational programs for single-issue referenda and ordinary elections fail to inform voters about these simpler issues and decisions suggests that creating a successful ratification education program, for the purposes of SMJ and meaningful choice, is improbable or impossible.

Second and more importantly, combating constitutional ignorance through education is made exceedingly difficult by the ratification campaigns that immediately begin upon promulgation of the draft constitution. These campaigns have a goal that is both easier to meet and in direct tension with that of education programs. The purpose of an education program is to teach citizens about constitutionalism and institutional design so that they can understand the constitution-making process, effectively participate within it, and eventually review the draft constitution to be voted upon. Ratification campaigns, on the other hand, want to persuade voters to vote a certain way on the draft by any means possible. Educating citizens is as important to a ratification campaign as confusing or misleading them; both are appropriate means of bringing voters to the desired decision.
The effect of political campaigns on voters is a relatively new area of study. This is largely due to the long-standing and well-supported assumption that campaigns are of little relevance. According to this logic, voters make their decisions on the basis of partisanship, long-standing beliefs, and other uncontrollable environmental factors, as evidenced by the ease of accurately predicting election and referenda outcomes well before the start of political campaigns. This suggests that campaigns, or at least how they are run, have little to no effect on voters. However, recent studies of campaign effects have shown that these original assumptions were too strong. Campaigns, or at least how they are run, are only irrelevant when the public has long-standing opinions on a political choice and make it within the context of a well-developed system of heuristics. However, certain conditions make campaigns and media effects extremely effective, and ratification referenda just so happen to take place in contexts where all of these conditions are present.

Campaigns are likely to be most influential when: voters need to make complex decisions; the subject matter is new and there is little history of public debate on it; traditional leaders and other cue-givers are uninformed or in conflict with one another; other reliable heuristics are absent or inapplicable; voters are either uninformed or recently informed about the relev-

549 See, for example Warren E. Miller and J. Merril Shanks, The New American Voter (Cambridge, MA: Harvard University Press, 1996). Admittedly, these and other above-mentioned studies exclusively focus on elections, mainly presidential elections in the US. Nonetheless, their findings were and continued to be used to discredit campaign effects.
vant issues; voter choice is structured in a new and unfamiliar way; voters are unlikely to have long-standing relevant opinions; voters are exposed to contradicting messages; and local leaders unhindered by normal party or ideological discipline have incentives to position themselves around a referendum in order to maximize expected positive blow-back. 551

These conditions make citizen attitudes unstable and campaign delivered information likely to be influential, and all of them apply to the context of ratification referenda. The subject and issues of constitution-making is foreign to voters, elites, and parties. The type of political decision required is also new; “to citizens in both systems of plurality and proportional representation, a referendum poses a change to well-known electoral choice.” 552 Voters are also largely ignorant, and those that are informed are newly informed, meaning their opinions are recent, not backed up by experience, and thus more easily changed and replaced. Constitution-making is rare and thus there is little history of public debate. Ratification campaigns thus take place in contexts where voters, despite any proceeding educational programs, are extremely likely to be influenced by calculated campaigns.

Of course, being influenced by a ratification campaign is not necessarily detrimental to making a meaningful choice. That is, a meaningful choice threshold does not require the unrealistic absence of persuasion or non-objective discussions of the constitution. A campaign that sought to persuade informed voters that they should have specific values, and that these specific values conflict with the actual text of a proposed constitution would not affect a person’s capacity for making a meaningful choice. The same is true for a campaign that emphasized the

weaknesses or strengths of one possible outcome of constitutional rejection, or the inefficiency of the government likely to result from the proposed draft.

Ratification campaigns become detrimental to education programs and the capacity for meaningful choice because, they address who voters are confused, ignorant, or newly informed, are designed to convince them to vote a certain way, and take place in a context in which institutions and laws regulating campaign conduct are non-existence or ineffective. Thus, campaigns occur where their target is prone to manipulation, they have incentives to manipulate, and obstacles to manipulation are relatively absent. The result, as one author notes, is that “efforts at self-education are thwarted by manipulative campaigns designed to oversimplify the issue and appeal to the electorate’s worst instincts.”

Campaigns manipulate voters in one of several ways: they foreground particular true facts, changing their meaning by eliminating context or means of comparison; provide misinformation or strategically incomplete information; prime one aspect of a vote and make it determinate; or prime an issue or factor that is unrelated to the vote entirely. Examples of all forms of manipulation are readily found throughout the history of ordinary referenda and constitutional ratification campaigns. In both the Danish and Swish referendum on the Euro, held in 2000 and 2003 respectively, the no campaigns relied on unrelated issue priming, choosing to refrain from making arguments related to the substance of the referendum and instead turning


the vote into one on patriotism, nationalism, fears of a central bank, and personal commitments to social welfare.\textsuperscript{555}

In the campaigns leading up to the Albanian Constitutional referendum in 1997, both sides “spent a relatively limited amount of time on substantive issues.”\textsuperscript{556} The Democratic Party, leading the charge of the ‘No’ campaign, resorted to misinformation. For instance, they attacked Article 18, a ban on arbitrary discrimination, by claiming that it violated the ECHR and was meant to restrict individual liberties. In response, the ‘Yes’ campaign resort to a defensive position, meaning that voters, 90% of whom approved the constitution, likely did so on the basis of limited and distorted information.\textsuperscript{557}

In Poland in 1997, the Polish state electoral commission launched an extensive information campaign meant to educate the public about the new constitution and lay out arguments for and against it. However, “this effort largely descended into an electoral campaign in the nature of propaganda rather than education.” Opponents of the constitution, for instance, provided incomplete information on several articles, such that constitutional provisions relating to future collaboration with international organizations, child maturity and freedom of consciousness, and a consultative Monetary Policy Council, were framed as attempts to de-

\textsuperscript{555} LeDuc, "Opinion Formation and Change in Referendum Campaigns," 33.


\textsuperscript{557} Ibid., 330f.54.

Similarly, the proposed constitutions of the 1970 Arkansas State Constitutional Convention and the 1968 Rhode Island Convention both immediately became the site of numerous and conflicting public relations campaigns that resorted to rumor-mongering, exaggerated interpretations of constitutional provisions, and simultaneous celebrations and condemnations of the drafting process.\footnote{Patrick T. Conley, *The Rhode Island State Constitution: a reference guide* (Westport, Conn.: Praeger, 2007). 32-34; Cornwell, Goodman, and Swanson, *State constitutional conventions: the politics of the revision process in seven states*: 170-73; Goss, *The Arkansas State Constitution: A Reference Guide*: 10-12; Lenowitz, "Rejected by the People: Failed U.S. State Constitutional Conventions in the 1960s and 1970s," 30-36.} Those opposed to the Arkansas draft, for example, successfully convinced a large portion of the electorate that the constitution would benefit elites and increase taxes, though neither of these claims followed logically from the text.\footnote{Cornwell, Goodman, and Swanson, *State constitutional conventions: the politics of the revision process in seven states*: 173.} The 'Yes' campaign to the 1992 Canadian Constitutional referendum employed similar scare tactics, subsequently reinforcing voter feelings of manipulation by elites.\footnote{LeDuc, "Opinion Formation and Change in Referendum Campaigns," 55.}

Finally, it is worth noting that the manipulation wrought by ratification campaigns usually goes unchecked by educational programs, and that this should be expected. The driving forces behind education programs—constitution-makers, civil society organizations, and the sitting government—will take sides on the draft constitution upon its release, if not sooner. Their incentive for neutrally educating citizens will be overridden by the competing incentive to con-
vince them to vote a certain way, and education programs will either cease or transform into ratification campaigns. While some external NGOs or IGOs might wish to continue neutral education programs, the effects of these will be severely limited by the likely absence of local support.

The 2005 referendum on the Kenya Constitution is a perfect example of education programs morphing into manipulative campaigns upon promulgation of the draft document. The government, NGOs, and local civil society organizations immediately ceased education efforts, choosing instead to support either the pro-constitution Bananas or anti-constitution Orange campaigns, neither of which made significant efforts to discuss the contents of the constitution. Both campaigns were led by political elites using the opportunity to position themselves in advance of the 2007 elections, and both did their best to turn the vote into one on ethnicity, rather than on constitutional design.562 In addition, the Orange campaign falsely claimed that the constitution disadvantaged younger citizens, enlarged presidential power, legalized abortion, and gave the president a life-long term, and simultaneously reframed support of the constitution as explicit support for the unpopular Kibaki government.563 The Banana campaign responded weakly, choosing instead to engaged in indirect vote-buying than disseminating information about what the constitution entailed.564

To review, the final defense to my claim that voter ignorance defeats SMJ is that voters can be educated. This defense fails to rescue SMJ for two related reasons. First, educational pro-

grams already take place for elections, ordinary referenda, and ratification referenda, yet elec-
torates remain largely uninformed. The size of the chasm between voter knowledge and what
it takes for voters to make a meaningful choice on a ratification referendum makes it hard to
imagine any future education programs having regular success where so many others have
failed. Second, and far more importantly, education programs are likely to be overwhelmed by
powerful ratification campaigns that appear immediately upon promulgation. These cam-
paigns operate in a context in which campaign effects are known to be high and upon an elec-
torate especially prone to manipulation. As Condorcet notes, when the electorate are given
the right to ratify a constitution, “the men who really exercised this right would be those
whose eloquence, reputation, and standing earned them temporary sway.”565

Of course, while I claim that we should expect education attempts to be outdone by ratifi-
cation campaigns, and while this claim receives indirect support from the near impossibility of
finding a recent instance of a ratification referendum in which constitutional issues seem to
have led to the outcome, this expectation may be proven false. In other words, it might be pos-
sible to educate voters to such an extent that a meaningful choice becomes possible, and it
might be possible for ratification campaigns to refrain from or ineffectively manipulate and
confuse voters. However, this possibility is not good enough to save SMJ, for while framer ed-
cucations campaigns can be designed to almost guarantee informed framers, the reception of
voters to educational efforts and the nature and effects of the spontaneous ratification cam-
paigns will always be extremely unpredictable. As LeDuc notes,

“the most volatile referendum campaigns are likely to be those in which there is little partisan, issue, or ideological basis on which voters might tend to form an opinion easily. Lacking such information, they take more time to come to a decision, and that decision becomes highly unpredictable and subject to change over the course of the campaign, as new information is gained or new events unfold. The potential volatility in such circumstances is very high, because there little in the way of core beliefs or attitudes to anchor the opinions formed.”

With such volatility, education programs cannot be relied upon to raise voters out of ignorance, meaningful choice cannot reasonably be guaranteed, and therefore ratification cannot be justified as a moment in the constitution-making process where constituent action can be expected.

7. CONCLUSION

As explained in chapter three, a constituent power justification defends the necessity of ratification by appealing to the long-standing tradition of constituent power and its conceptual associates popular sovereignty, ordinary and extraordinary law, and fear of government oppression and domination. Specifically, a constituent power justification claims that ratification is a necessary component of the constitution-making process because constitutions must be created by the constituent power, and ratification plays some sort of essential role in making this happen. However, bringing constituent power theorizing into contact with the mechanics of the constitution-making process and clarifying the kind of role ratification might play reveals weaknesses in this type of justification.

If ratification is one of many instances of constituent action in the constitution-making process it becomes redundant or incoherent. If the procedure plays an ameliorative role, making up for prior failures to convolve or manifest the constituent power, it becomes a mere ad-

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566 LeDuc, "Opinion Formation and Change in Referendum Campaigns," 41.
hoc solution. And, if ratification becomes one of several attempts meant to enable the constitution power to act, the concept of constituent power itself becomes lost from the justification. Thus, as I argued, the multiple moment justification, the ameliorative function justification, and the multiple approximations justification failed to justify the use of ratification procedures.

However, the particular failings of these types of constituent power justifications suggest a final possibility. Rather than envisioning ratification as one of many possible moments of constituent action or constituent action approximations, ratification can be understood as the sole moment during the constitution-making process when the constituent power acts. This sole moment justification escapes the deficiencies plaguing other forms of CPJ by limiting constituent action to ratification. Moreover, as seen in chapter four, it is the type of argument made by the Berkshire Constitutionalists; the Massachusetts revolutionaries who successfully claimed for the first time in history that citizens have a right to ratify any constitution meant to rule over them. Their arguments not only first justified and conceptualized the procedure of ratification, but they remain the most comprehensive explanation for why ratification is a necessary component of constitution-making.

However, as argued in this chapter, SMJ ultimately fails to explain the need for ratification. The justification claims that ratification is necessary because it is the sole moment in the constitution-making process where the constituent power acts and creates its constitution. It makes this argument by characterizing constituent power as inalienable, which means that SMJ only justifies ratification procedures that make use of referenda. However, in order for a referendum vote to serve as a site of constituent action, individual voters must make a mean-
ingful choice on the constitution. That is, they must choose whether to accept a proposed constitution on the basis of their understanding of the document and the likely result of its rejection. This type of choice is made necessary by the purpose of the referendum, to enable the constituent power to create something. Creation entails that the creator has some level of comprehension over its creation. Making this claim does not import a thick conception of what it means for the people to express its will, but instead relies on the simple idea that something cannot be taken to be the intentional creation of an agent if he did not understand what it was he was willing and creating.

This standard of meaningful choice is unlikely to be met in constitutional referenda, for voters will almost certainly be too ignorant to make the necessary comparison. This is not because voters in constitution-making countries will be especially stupid. Rather, voter ignorance is expected because the information required to evaluate a draft constitution is technical, hard to obtain, and without value for the average citizen in any other circumstance. Voters are known to usually lack the information needed to independently choose political representatives or vote on specific referenda on their respective merits, and the greater obscurity of the knowledge needed to evaluate a draft constitution makes it even less likely for it to be present in a sufficient percentage of the ratifying population. Thus, since we should expect voters to be unable to make a meaningful choice, ratification procedures cannot be relied upon to provide the sole moment of constituent action, and thus SMJ, along with other types of constituent power justifications, cannot justify ratification.

Note that this argument is not anti-democratic. The inability of voters to make a meaningful choice on a proposed constitution says nothing about their ability to competently vote in an
election or ordinary referenda, even one that pertains to constitutional issues. This is so because the standard of meaningful choice only applies to ratification referenda that purport to be the site of constituent action. Voters must comprehend fully what they are voting on because their actions are meant to combine and form the actions of a constituent power creating extraordinary law. When voters go to the ballot box to vote for a president or legislator, to decide upon a tax referendum, or even to make a decision upon a particular constitutional amendment, their actions are not meant to be those of the constituent power. Theories of democracy, at least most prominent ones, do not demand such a high level of knowledge.

Attempts to rebut the dismissal of SMJ, I argue, ultimately fail. Specifically, the meaningful choice threshold is not too high, as evidenced by the fact that framers cannot meet it, because framers usually become quite informed while writing the constitution, and constitution-making processes can be designed to almost guarantee this outcome. Information shortcuts cannot be relied upon to overcome voter ignorance for two reasons. On the one hand, ratification referenda take place in a context where heuristics are known to malfunction. On the other hand, even if heuristics worked perfectly, they would not eliminate the problem posed by voter ignorance. Meaningful choice requires that voters understand what it is they are creating, while information shortcuts and heuristics only provide an explanation for how voters, despite their confusion, nonetheless choose outcomes that reflect their underlying preferences, interests, and beliefs. The existence of reliable heuristics cannot save SMJ, for voters can fail to make a meaningful choice in a ratification referendum even if the outcome would have been identical had they been informed.
Finally, constitutional education programs cannot be relied upon to educate voters and make meaningful choice likely. Such programs fail to eliminate voter ignorance in ordinary elections and referenda, where the level of knowledge demanded is less, and appear to have failed in previous ratification referenda. This is likely due to the fact that education programs immediately devolve into or are replaced by ratification campaigns upon the release of draft constitutions. These campaigns operate in a context in which campaign effects are known to be highest and voters are especially prone to manipulation. As a result, the basis of voter decisions on constitutional ratification referenda are likely to be unrelated to its content, or at the least entirely unpredictable.

Thus, SMJ fails to justify ratification. Constituent power is the creative power of the people to make (and unmake) their constitution. If it emerges in ratification only, which is the claim of SMJ, the process must plausibly serve as the expression of the popular will. In other words, ratification must be a clear instance in which the people as a whole decide upon and create the foundations of their future government. However, the general ignorance of ratifiers in matters of constitutional-design challenge the ability of ratification to serve this purpose, and designers of constitution-making processes can do little to eliminate or overcome this deficit.
6.

LEGISLATIVE & RATIFICATION

"An important justification for people’s participation is said to be the legitimacy that it confers on the constitution. If people have participated, they are more likely to have a commitment to it, even if they have not fully understood the process or the constitution, or indeed even if their participation was largely ceremonial."

_Yash Ghai & Guido Galli_\(^{567}\)

"Legitimacy is a mushy concept that political analysts do well to avoid."

_Samuel P. Huntington_\(^{568}\)

In this chapter, I address what is possibly the most intuitive and certainly the most discussed justificatory source for ratification: legitimacy. Few seem to think about, let alone study, the reasons for incorporating ratification within constitution-making; however, those that do usually make reference to the procedure’s alleged legitimating effects. The idea is fairly simple.

The desired outcome of constitution-making is not merely a written document, but one that is legitimate. Ratification, the arguments goes, makes this outcome more likely. As Elster notes, ratification “is intended to confer downstream legitimacy on the constitution.”\(^{569}\) Why might this be?

The constitution-making best practices literature that emerged in the last ten or so years frequently links ratification to legitimacy, though how and why is usually unexplained or left

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\(^{569}\) Elster, _Ulysses Unbound_: 113.
underdeveloped. Miller, for instance, claims that, “referendums can be valuable in constitution making, conferring a degree of legitimacy on the process and its outcome.” Ndulo and Selassie also link ratification with creating a legitimate constitution. Ndulo traces ratification’s legitimating effect to the procedure’s ability to ensure that a constitution is not “perceived as being imposed on a large segment of the population, or having been adopted through manipulation of the process by one of the stakeholders.” Somewhat similarly, Selassie explains that the use of a special constituent assembly to ratify the Eritrean constitution was necessary because of “the issue of legitimacy,” the central assumption of which is “that the government is established by and on behalf of the people.”

Some authors group ratification with other participatory procedures such as assembly elections and public consultations and promote all of them because “broad public participation contributes to the constitution’s legitimacy.” Examples of this participation equals legitimacy logic abound. A recent UN Guidance Note from the Secretary-General advises all constitution-makers to focus on the “the impact of inclusivity and meaningful participation on the leg-


571 Benomar, "Constitution-Making and Peace Building: Lessons Learned From the Constitution-Making Processes of Post-Conflict Countries," 11. The quantitative studies on constitution-making by Carey and Elkins and Ginsburg both include the presence of a ratification referendum as an indicator of participation and inclusiveness. See Carey, "Does it matter how a constitution is created?"; Elkins, Ginsburg, and Blount, "The Citizen As Founder: Public Participation in Constitutional Approval."

572 Though it is not the main focus of this dissertation, I must admit to being extremely skeptical of the trend in constitution-making literature to push the use of participatory processes, regardless of context, in the name of legitimacy promotion. Lusztig describes many of my concerns when he writes: “the requirement of mass input into and legitimation of constitutional bargaining in deeply divided societies is incompatible with successful constitution-making. There are two reasons for this. First, mass input/legitimation undermines effective elite accommodation. … Second, mass input/legitimization is a catalyst for the creation of constitutional interest groups.” Michael Lusztig, "Constitutional Paralysis: Why Canadian Initiatives are Doomed to Fail," Canadian Journal of Political Science 27, no. 4 (1994): 5.
The legitimacy of new constitutions.” Vivien Hart, in an essay on democratic constitution-making, concludes that “the legitimacy of constitutional agreements at the end of the twentieth century depends upon openness in two senses: a process both open-ended and open to participation.” Similarly, Wing notes that, “participation in constitutionalism…is a central factor in determining the legitimacy and durability of democratic transitions in Africa today,” and Medhanie explains that participatory constitution-making secures the consent of elites, stakeholders, and society as a whole, and that such consent is important because it “is actually the source of the constitution’s legitimacy.”

Medhanie’s comments point to another reason for thinking legitimacy is the justificatory key to our inquiry: the long tradition of consent-based accounts of political authority. Starting in the late sixteenth and early seventeenth centuries, thinkers such as Buchanan, Hooker, Althusius, and Hobbes, soon to be followed by Pufendorf, Lock, and later Rousseau, developed conceptions of legitimate government predicated on an original or ongoing act of individual or collective consent. These accounts continue to influence political thinking to this day, and though they differ in regards to their details and implications for political obligation, state form, revolution, and the like, all seem to provide some sort of explanation for why constitutions must be ratified. Simply put, a constitution, and the government and state it structures, must be consented to by its citizens in order to obtain coercive authority over its populace. The explanatory power of such consensual accounts of legitimacy remains even if we reject the

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contractual metaphor at their base. Constitutions may be coordination devices and conventions, rather than contracts, but at the beginning, some sort of popular consent remains necessary.

Finally, a growing body of empirical work points to the legitimating effects of participation in creating systems of rules. For instance, in several studies about the importance of legitimacy on observed legal compliance, where legitimacy is defined as a citizen’s belief that she ought to obey the law, Tyler finds that individual experience with political and legal authorities plays a central role. In particular, he claims that “procedural justice is the key normative judgment influencing the impact of experience on legitimacy,” and that “one important element in feeling that procedures are fair is a belief on the part of those involved that they had an opportunity to take part in the decision-making process.” Similarly, on the basis of several lab experiments, Frohlich and Oppenheimer found that subjects who had a hand in choosing distributional principles “are more confident in their choices and more satisfied, and their confidence grows in contrast with their counterparts who have a [identical] principle imposed on them.” Numerous other studies provide further support for the idea “that personal influence in the procedure generates legitimacy,” and that “direct voting in referendums is one such way to exercise influence in the process.” These sorts of findings suggest that ratification procedures, particularly referenda, might play a major role in creating a legitimate constitution.

Mikael Persson, Peter Esaiasson, and Mikael Gilljam, "The effects of direct voting and deliberation on legitimacy beliefs: an experimental study of small group decision-making," European Political Science Review
In this chapter, I follow these leads and examine whether ratification has these purported legitimating effects, and whether they provide sufficient reasons for its implementation. First, however, certain difficulties have to be addressed that stem from the term and concept of legitimacy. As we saw in chapter two, discussions of representation tend to get bogged down in disagreements about what representation is a concept of. Is it a political relationship? Does it have to be institutional? Does it admit to degrees? With legitimacy, a different problem faces us. The concept is often used confidently in both academic and everyday settings. People usually know what they are referring to when they discuss legitimacy, and their audience likely knows as well. The concept is unambiguously, as far as these things can go, connected to its object. However, difficulty arises because we use the term legitimacy to refer to a variety of different concepts, and thus different objects and properties.

These concepts are related, they all have something to do with validity, acceptance, and right, but they are nonetheless distinct. In other words, what it means for something to valid, acceptable, or right differs from one concept of legitimacy to the next. For example, I might get angry at a Supreme Court judgment and call it illegitimate, claim that as a result the legitimacy of the court is in question, yet admit that the decision was legitimate as a matter of law. I refer to something different in each of these instances, but in none of them am I misusing the term.

My general intuition is that the seemingly self-evident link between ratification and constitutional legitimacy weakens when both the meaning of legitimacy and the actual mechanism of

legitimation are treated with greater precision. Thus, my task in the first section of this chapter is to gain an understanding of what legitimacy can mean in a political context, and how it might apply to a constitution at all. To do this I divide political legitimacy into three different concepts: moral legitimacy, sociological legitimacy, and legal legitimacy. Next I apply these concepts to constitutions, and argue that legal legitimacy collapses into sociological legitimacy when it comes to higher law.

In the remainder of this chapter I examine how ratification might promote the moral and sociological legitimacy of a constitution. For both concepts of legitimacy, ratification might have one of two effects. The procedure might affect the contents of a constitution, such that the constitution becomes legitimate on substantive grounds, or the constitution might become legitimate simply because it resulted from ratification, regardless of its contents. There are numerous possible arguments one might make explaining how ratification might legitimate a constitution through these two mechanisms, but I concentrate on what seem to be the most plausible. In addition, I limit the discussion to ratification by referenda, for this is the most common ratification procedure and the one usually cited in discussions of legitimacy. I conclude the chapter drawing my findings together and seeing where this leave ratification.

1. WHAT IS LEGITIMACY?

Confusion and disagreement surrounds the concept of legitimacy because, among other factors, the term is used differently depending on author, context, and purpose.

While the term is consistently used to indicate that something is valid or right, what it actually means for something to be valid or right is frequently left unexplained or underdeveloped. In
order to more precisely evaluate the possible legitimating effects of ratification, I hope to clarify the concept. Specifically, I argue that when it comes to the political context, legitimacy splits into three different types or concepts, each evaluated according to different sorts of criteria. Roughly put, something is *morally legitimate* if there is an acceptable moral justification for its claim to authority; *sociologically legitimate* if a significant portion of the relevant population believes it to be justified or morally legitimate; and *legally legitimate* if it is lawful according to the legal order of which it is a part.

Of course, as we will see, there is significant overlap and frequent causal connections between these types of legitimacy. Government officials might be morally legitimate authorities because they were lawfully elected and thus legally legitimate; a judicial interpretation might be unlawful because it violates the bounds of morality; a rule might become lawful simply because people believe it to be right; and all instances of sociological legitimacy rely on basic beliefs in moral legitimacy. Despite this inevitable overlap and connection, it is nonetheless worth distinguishing between each of three types of legitimacy, for doing so brings increased clarity to

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578 In elaborating the various legitimacy types I primarily draw from, and believe my taxonomy has relevance for, the fields of political science, political and legal philosophy, criminology, political psychology, and sociology.

discussions of constitutional legitimacy and will assist us in evaluating how a constitution-making procedure might help create a legitimate constitution.\footnote{Sometimes people see the lack of an overlap, or any attempt to distinguish between different concepts of legitimacy, as a deficiency in attempted explanations. Stillman, mistakenly in my opinion, attacks Friedrich’s definition on the basis of its explicit exclusion of moral values and focus on citizen belief. Peter G. Stillman, "The Concept of Legitimacy," Polity 7, no. 1 (1974): 37.}

Before proceeding, it begs mention that a significant portion of the argument below, most obviously the strict distinction between moral and legal legitimacy, assumes that the basic tenets of legal positivism are true. At the least, it requires accepting Austin’s foundational claim that “the existence of law is one thing; its merit and demerit another.”\footnote{John Austin, The Province of Jurisprudence Determined, ed. Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995). 159.} In other words, the existence and identity of law depends exclusively “on behavior capable of being described in value-neutral terms, and applied without resort to moral argument.”\footnote{Joseph Raz, The Authority of Law, Second ed. (Oxford: Oxford University Press, 2009). 40.} This is not the place to defend the merits of legal positivism against competing jurisprudential considerations; instead I simply assume its truth and admit that my arguments will have less resonance to natural law theorists and other non-positivists.\footnote{See Hart, The Concept of Law; Kelsen, General Theory of Law and State; Leslie Green, "Law, Legitimacy, and Consent," Southern California Law Review (1998); Raz, The Authority of Law; Jules L. Coleman, The Practice of Principle (Oxford: Clarendon Press, 2001).}

1.1 MORAL LEGITIMACY

Moral legitimacy is the conceptual center around which both legal and sociological legitimacy revolve. Neither of the other two legitimacy types makes sense without it. Most generally, moral legitimacy relates to “moral justifiability or respect-worthiness,” the latter usually interpreted as necessitating some sort of duty of compliance toward that which is morally legi-
mate. More precisely: x is morally legitimate if x’s claim to authority is morally justified. This definition makes use of the concept of practical authority, which a person or group possesses “if their authoritative utterances are themselves reasons for action.” Something has practical authority if its demands or instructions in a particular arena provide reasons for action meant to exclude, replace, or override those reasons directly related to the action being requested.

Consider a state, the most common political subject of moral legitimacy. A state claims to be authoritative when it asserts a right to rule and demands some sort of deserved and dutiful compliance. In other words, when it claims a right to issue commands and directives relating to keeping the public order, maintaining the state, and exercising coercive force, and demands some form of non-selfish compliance from its citizenry. A state claiming such authority expects citizens to comply with its edicts simply because it makes them. Citizens are expected to pay their taxes because the state demands payment, not because tax payments contribute to

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587 Raz describes authoritative reasons as preemptive, meaning that they are “not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.” Ibid., 20-37. I add override in order to take into competing conceptions of practical authority that characterize the reasons produced by authority as being extremely weighty, rather than fully preemptive.
public infrastructure and national security or because failing to do so results in expensive audits. In claiming such authority a state is asserting that there are sufficient moral reasons to treat its edicts as preemptive in this fashion.

States claiming to be authoritative are morally legitimate, they have morally legitimate authority or *de jure* authority, when “their claim [to have a right to rule] is justified and they are owed a duty of obedience as a result.” These two facets of moral legitimacy are related, in that the existence of good moral reasons for a state’s claim to authority generates the relevant duties of obedience. The nature of the obedience, the type of duty produced by morally justified authority, and the recipient of the duty remain controversial topics. Obedience might amount to not actively undermining the state, not interfering with the state, obeying some or all of the state’s commands, or even assisting and supporting the state. The generated duty might be content-dependent or independent, absolute, prima facie, or preemptive. Citizens might owe obedience to the state itself, its government, or the people in whose name it acts. I remain neutral on these questions; moral legitimacy simply consists in a morally justified claim to authority and an owed duty of obedience of some sort.

Morally legitimate authority is distinct from *de facto* authority. A state is *de facto* authoritative when its claim to authority is successful rather than morally justified. Such a state claims a right to rule, acts as if it has a right to rule, and succeed in establishing and maintaining its

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588 Ibid., 26; Raz, *The Authority of Law*: 6.

rule. In modern contexts, this success is usually but not necessarily due to the fact that the citizenry believe in the state’s moral validity. The idea here is that it is extremely difficult for a government to effectively rule a modern polity unless a significant portion of the population believes that it has the right to do so. Whether this belief is warranted and the state is actually morally legitimate is irrelevant for the purposes of determining de facto authority. Thus, a state can claim to be authoritative without being a de facto or a legitimate authority, can be a de facto authority without being a legitimate authority (this is a mere de facto authority), and can be a legitimate authority without being a de facto authority.

Note that morally legitimate authority is distinct from the naked exercise of coercive power, even when it is done for good moral reasons. For instance, a street gang might justifiably coerce members of a community to combat an encroaching fire, but this does not amount to morally legitimate authority because they do not claim a right to rule and do not expect compliance because of who or what they are. In addition, an entity that effectively rules a territo-

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592 While it is conceptually possible to imagine a non de facto morally legitimate authority, certain views on what actually makes an authority morally legitimate might make this impossible. For instance, if one of the primary moral justifications for having a political authority is to secure stable social co-ordination, and this is only possible (without violating other significant moral principles) if the authority is de facto, then all legitimate political authority is necessarily effective and de facto. However, as Raz notes: “this is the result of substantive political principles… It is not entailed by a conceptual analysis of the notion of authority, not even by that of the concept of political authority.” Raz, *The Authority of Law*: 9. One example of a non de facto yet morally legitimate authority might be the Polish government in exile in London in 1940. Nonetheless, while it did not successfully rule Poland, the government in exile was recognized as authoritative by the bulk of the Polish population. Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason*: 128.

593 For an interesting distinction between two types of mere defacto authority, distinguished by reluctant acceptance of an authority’s claim to authority on the one hand, and the outright rejection of it on the other, see Anthony Bottoms and Justice Tankebe, "Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice," *The Journal of Criminal Law & Criminology* 102, no. 1 (2012): 148-49.

ry might fail to be *de facto* or morally legitimate. Consider an army governing a newly conquered populace. It might effectively impose its will on the bulk of the population, but fail to be a *mere de facto* authority or a morally legitimate authority because it does not claim to have a right to rule. Moreover, even if it did make such a claim, it might fail to be morally legitimate if its structure is so unjust that the right to rule cannot be justified. De facto and legitimate state authorities are therefore distinct from merely effective states because they involve moral reasons in some way.

1.2 SOCIOLOGICAL LEGITIMACY

Sociological legitimacy is already familiar to us through the concept of de facto authority. As mentioned, a state is de facto authoritative if it claims to be authoritative and succeeds in being so. Sociological legitimacy is one of the most common reasons for its success; it is the citizenry's belief that the regime's claim to authority is morally justified and their resultant acquiescence or obedience.

This legitimacy type descends from Max Weber, who described it as one of the most important factors in state survival. For Weber, a legitimate political regime is one characterized by *legitimitätsglaube* being present within the citizenry. Thus, to speak in circles, a regime is legitimate if its citizens believe it to be legitimate. As he explains: “that basis of every system of authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue

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596 Gilley summarizes the concept: “legitimacy is a citizens willingness to comply with a system of rule, out of not selfishness, experience or habit, but rather a considered belief in the moral validity of the rule. Gilley, *The Right to Rule: How States Win and Lose Legitimacy*: 3.

of which persons exercising authority are lent prestige.”\textsuperscript{598} Using our disaggregated conception of legitimacy, we can say that for Weber, a regime is sociologically legitimate to the degree that its citizens believe it to be morally legitimate.\textsuperscript{599} Weber believed that obedience follows such beliefs. The type of obedience needed is what criminologists and socio-legal scholars term ‘legitimate normative obedience,’ i.e. obedience due to a belief in the rightful authority of officials, rather than due to instrumental reasons or general moral beliefs in proper behavior.\textsuperscript{600}

We can thus define sociological legitimacy in the following manner: \( x \) is sociologically legitimate if a significant portion of the population that \( x \) claims authority over believes \( x \) to be morally legitimate and complies with its directives as a result.\textsuperscript{601} As Lipset defines the term, “[sociological] legitimacy involves the capacity of a political system to engender and maintain the belief that existing institutions are the most appropriate and proper ones for the society.”\textsuperscript{602} The concept of sociological legitimacy is thus a descriptive concept, for it describes whether or not a certain percentage or number of citizens have certain attitudes or beliefs towards a political object, and whether they act a certain way because of them.\textsuperscript{603} It is therefore “a question of

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\item \textsuperscript{598} Max Weber, \textit{The theory of social and economic organization} (New York: Free Press, 1997), Book. 382.
\item \textsuperscript{599} Weber famously traces this belief in legitimacy to three sources: tradition, charisma, and legality.
\item \textsuperscript{600} Tyler, \textit{Why People Obey the Law}; Bottoms and Tankebe, “Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice,” 120.
\item \textsuperscript{601} This definition is necessarily reductive, insofar as a properly robust explanation would have to explain the nature of these beliefs, their source, and there relation to shared beliefs and values.
\item \textsuperscript{602} Seymour Martin Lipset, \textit{Political Man: The Social Bases of Politics}, 2nd ed. (London: Heinemann, 1983). 86. Note that sociological legitimacy might be maintained and supported by a belief that one’s fellow citizens consider an authority morally legitimate, and perhaps will impose sanctions in response to deviance, but that these sorts of beliefs are nonetheless distinct from those beliefs that constitute sociological legitimacy. Horne ignores this distinction in her social norm approach to legitimacy. Christine Horne, “A Social Norms Approach to Legitimacy,” \textit{American Behavioral Scientist} 53(2009).
\item \textsuperscript{603} Sociological legitimacy is thus variable between time periods, groups, and governmental organs.
\end{itemize}
fact,” as Friedrich notes, “whether a given rulership is believed to be based on good title by most men subject to it.”

Sociological legitimacy is thus distinct from moral and legal legitimacy, both of which are evaluative concepts, in that its measurement is completely dependent on attitudinal and behavioral characteristics of a given set of individuals, rather than reliant on objective or semi-objective external criteria. Sociological legitimacy remains a normative concept, however, in that it concerns beliefs in moral legitimacy and the obedience that such beliefs entail. Thus, attempts to completely reduce the concept to rationally calculated obedience, misuse the term. Finally, note that, at least theoretically, the fact that x is sociologically legitimate neither means that x is or is not morally legitimate. Moral legitimacy only follows sociological legitimacy to the degree that citizens possess moral competence.

1.3 LEGAL LEGITIMACY

The final type of legitimacy is legal legitimacy. As Fallon notes, “that which is lawful is also legitimate.” This definition needs to be refined, however, in order to separate legal legitimacy from mere lawfulness. Something is only legally legitimate if it is lawful according to the

605 As Clark notes, “the test for legitimacy is not the truth of the philosopher, but the belief of the people.” Ian Clark, "Legitimacy in a Global Order," Review of International Studies 29(2003): 80.
606 Fallon notes a weak sense of sociological legitimacy that means observed popular acquiescence, regardless of reason. While legitimacy is certainly employed by some political scientists in this way, most likely due to its relative ease of empirical measurement, I claim that such usage overly distorts the concept. For instance, according to this weaker sense of sociological legitimacy, the governments of Mugabe, Pinochet, and Than Schwe were sociologically legitimate. Fallon, "Legitimacy and the Constitution," 1795-96.
legal system in which it exists or operates, while something can be lawful according to a variety of legal systems.\textsuperscript{609} Put more precisely: $x$ is legally legitimate if $x$ is lawful according to the legal system of which $x$ is a part. In this sense, legal legitimacy is equivalent to the positivist conception of legal validity. Specifically Raz’s version of legal validity, which defines something as legally valid “if and only if...it belongs to a legal system in force in a certain country or is en-
forceable in it.”\textsuperscript{610}

Two additional features of legal legitimacy are worth clarifying. First, ascribing legal legitimacy to an object involves making a legal statement, i.e. a statement in which “the fact that certain laws belong to certain legal systems” is a “necessary condition of the truth.”\textsuperscript{611} The truth conditions of legal legitimacy, unlike moral and sociological legitimacy, consist in specific legal facts rather than moral properties or actually existing beliefs. Second, legal legitimacy as a concept nonetheless relies upon normative and sometimes even moral presuppositions. Assertions of legal legitimacy establish that something has the legal effects that it claims because it a valid component of the relevant legal system. This is why legal legitimacy is identical to legal

\textsuperscript{609} Thus, the Kenyan legal system tells us something about the legal legitimacy of Kenyan laws and edicts, but says nothing in regards to laws created in Russia or anywhere else. One could sensibly claim that a Russian law is lawful according to the Kenyan legal system, but the existence of a Russian law that is legally legitimate according to the Kenyan legal system is a conceptual impossibility. Similarly, Raz writes: “The gist of the legalists approach is that the lawful government is that authorized by the positive law of the land.” Joseph Raz, “On Lawful Governments,” \textit{Ethics} 80, no. 4 (1970): 301. See also Kelsen, \textit{General Theory of Law and State}: 117.

\textsuperscript{610} Raz, \textit{The Authority of Law}: 153.

\textsuperscript{611} Raz, “On Lawful Governments,” 300. In a sense, Raz’s discussion in this article about the three different contexts in which the concept of a legal system is deployed, and the confusion wrought by failing to distinguish between these contexts, anticipates Fallon’s tripartite legitimacy distinction. Ibid., 302-04. Note also that I follow Leslie Green in interpreting Raz’s discussion of lawful government as an as an explanation of legal legitimacy: Green, “Law, Legitimacy, and Consent,” 797. Finally, for a discussion of legal statements, see H.L.A. Hart, \textit{Essays in Jurisprudence and Philosophy} (Oxford: Clarendon Press, 1983). 21-48.
validity, which means “the specific existence of norms.” Legal systems presume their own normativity, and thus claiming that a specific law or political action properly belongs to an accepted legal system is to suggest that the law or political action deserves compliance as a result. Thus, it is not uncommon for assertions of legal legitimacy to assume the moral legitimacy of a legal system as a whole. Legality and morality are still distinct, but this further shows to the inevitable linkage between different types of legitimacy.

2. LEGITIMATE CONSTITUTIONS

We now need to apply these three concepts of political legitimacy to constitutions. What does it mean for a constitution to be morally, sociologically, or legally legitimate? In this section I argue that while we can sensibly talk about legitimate and illegitimate constitutions when it comes to moral and sociological legitimacy, the same is not true for legal legitimacy. Legal legitimacy collapses into sociological legitimacy when it comes to higher law and is thus irrelevant for our inquiry.

2.1 MORALLY AND SOCIOLOGICALLY LEGITIMATE CONSTITUTIONS

A morally legitimate constitution is a constitution with morally justified authority; it is a constitution that justifiably structures a given state, creates its legal system, sets limitations on government power, and is owed some form of respect and compliance as a result. Morally legitimate constitutions demand that a specific right be protected from government infringe-
ment, or that one organ of government has such and such a check on another organ, not because of the individual merit of the right or the check, and not because citizens agree with these provisions, but because the constitution demands it and moral reasons exist for respecting this demand. To use Frank Michelman’s term, a morally legitimate constitution is ‘respect-worthy,’ in that it creates a legal and political system the inhabitants of which have good reasons to respect even when they disagree with specific laws or policies and fail to change them.\footnote{Frank I. Michelman, "Ida’s Way: Constructing the Respect-worthy Governmental System," \textit{Fordham Law Review} 72(2004): 346-47.}

The assertion of a constitution’s moral legitimacy, like any application of moral legitimacy to the political domain, assumes that the exercise of political authority, or in this case structuring the exercise of political authority, is problematic in the absence of sufficient moral justification. In other words, it assumes that in the absence of good moral reasons it is wrong for a state, individual, or institution to make political and legal rules, enact them, and demand compliance. This stems from a core belief in the inherent freedom of individuals, or at least their freedom from limitations and coercion externally imposed by others.

Finally, it begs mention that how we determine whether a constitution’s claim to authority is morally justified depends on the comprehensive moral theory we endorse. For instance, according to Rawls’ liberal principle of legitimacy, a morally legitimate constitution is one “the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”\footnote{John Rawls, \textit{A Theory Of Justice}, Revised ed. (Cambridge: Harvard University Press, 1999). 137.} For Raz, a legitimate constitution would be one that meets the normal justification thesis and the independ-
ence condition, meaning that “a person would better conform to reasons that apply to him any-
way...if he intends to be guided by the authority’s directives than if he does not” and “the
matters regarding which the first condition is met are such that with respect to them it is bet-
ter to conform to reason than to decide for oneself, unaided by authority.” For Simmons and
perhaps Locke, a legitimate constitution would simply be that constitution directly consented
to by the populace. 616 These and other theories will be taken into consideration below when
ratification’s legitimating capability is tested.

A sociologically legitimate constitution is a constitution that a relevant portion of the pop-
ulation believes is morally legitimate and treats as authoritative as a result. 617 This means, for
instance, that citizens consider the constitution to be the constitution, that the government
functions in accordance with the constitution’s provisions, that legal reasoning stops at the
constitution, and that most people believe that all of this occurs for good moral reasons. The
provisions of a sociologically legitimate constitution, as well as the institutions that it struc-
tures, are thus thought to be appropriate, deserving of respect, and generally justified. More-
ever, they are actually complied with because of such beliefs. In other words, most citizens liv-
ing in a state structured by a sociologically legitimate constitution believe that their constitu-

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616 Simmons, Justification and Legitimacy: Essays on Rights and Obligations: 123-56.

617 Measuring sociological legitimacy, regardless of context or object, is inherently difficult. When it comes to
constitutions a variety of approaches, all of which are necessarily reductive and imperfect, have been used. Wid-
ner uses the level of violence five years after constitution-making in post-conflict countries. Moehler uses consti-
tutional support, measured through four survey questions designed to assess whether respondents felt that the
constitution included their views, represents the national political community as a whole, is worthy of compli-
ance, and should be preserved. De Raadt takes a more elite-based focus, relying on incidents of constitutional
conflicts in the area of executive-legislative relations as well as disputes about the competencies of constitutional
courts, while Elkins et al rely on constitutional durability. Elkins, Ginsburg, and Melton, “The Lifespan of
Written Constitutions.”; Moehler, Distrusting Democrats: Outcomes of Participatory Constitution Making;
Widner, Constitution Writing in Post-Conflict Settings: An Overview.; Widner, “Constitution Writing and
Conflict Resolution.”; Jasper de Raadt, “Contested Constitutions: Legitimacy of Constitution-making and
Constitutional Conflict in Central Europe,” East European Politics and Societies 23, no. 3 (2009).
tion is appropriate and morally justified as a whole, and that its dictates should be obeyed accordingly.  

Sociological legitimacy is the legitimacy type most frequently relied upon in the constitution-making literature. Ndulo, for example, refers to a legitimate constitution as one the people feel that they own, and therefore respect, defend, and obey, and Banks and Alvarez claim “that constitutional legitimacy is determined by the people’s acceptance of the Constitution, the fit between the new set of rules and society.” Most explicitly, Arato and Miklosi explain that they “are ultimately concerned with the sociological sense of the term legitimacy as established by Max Weber, having to do with a significant part of a population…considering a political order as a whole or the government based on it…justified or valid.”

2.2 THE IRRELEVANCE OF LEGAL LEGITIMACY

Unlike moral and sociological legitimacy, a conceptual problem emerges when one applies legal legitimacy to a constitution. A legally legitimate constitution would be a constitution that is legal according to the legal system of which it is a part. However, in constitutional governments the constitution creates the legal system; it lies at the end of any chain of legal reasoning regarding the lawfulness of an object or action and undergirds all legal rules and regulations. Thus, claiming that a constitution is legally legitimate seems confused, for the criterion of legal legitimacy, lawfulness, is partially set by the object whose legitimacy is being asserted.

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618 Of course, citizens might believe that one provision of the constitution is outdated or flawed and needs to be changed, while still maintaining that the document as a whole is justified. In addition, note that the matter of sociological legitimacy of a constitution is different from the sociological legitimacy of the government. Thus, a sociologically illegitimate government might operate in a state structured by a sociologically legitimate constitution. This is especially likely if said government is seen as departing from the provisions of the constitution.


There are two possible solutions to this conundrum. The first is that constitutions can contain reflexive standards of legal legitimacy. Many constitutions contain sections that seem to serve this purpose. For instance, the final provision of the 1948 Constitution of the Italian Republic states:

“This Constitution shall be promulgated by the provisional Head of State within five days of its approval by the Constituent Assembly and shall come into force on 1 January 1948. The text of the Constitution shall be deposited in the Town Hall of every Municipality of the Republic and there made public, for the whole of 1948, so as to allow every citizen to know of it.”

This provision, one might argue, makes the Italian Constitution self-legitimizing, for it contains steps that, if followed, produce a lawful constitution. Moreover this seems appropriate, for the constitution defines the legal system of Italy, of which the constitution is a part, and therefore no other source of legality is possible.

Despite the frequency of constitutions including such provisions, this solution makes little sense. On the one hand, the implication of a constitution that violates its own enactment provisions is unclear. When something is legally illegitimate it is not legal and lacks legal force; an invalid law is not a law, and an invalid legal command is not part of a legal system. Thus, if the constitution provides its own criterion of legal legitimacy, and it fails to satisfy it, then the constitution is legally invalid, which implies that it cannot serve as a source of legal legitimacy for anything, itself included. For instance, if the Italian Constitution was promulgated ten days after its approval and only publicized in northern municipalities, it should be illegal and legally

\footnote{Italian Const. Final and Transitional Provisions, XVIII}

\footnote{The Hungarian Round Table is another example of such reflexive legitimacy. According to Arato, they “claimed a potential, retroactive democratic legitimacy. If, as the argument went, the population voted under the new electoral rules, within the new procedural framework, this would, after the fact, legitimate the agreement.” Arato, *Civil society, constitution, and legitimacy*, 149.}
illegitimate. However, by being legally illegitimate, it is not lawful and cannot serve as a source of lawfulness for anything, meaning that it is not actually legally illegitimate for there is no acceptable source of constitutional legality. This circularity plagues any attempt to locate the source of legal legitimacy for a constitution in the same constitution, for legitimacy presupposes the possibility of illegitimacy, which requires that the relevant criterion is separate from the object being evaluated.

On the other hand, constitutional self-legitimation simply contradicts or falls short of what people mean when they use the term legal legitimacy. This is best demonstrated by a hypothetical put forward by Frederick Schauer. He presents and signs a new constitution for the United States, the first and final articles of which read: “Article 1. Frederick Schauer or those he may designate shall possess all of the legislative powers of the United States,” and “Article VI. The Constitution shall be established and in force upon signing by the individual named in Article 1.” This constitution is lawful and in force according to its own terms, i.e. by satisfying its own internal conditions of validity it became legally legitimate. The same is true for the actual U.S. Constitution, which also satisfied its own internal conditions of legitimacy. The fact that the U.S. Constitution is the legally legitimate constitution of the United States, while Schauer’s is not, points to the insufficiency of a purely internal criterion of legal legitimacy. We can make this distinction, as Schauer notes, “not because of anything internal to one document or the other, because internally they are equally valid. Rather, we know that one is the
Constitution and the other is not because of what we know empirically and factually about the world.\(^{623}\)

The second solution claims that the legal or political system being replaced can provide the relevant criteria of lawfulness by dictating how future constitutions are to be made or what they must include. Here, legal legitimacy is meant to come from legal continuity. Examples of this abound in constitution-making history: Louis XIV demanded that he receive a veto over and within the constitution; the Allied powers demanded the creation of a highly decentralized government in West Germany and the popular ratification of the constitution; the National Resistance Movement’s government in Uganda passed a series of acts dictating the appointment of constitutional commissioners, the make-up of the constituent assembly, and the manner in which its members could campaign; and the South African Interim Constitution specified the process of constitution-making and constrained the final document’s content by imposing thirty-four binding constitution principles.\(^{624}\) In 1992, the Hungarian Constitutional Court retroactively endorsed this vision of legality when it claimed: “the exchange of systems


\(^{624}\) Elster, "Forces and mechanisms in the Constitution-making process," 373-75; Ebrahim, Fayemi, and Loomis, "Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa: Recommendations to Commonwealth Heads of Government," 121; Aili Mari Tripp, "The Politics of Constitution Making in Uganda," in *Framing the State in Times of Transition: Case Studies in Constitution Making*, ed. Laurel E. Miller (Washington, DC: United States Institute of Peace Press, 2010), 162-66. Note that such constraints on the constitution-making process have mixed success; the French Assembly ignored both of the King’s requests and the German framers resisted much of the desired decentralization, while framers in Uganda and South Africa closely followed the instructions given to them.
took place on the basis of legality…in a formally unimpeachable manner through adhering to the lawmaking rules of the previous lawmaking order.”

According to this argument for legal continuity, the legal legitimacy of these constitutions depends upon the degree to which they and their creators followed the mandates of the previous legal authority. This solution, while tempting, is mistaken for several reasons. For one thing, it arbitrarily makes legal legitimacy impossible for those constitutions created in a context where constitution-making directives are absent. The constitutions of completely new states, or states in which the previous regime had nothing to say about the creation of its replacement’s constitution, could never be legally legitimate. In addition, this solution perversely gives existing regimes the power to set the terms of legal legitimacy for the constitutions that are meant to replace them.

Most importantly, however, allowing existing regimes to determine the legal legitimacy for new constitutions confuses the legal purpose of constitution-making and the actual role of a constitution from a legal standpoint. Constitutions are the ultimate legal foundation for a juridical system and their creation necessarily negates the legal authority of any previous foundation. It therefore makes little sense for the legal legitimacy or lawfulness of a constitution to depend on its observance with a command or stipulation from its precursor, for to do so suggests that this prior legal source, rather than the new constitution, is juridically superior. If a constitution is to serve as the new source of all future legal norms, it cannot obtain its own le-

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626 Unless a new constitution refers to the old constitution, or judicial interpretation consults prior legal systems when appropriate precedent is absent.
gal legitimacy from a prior system. To summarize, since something is legally legitimate if it is lawful according to the legal system of which it is a part, and constitutions create and define legal systems rather than operate within them, legal legitimacy in the normal sense does not apply to constitutions.

2.3 COLLAPSE INTO SOCIOLOGICAL LEGITIMACY

Despite this conclusion, it remains possible to differentiate a lawful constitution from one that is not. We know that the constitution adopted in 1787 in Philadelphia is valid higher law for the United States while the Articles of Confederation are not. We know that the Constitution of the Federal Republic of Brazil is not a lawful constitution for Suriname and Guyana. Such judgments are possible because the legality of constitutions is determined by social facts. The same is true for ordinary law in a stable legal system, except that the relevant social facts are of a particular type: legal facts. A given law is a law if it is an actual component of a legal system, meaning that its origins followed the proper legal procedures and its contents do not violate higher legal norms, i.e. if it is legally legitimate. When it comes to constitutions, such reasoning is inapplicable, for constitutions are the final and highest source of legal facts and norms. The relevant social facts are therefore not strictly legal, but instead relate to specific attitudes and behavior of the relevant population and legal officials.

Another possibility might be that constitutions receive their legal legitimacy by following the dictates of international law. However, at this point such an argument is unpersuasive because, as of yet, it is not widely accepted that international law can play such a role (it would increase the role of international law extensively) but also because there “is no firm evidence of rules applicable to the process of constitution making.” See Franck and Thiruvengadam, “Norms of International Law Relating to the Constitution-Making Process,” 14.

This is despite the fact that Article VII of the U.S. Constitution violated the Articles of Confederation by allowing for secession, removing amendment power from the Continental Congress and state legislatures, and specifying a new means for constitutional revision. Ackerman, We the People 2: 34-35.
We can identify the constitution of a given polity by looking for the document that is treated like higher law; i.e. the document that lies at the end of judicial reasoning, that determines and limits the interaction of governmental organs, that prescribes how laws are actually created, and that safeguards fundamental rights. The people and government of Suriname and Guyana do not follow the Brazilian constitution or treat it as authoritative, and it is therefore not the legal constitution for these countries. In contrast, the document ratified in Philadelphia in 1789 is valid law in the United States because governmental organs, political officials, and the majority of the population in the U.S. treat it as such. As Fallon notes, the U.S. Constitution “is law not because it was lawfully ratified, as it may not have been, but because it is accepted as authoritative.”

This logic maps onto Hart’s discussion of the primary rule of recognition: the rule that identifies the ultimate source of legal validity in a legal system. As Hart writes, “to say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition.” This rule of recognition consists in the practice of legal and political officials; i.e. a rule pointing to x as the source of legal validity consists in the fact that legal and political officials treat x as the ultimate source of legal validity. In a constitutional setting, the rule of recognition points to the constitution as the ultimate source of legal validity. Therefore, the legal legit-

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630 Hart, The Concept of Law: 92-120.
631 Ibid.
imacy of a constitution hinges on the practice of recognizing the constitution as the actual and proper constitution of the polity in question.632

One question remains: in a constitutional setting who must apply the rule of recognition? According to Hart, rules of recognition apply to legal and political officials; it is their habits and actions that make x the ultimate source of legality. If Hart is correct and similar logic applies to constitutions, than ratification will have no effect on legal legitimacy, for nothing about the procedure is bound to significantly or predictably affect the behavior of future officials towards the constitution. However, for newly constitutionalized polities, especially constitutional democracies, it seems as if something more is needed than a rule of recognition only applicable to officials for a constitution to be legally legitimate. One can imagine Schauer’s constitution also including provisions appointing his friends and family to all governmental positions, all of whom are inclined to treat his constitution as the ultimate source of legality, yet this would not make his constitution the lawful one.

For a new constitution to be legally legitimate, not only do legal and political officials need to recognize it as the proper law of the land, but also a significant portion of the population needs to do the same. The citizens under the newly created constitutional government must see the constitution as the rightful, appropriate, and authoritative constitution. In other

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632 Note that a constitution is the ultimate source of legal validity pointed to by a rule of recognition and not the rule of recognition itself. Constitutions are codified higher law that can be amended, repealed, and intentionally replaced by enactment, while rules of recognition are social practices that cannot change until the social practices that they are change. This mistake is regularly made in the constitution-making literature. See for instance Ginsburg, Elkins, and Blout’s claim that “Because the constitution…provides the ultimate rule of recognition for lawmaking processes, it requires the greatest possible level of legitimation in democratic theory.” This claim is completely confused, for a social practice is not something that is or is not legitimate, in any sense of the concept. Ginsburg, Elkins, and Blount, “Does the Process of Constitution-Making Matter?,” 206; Raz, “On the Authority and Interpretation of Constitutions: Some Preliminaries,” 160-61.
words, for new constitutions, legal legitimacy depends on the practice and behavior of government officials, which ratification will not effect, and the sociological legitimacy of the constitution. Therefore, when examining the effects of ratification on creating a legitimate constitution, only moral and sociological legitimacy are relevant.

3. CREATING LEGITIMACY – OUTCOME & PROCESS

How might ratification help create a morally or sociologically legitimate constitution? Ratification is a procedure, so we need a procedural explanation of moral legitimacy, i.e. an explanation that links a specific outcome (a legitimate constitution) to a specific procedure (ratification). There are two general ways in which a procedure can positively effect the actual or perceived normative status of an outcome: it can substantively alter the nature of the outcome, such that it meets or comes closer to meeting some independent normative criteria; or, it can serve as the normative criterion itself and validate its own outcome. For ease of reference, I call the former a substantive effect and the latter a procedural effect.

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633 See Fallon, "Legitimacy and the Constitution," 1804.

634 In certain contexts, adhering to the directives of previous legal authorities might improve sociological legitimacy. For instance, in a state replacing a sociologically legitimate constitution with a new one for reasons unrelated to instability or loss of authority, following the procedures set out by the old constitution might enhance the legitimacy of the new constitution. I discuss this below in the section covering procedural sociological legitimacy.

635 Esaiasson, Gilljam, and Persson suggest a similar distinction when they write: "Participatory constitution making can generate legitimacy beliefs through two different mechanisms. The first focuses on citizens' ability to choose effect constitutional alternatives...the other mechanism focuses on the additional value of taking part in the constitution-making process itself." Peter Esaiasson, Mikael Gilljam, and Mikael Persson, "Which decision-making arrangements generate the strongest legitimacy beliefs? Evidence from a randomised field experiment," European Journal of Political Research 51(2012): 787.
3.1 SUBSTANTIVE AND PROCESS LEGITIMACY

Looking at Rawls’ discussion of perfect, imperfect, and pure procedural justice helps clarify the substantive and process effect distinction.\(^{636}\) Perfect and imperfect procedural justice share a common characteristic feature: “there is an independent criterion for what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed.”\(^{637}\) For perfect procedural justice, it is possible to devise a procedure that is sure to lead to an outcome that meets this criterion, while for imperfect procedural justice this cannot be guaranteed. Rawls illustrates perfect procedural justice by describing the division of a cake, where the independent criterion of justice is an equal distribution. Under certain assumptions, assigning the division to one person and having her take the last piece after the others choose guarantees equal pieces, for the assigned person will divide the cake equally in order to maximize the size of her piece.

Imperfect procedural justice departs from perfect because the procedures are fallible. An example is a criminal trial; the known independent criterion of justice is that a defendant is declared guilty only if she committed the crime she is charged with, but trial procedures cannot be designed to guarantee just verdicts. Even the most well tailored trial procedures will sometimes convict the innocent or set the guilty free.\(^{638}\)

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\(^{637}\) Ibid., 74-75.

\(^{638}\) The distinction between perfect and imperfect justice can be challenged on the grounds the perfect procedural justice is simply imperfect procedural justice with a higher probability of obtaining the just outcome. See Martin Gustafsson, "On Rawls’s Distinction between Perfect and Imperfect Procedural Justice," *Philosophy of the Social Sciences* 34(2004).
In contrast, “pure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed.” Here, the nature of the distribution that results from a fair procedure is not used to determine the justness of the outcome, for no demonstrative evaluative criterion exists apart from the procedure itself. This is why Rawls emphasizes that a “distinctive feature of pure procedural justice is that the procedure for determining the just result must actually be carried out; for in these cases there is no independent criterion by reference to which a definite outcome can be known to be just.” Rawls illustrates pure procedural justice through a stylized gambling example. Assuming just background conditions and starting positions, fair and freely entered into betting procedures produce just outcomes. This has nothing to do with the resultant distribution of money, but rather with the fairness of the procedure and the intent of all participants to play.

Perfect and imperfect procedural justice are examples of substantive effects, for they involve procedures altering the nature of an outcome so that it meets or is more likely to meet an independent evaluative criterion. Pure procedural justice involves a procedural effect, for fol-

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639 Rawls, *A Theory Of Justice*: 75. A page earlier Rawls qualifies pure procedural justice by noting that “the outcome is just whatever it happens to be, at least so long as it is within a certain range.” This is a critical qualification, though Rawls does not pick it up again to my knowledge, for it is hard to imagine a conception of justice that is pure enough for any outcome to be ruled just because of the justice of its generation.

640 Ibid.

641 Of course, Rawls makes this distinction too strongly, or at the least his followers tend to treat it too strongly, for the background conditions and assumptions are the main force of justice rather than the procedure itself. By this I mean that the fair gambling rules produce an automatically just outcome because we assume: that the players understand them, enter into the game freely, are not drunk or insane, are not intimidating one another, have equal information, are fully in control of their actions, understand the repercussions of playing, etc. Thus, while there is no independent criterion of judging the final outcome of instances of pure procedural justice, we have suspicions as to what they might be because of our knowledge of these assumptions and conditions.
ollowing the proper procedure makes the outcome just, and there is no clear criterion to determine the justness of the outcome other than the procedure itself. Applying a modified version of this distinction to constitutions and legitimacy, we can say the following. A constitution-making procedure, alone or in combination with others, might involve *procedural legitimation*; i.e. a constitution might be legitimate simply because it resulted from a particular constitution-making procedure or set of procedures. Here, the procedure can serve as a necessary or sufficient condition. In other words, something might be legitimate because a certain procedure produced it, or might be illegitimate if a certain procedure did not. In both of these instances, the procedure directly affects the legitimacy of the constitution rather than the actual provisions the document contains.\(^{642}\)

Alternatively, a constitution-making procedure, alone or in combination with others, can legitimate a constitution by influencing its contents and making it more likely to meet some known criterion of legitimacy; this is *substantive legitimation*. This criterion of legitimacy does not have to be exact or able to be spelled out thoroughly ahead of time. Unlike Rawls’ distinction, our concern here is that the procedure affects the contents of the constitution, and the contents of the constitution are what makes the document legitimate or illegitimate.

\(^{642}\) Rawls discusses legitimacy in terms of procedural legitimation in his reply to Habermas in *Political Liberalism*. He explains that, “a legitimate procedure gives rise to legitimate laws and policies made in accordance with it,” and defines a legitimate procedure as “one that all may reasonably accept as free and equal when collective decisions must be made and agreement is normally lacking.” In a sense, this creates an odd double procedural legitimation, insofar as procedural criteria is used to select a procedure which is to select laws or policies that are therefore legitimate. John Rawls, *Political Liberalism*, Expanded ed. (New York: Columbia University Press, 2005). 427-28. Due to the confused nature of this account, I will not be discussing it further.
Combining the two concepts of legitimacy applicable to constitutions with the procedural and substantive distinction produces four pathways through which a constitution-making procedure might legitimate a constitution, and therefore four different ways that ratification might contribute to legitimacy. First, ratification might play a role in *procedural moral legitimation*: a constitution is morally legitimate because it was ratified, or because it resulted from a constitution-making process that included ratification. Here, as with all procedural effects, the resultant constitution’s moral justification flows from the specific procedure rather than the details of its contents. Something about the procedure of ratification, by itself or in combination with other procedures, produces a constitution that is morally legitimate because of its genesis.

Second, ratification might serve the purpose of *procedural sociological legitimation*: a constitution is more likely to be considered morally legitimate by those it purports to govern because a portion of them or their delegates had the opportunity to ratify it. Advocates of participatory constitution-making implicitly make this sort of argument when they claim that “a high level of popular participation” is “necessary for a constitution to be regarded as legitimate and relevant by the citizenry” and identify ratification amongst those procedures best suited to engage the people. Arguments concerning procedural sociological legitimation and participation are

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further bolstered by a growing literature on the increased cooperation effects of endogenously chosen institutions.\textsuperscript{644}

The third pathway is \textit{substantive moral legitimation}: ratification affects the contents of a constitution such that it is more likely to fall within the boundaries of morality. I use the term boundaries because I assume that morality underdetermines the contents of a constitution.\textsuperscript{645} By this I mean that according to any plausible conception of morality choosing specific constitutional provisions requires decisions based on non-moral reasons. This follows from two observations. On the one hand, many moral values are incommensurable, meaning that moral reasons do not exist for choosing between them.\textsuperscript{646} For instance, moral principle A might give reason to maximize liberty while moral principle B supports a guaranteed minimum standard of living for all citizens. Framers designing a constitution might disagree over a specific provision or institution that favors one of these principles over the other, but they will be unable to give good moral arguments for preferring to live under a constitution that emphasizes A over B or vice versa.

Moral arguments are unavailable to these framers because liberty and a minimum standard of living, for the sake of this argument, are incommensurable, i.e. valuable in a way that cannot

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\textsuperscript{644} For a review of this literature, as well as a representative experiment, see Matthias Sutter, Stefan Haigner, and Martin G. Kocher, "Choosing the Carrot or the Stick? Endogenous Institutional Choice in Social Dilemma Situations," \textit{Review of Economic Studies} 77(2010).

\textsuperscript{645} Raz mentions that morality underdetermines the contents of a constitution in Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," 171-74, 93n20.

be compared. Thus, the most that moral reasons relating to authority can do is to create boundaries within which constitutions are morally legitimate. In order to create a constitution specific enough to be functional, framers will have to choose between competing incommensurable values and principles. Such choices can and are motivated by good reasons, frequently related to context, but these reasons are not the sort of moral reasons that determine whether the constitution’s claim to authority is morally justified.  

On the other hand, even settled moral values underdetermine institutional choice. For instance, a democratic republican theory might include the following moral principle: a legitimate constitution must provide formal mechanisms that allow the governed to equally influence political officials, so that they can help determine the contents of the laws and policies these officials enact. Even if this principle was widely accepted and had no competitors, any number of constitutional arrangements might reasonably meet it. For instance, a representative government limiting campaign contributions and making use of proportional representation would be as legitimate as one employing single-member constituencies with plurality voting, the right of recall, and publicly funded elections. This is just an example, and perhaps there are good causal and moral reasons for choosing one of these alternatives over the other. My point, however, is that even if we disregard the problem posed by incommensurable moral values, the conditions of moral legitimacy will never fully determine the specifics of a constitut-

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647 Or moral reasons unrelated to the moral justification of authority. For instance, in the above example, the existence of a long-standing impoverished and mistreated minority population might give reason for preferring B over A, and while these will be moral reasons, they are not moral reasons related to the moral legitimacy and justified authority. Raz calls the latter ‘merit reasons.’ See Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," 174.
tion. Thus, it is appropriate to speak of the boundaries of a morally legitimate constitution rather than attempt to spell out its exact contents.

Fourth and finally is *substantive sociological legitimation*: ratification affects the contents of a constitution such that it is more likely to appear morally legitimate to the citizens it purports to govern. The idea here is that certain attributes of a constitution are more conducive to making it authoritative in the eyes of its citizenry, and that ratification makes such attributes more likely to appear within the text. Remember, however, that these attributes are not necessarily the same as those that make a constitution actually morally legitimate.

Both forms of substantive legitimation might seem unlikely, for ratification is a process in which a drafted constitution is approved or rejected as a whole.\(^{648}\) Ratifiers receive a finished product, they can neither insert desired provisions or vote out those they find problematic, and thus their effects on the text appear rather limited.\(^{649}\) Nonetheless, ratification can affect the contents of a constitution through one of two pathways: by preventing illegitimate constit-

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\(^{648}\) As mentioned, the Massachusetts Constitutional Convention attempted a more dynamic method of ratification in which voters were given the opportunity to vote on each separate provision. This proved to be an unworkable procedure, and resulted in votes being manipulated in order to produce the required consensus. Condorcet discusses the inherent flaws in such a ratification process, some of which I will discuss below. Condorcet, "On the Need for the Citizens to Ratify the Constitution," 273.

\(^{649}\) I am excluding those rare instances in which ratifiers are asked to vote separately on certain provisions separated from the main text. There seem to be three reasons to do this. First, separating a controversial issue might prevent an entire constitution from being rejected over a single provision that met with disapproval, and prevent opponents to the constitution from using such an issue to sway ratifiers against the constitution. Second, placing a controversial issue to the side might isolate public debate around the segmented provision, therefore shielding the constitution as a whole from scrutiny and negative opinion. Third, framers might simply let ratifiers decide on an issue for which there is no conclusive agreement. To my knowledge this practice is isolated to constitution-making in the U.S. States. For instance, the 1969-1970 Illinois Constitutional Convention segmented two provisions having to do with the method of election for members of the House of Representatives and judicial selection, giving voters two alternative to choose from for each. Lenowitz, "Rejected by the People: Failed U.S. State Constitutional Conventions in the 1960s and 1970s," 20; Janet Cornelius, *Constitution Making in Illinois, 1818-1970*, Rev. ed. (Urbana: Published for the Institute of Government and Public Affairs, 1972), Book. 154-55.
tions created by framers from coming into effect; or by preventing illegitimate constitutions from being written by framers in the first place. Put differently, ratification can serve as a filter for illegitimate constitutions or affect the behavior of the framers. Taken together, the various ways in which ratification can legitimate a constitution are shown in the following table:

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<th>Sociological Legitimacy</th>
<th>Moral Legitimacy</th>
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In the sections that follow I consider these pathways. I choose one or two arguments for each and examine their persuasiveness for justifying ratification. I do not purport to be comprehensive—there are many different arguments one could make explaining how ratification procedurally or substantively legitimates a constitution. Instead, I focus on arguments that appear in the relevant literature or seem particularly plausible.

4. PROCEDURAL LEGITIMATION

As mentioned, procedural legitimation occurs when a constitution is legitimate because of how it was made, rather than its contents. The fact that ratifiers approved a constitution either contributes to the moral reasons in favor of its claim to authority (moral legitimacy) or appears to do so from the perspective of those it now governs (sociological legitimacy).
4.1. PROCEDURAL MORAL LEGITIMATION

The logic of a procedural moral legitimation argument should be familiar, for the past three chapters discussed a procedural legitimation argument. Put in the language of moral legitimacy, a theory of constituent power holds that a constitution’s claim to authority is only morally justified, meaning that sufficient moral reasons exist for its right to structure the state (and citizens have a duty to obey accordingly), if it is the product of the constituent power. Thus, according to a CPJ, the people must exercise their constituent power and create the constitution for it to be morally legitimate, and ratification is justified because it makes this possible. For the reasons covered in the previous chapters, this particular procedural justification fails to persuade.

Another argument that links ratification with procedural moral legitimation comes from what I call pure consent theory, a particular offshoot of the social contract or consensual tradition in the history of political thought. This argument links legitimacy with direct acceptance of the constitution but differs from constituent power arguments in that the relevant moral unit of concern is the individual rather than the collective. In other words, while constituent power arguments emphasize the importance of the people taken as a whole accepting the constitution and making it their own, pure consent theory focuses on the direct acceptance of the constitution by each person under its jurisdiction.

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650 This distinction between constituent power theory and pure consent theory can be understood by envisioning two different conceptions of the social contract. As noted in chapter 4, constituent power theory adheres to the Lockean two-step model. The people first transfer political power to civil society, and then civil society exercises constituent power to create its government. For pure consent theory, there is only one step. People individually transfer their political power, and take on obligations, by directly consenting to the state.
Starting from the premises that individual autonomy, understood as control over the course of one's life, is of the utmost importance, and that moral authority is exclusively concerned with the right to impose new duties by binding directives and to have these directives obeyed, it argues that the only way to obtain such authority over an individual is through their direct consent. Here, consent is understood as a performative action through which a subject undertakes an obligation and therefore agrees to restrict her future choice. Such consent changes the moral relationship between an individual and the other party, and therefore must be informed, non-coerced, and free from duress.\textsuperscript{651} Ratification, a pure consent theorist might argue, is a necessary component of the constitution-making process because it allows individuals to directly consent to their governing document and undertake obligations. This gives the constitution, and the state that results, a morally justified right to rule over all those consenting.

This argument can be challenged in two ways. On the one hand, we might rehearse the numerous objections to the premises of consent theory, especially its constitutional application. Raz, for example, claims that consent only bars the consentor from raising complaints against an authority, but can never justify an unjustified authority. The fact that a population

\textsuperscript{651} Contemporary authors that place consent within their accounts of political authority include Plamenatz, Murphy, Green, Rawls, and Simmons. For the most part, these theories can be divided into two types. The first has little to do with the importance of consent and more with what is best for people or what is fair. This category includes theories of hypothetical consent, which utilizes consent as a means to generate intuitions about what a legitimate government must look like. The second type emphasizes the act of consent, conceptualizing it as the sole criterion of moral legitimacy, and thus distinguishes between a legitimate authority and a morally desirable one. Only this second type of consent theory, explained best by Simmons and Green, involves pure procedural legitimation, and thus it is my sole focus. Simmons, \textit{Justification and Legitimacy: Essays on Rights and Obligations}; Raz, \textit{The Morality of Freedom}; Rawls, \textit{A Theory Of Justice}; Leslie Green, \textit{The Authority of the State} (Oxford: Oxford University Press, 1989); John Plamenatz, \textit{Consent, Freedom, and Political Obligation}, 2nd ed. (Oxford: Oxford University Press, 1968); Mark Murphy, "Surrender of Judgment and the Consent Theory of Political Obligation," in \textit{The Duty to Obey the Law: Selected Philosophical Readings}, ed. William Edmundson (Lanham, Md: Rowman & Littlefield, 1999).
consents to a genocidal autocracy will never make this authority morally legitimate. Consent theorists respond to such objections by arguing that the only consent that matters is rational or reasonable consent, and consenting to such a regime fails either test. However, in these instances, Raz explains, “it seems reasonable to suppose that…the only reasons which justify consent to authority also justify the authority without consent.”

Michelman makes a different argument with similar effects. He claims that constitutions, at least good ones, are necessarily vague, open to interpretation, and flexible when it comes to the very moral concerns that would factor into an account of legitimacy based on informed consent. The kinds of things people would need to know in order to consent and take on obligations to a constitution are the very things that will be decided once the constitution goes into effect. Thus, a consent-based account of moral legitimacy is impossible. Alternatively, Hardin persuasively argues that adopting a constitution does not entail future commitments and obligations, for as a coordination device it simply raises the costs of trying to do things some other way. The logic of consent arguments, based on an exchange of obligations, duties, and power, is therefore inapplicable.652

On the other hand, we can accept consent theory and critique it on its own grounds. This will be my main focus. Now, a well-known objection to most consent theories is that they are limited to the first generation of citizens, for few if anyone consents to the government they are born into. This applies to the attempt to justify ratification through pure consent theory, for it suggests that the constitution would be morally illegitimate for those born after ratifica-

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tion. Moreover, the constitution could not become morally legitimate through some other way, for instance by producing desired public goods, just distributions, or needed coordination effects, for the very reasons that make consent necessary in the beginning preclude alternative sources of moral legitimacy from being relevant later. For pure consent theorists, moral legitimacy is simply the “logical correlate of the (defeasible) individual obligation to comply with the lawfully imposed duties that flow from the legitimate institution’s processes.” Since such obligation requires individual consent, for there is no other way for an authority to obtain the right to issue directives that serve as preemptive reasons for an individual, the quality of a constitution and its beneficial effects, regardless of their magnitude, can never morally legitimate a constitution when the opportunity for consent has passed.

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653 Condorcet seems to endorse both a conception of pure procedural legitimacy and this objection. This is why he writes: “we simply fix the duration of the new constitution at the term beyond which it would cease to be legitimate; that is, at 18 or 20 years.” Condorcet, “On the Need for the Citizens to Ratify the Constitution,” 270.

654 In other words, other explanations of how a design procedural morally legitimates its outcome might only apply to the first generation, but allow different sources of moral legitimacy to come into play later on. Pure consent theory cannot allow this, for its arguments are motivated by the claim that personal consent is the only way a someone can gain justified control over an aspect of a person’s life.

655 Simmons makes this point by distinguishing between a justified state and a legitimate one. Whether or not a state is justified depends on the general qualities of a state. Is it just? Does it promote human happiness? Does it uniquely solve a pressing social problem? A state that is morally justified in this way might be worth having and supporting, for moral agents might have good reasons to pursue ends such as justice, happiness, and coordination. Nonetheless, “a particular state’s being justified in this way cannot ground any special moral relationship between it and you,” for no matter how wonderful a state may be and how many moral reasons exist for supporting it, the quality of a state can never give it “any special right to impose on you additional duties.” Simmons goes on to explain how Kant and many neo-Kantians, such as Rawls and Nagel, confuse justification and legitimacy and therefore miss the importance of actual given consent. See Simmons, *Justification and Legitimacy: Essays on Rights and Obligations*: 122-57.

656 Note that attempts to explain the moral legitimacy of a non-consensual political institution through appeals to its positive attributes leave the realm of procedural legitimation. Procedural legitimation, as explained above, is premised on the absence of independent criteria that can be of use when evaluating an institution. Many consent-based accounts of political legitimacy, in their attempts to ward off attacks from philosophical anarchists, import these external criteria and therefore eliminate the need for emphasizing consent at all. As Raz notes, “it seems reasonable to suppose that, regarding such matters, the only reason which justify consent to authority also justify the authority without consent.” Raz, “On the Authority and Interpretation of Constitutions: Some Preliminaries,” 164.
One response to this line of argument might be the following: it is true that constitutions are morally illegitimate for future generations not given a chance to consent to them, and this is why we need to create mechanisms through which people can consent to a constitution after its initial ratification. Both Condorcet and Jefferson give support to his argument. Condorcet posed a solution to the lapsing authority of old constitution, recommending that “we simply fix the duration of the new constitution at the term beyond which it would cease to be legitimate; that is, at 18 or 20 years,” with these numbers representing “the time it takes for half of the citizens alive when the law was passed to be replaced by new ones” depending on whether the age of majority was fixed at 25 or 21 respectively.\textsuperscript{657} Jefferson, likely inspired by Condorcet, wrote that we should “provide in our constitution for its revision at state periods,” for each generation has “a right to choose for itself the form of government it believes most promotive of its own happiness.”\textsuperscript{658} Specifically, he proposes that citizens be given the opportunity every nineteen to twenty years to vote on whether or not to create a new convention. Thus, this argument goes, we should constitutionally mandate that voting citizens be regularly consulted as

\textsuperscript{657} Admittedly, Condorcet departs from a strictly individualistic conception of consent and reciprocal obligation and instead endorses societal level consent of a particular type. He writes: “any law accepted by the plurality of inhabitants of a nation can be taken as having unanimous support: given the need either to accept or to reject the law and to follow the plurality opinion, anyone who rejects a proposed law will already have decided to abide by it if it is supported by the plurality.” Here Condorcet combines an argument similar to a two-contract interpretation of Locke, according to which a majority decision indicates unanimous consent because of a prior unanimous agreement to abide by what the majority decides, with his own jury theorem. The prior agreement to abide by what the majority decides follows rationally from the fact that, given a large body of voters with a probability of greater than half of voting correctly, the decision reached by the majority will almost certainly be the correct one. I thank Iain McLean for providing clarification on this matter. Condorcet, “On the Need for the Citizens to Ratify the Constitution,” 272, 76.

to whether or not they accept their constitution or wish for something different. Through this mechanism, constitutions would remain morally legitimate.659

Such a mechanism is not only possible, but exists in the constitutions of fourteen U.S. States. These constitutions contain provisions mandating the periodic submission of a referendum to the electorate concerning whether or not a constitutional convention should be called.660 For instance, the secretary of state in Rhode Island must submit the question “Shall there be a convention to amend or revise the constitution?” to the qualified electorate every ten years from the most recent convention.661 Not implausibly, this question can be construed as a way in which citizens have the opportunity to consent to their constitution. Citizens have the choice to accept the constitution and consent to it by voting against a new constitutional convention, or to withhold their consent by voting the opposite.

659 Common attempts by consent theorists to show that citizens do in fact consent to their governments would also apply to constitutions. These chiefly include arguments asserting that individuals tacitly consent through residence, political participation, paying taxes, etc. I do not discuss these arguments here, for I believe that earlier critics have conclusively shown them to be mistaken. Hume, for instance, provides perhaps the earliest and most devastating attack on tacit consent and other non-explicit acts of consent when he notes, “we may as well assert, that a man, remaining in a vessel, freely consents to the dominion of the master; though he was carried aboard while asleep, and must leap into the ocean, and perish, the moment he leaves her.” For an example of such attempts to show consent when it appears to be absent see: Henry Beran, The Consent Theory of Political Obligation (London: Croom Helm, 1987); Michael Walzer, Obligations: Essays on Disobedience, War, and Citizenship (Cambridge, MA: Harvard University Press, 1970). 111-14; Locke, Two Treatises of Government: ch. 8, §119-22, p.347-49. For criticisms see George Klosko, Political Obligation (Oxford: Oxford University Press, 2005). 122-40; Simmons, Moral Principles and Political Obligations: 75-100; David Hume, Essays: Moral, Political, and Literary, ed. Eugene F. Miller (Indianapolis: Liberty Fund, 1985). 475.

660 These states are: Alaska; Connecticut; Hawaii; Illinois; Iowa; Maryland; Massachusetts; Missouri; Montana; New Hampshire; New York; Ohio; Oklahoma; and Rhode Island. See The Book of the States: 2011, (Lexington: The Council of State Governments, 2011). 17. For a discussion about the genesis of these automatic convention referenda, see John J. Dinan, “‘The Earth Belongs Always to the Living Generation’: The Development of State Constitutional Amendment and Revision Procedures,” Review of Politics 62, no. 4 (2000).

661 R.I. Const. art. XIV, § 2
There are reasons for not implementing automated constitutional referenda. Madison mentions some of them in his 1788 letter to Turberville, where he warns of the dangers of calling another constitutional convention: “it would...give greater agitation to the public mind; an election into it would be courted by the most violent partizans on both sides; ...[it] would be the very focus of that flame which had already heated men of all parties.”

In addition, routinized convention referenda are susceptible to manipulation by sitting legislatures and other power holders adverse to the possibility of a decrease in their power. These incumbents can use the convention question to show that institutional change is a regular possibility, while simultaneously taking steps, such as timing the vote to ensure minimal participation and leaving the referenda unsponsored and unadvertised, to ensure that a convention never occurs.

Regardless, even if one overlooks the possible disadvantages of such devices, they still do not make a conception of moral legitimacy that hinges on individual consent anymore persuasive in justifying ratification. This is because both constitutional convention and ratification referenda use a majority or supermajority voting threshold. It is therefore almost guaranteed that constitutions will go into effect, and later be approved by negative votes on the convention question, despite the objections of many voters. For these voters, the constitution would be

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morally illegitimate. The same is true for those who voted in favor of a constitution, but did so after being coerced or manipulated. It also holds for individuals who did not vote, either because they forgot, did not want to, could not get to the polls, or were not allowed.

In addition, pure consent theory demands that individuals intend to consent when they do, for obligations do not adhere if a person accidently agrees to undertake them, or undertakes them without knowing their substance. If I am stretching at a meeting when someone asks for volunteers to raise their hands, I am not obliged to volunteer for it was not my intent. Similarly, if I promise to see a movie with a friend on Saturday, and later find out that the movie is only playing in a theater eight hours away, I am not obliged to attend the movie because I did not understand what was involve and did not intend to commit to such a long journey. Applied to ratification, such a standard means that voters who do not and cannot understand the implications of a proposed constitution, can also not intentionally consent to its terms and undertake the appropriate obligations. As shown in the last chapter, we have reasons to expect that many if not most voters will be uninformed during ratification. The same reasons also lead us to expect that citizens will be ignorant when it comes to understanding the implications of a vote for or against a constitutional convention.

For Condorcet, they would not be illegitimate, for in accordance with his jury theorem the majority would arrive at the correct answer, and the minority would or should consent to the majority outcome because they also desire a right outcome. Unfortunately, this line of argument is no longer persuasive, particularly in constitutional settings, for the assumption of greater than half voting competence, as well as the existence of a right outcome, are highly questionable.

For further discussions about what it takes to consent, see Raz, The Morality of Freedom: 80-85; Simmons, Moral Principles and Political Obligations: 75-83.

I assume in this example that my ignorance is blameless and therefore excusable. Things might be different if my friend lives 8 hours away, far from any form of public transportation, and cannot drive. In this instance I should have known that to commit to a movie with him likely meant driving to where he lives.
In attempting to justify ratification through its role in consent-based procedural legitimation, one comes to the unwanted conclusion that constitutions are morally illegitimate for non-voters, the uninformed, the disenfranchised, the intimidated, and the coerced. Mechanisms designed to secure consent in future generations are susceptible to the same problems. This means that for large segments of the populations, possibly even a majority, there might be no good moral reasons for the constitutions claim to authority, and therefore no corresponding independent reasons to respect and uphold its provisions. For some, namely philosophical anarchists whose project involves showing that no existing or possible government could ever by morally legitimate, this conclusion is welcome. However, if one’s aim it to justify ratification by its ability to morally legitimate a constitution, a conception of moral legitimacy that suggests that any existing constitution is illegitimate for a substantial portion of its citizenry is unpersuasive. Pure consent arguments therefore do not justify ratification on the basis of its ability to procedurally legitimate a constitution.

4.2 PROCEDURAL SOCIOLOGICAL LEGITIMATION

Ratification involves procedural sociological legitimation when people consider a constitution morally legitimate simply because it was approved in a ratification procedure. Advocates of participatory constitution-making attribute such an effect to ratification when they claim that procedures can legitimate a constitution by increasing participation, “that public involvement in the constitution making process is essential for constitutional legitimacy,” and that ratification, as “the modal form of participation in constitutional design,” is justified on these

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668 More specifically, ratification might contribute to legitimacy, be necessary for legitimacy, or be sufficient for legitimacy.
grounds.\textsuperscript{669} Again, such arguments emphasize the effects that procedures have on belief rather than on the constitution itself. These types of arguments are attractive; it is easy to believe that a positively valenced political concept such as participation leads to legitimacy, and in operating democracies this may frequently be the case.\textsuperscript{670} Nonetheless, we need an explanation for this purported effect, something that many advocates of participatory constitution-making seem to forget. How might ratification contribute to content-independent sociological legitimacy?

4.2.1 Present Belief

The simplest explanation is that people believe ratification is necessary for legitimacy, such that its occurrence helps legitimize a constitution and its absence does the opposite. This relies upon a preexisting social norm or belief being present in the people, one that links the moral authority of a new constitution to whether or not it was ratified. We can imagine specific contexts in which such a social norm or belief might develop, most of which reflect path dependency. One would likely be present in a polity with a long-standing tradition of amending constitutions or approving new constitutions via referenda.\textsuperscript{671} For example, if the Swiss govern-


\textsuperscript{671} Similarly, Bowler and Donovan found that those who expected democracies to provide avenues of participation other than elections were more likely to support the use of ordinary referendums. Shaun Bowler, Todd
ment implemented its Federal Constitution of 1999 without submitting it to referendum, the people would likely have rejected its moral authority. The same is true if a U.S. state attempted to implement a new constitution without submitting it to the electorate. In both contexts, the people associate and expect constitutional change to conclude with a referendum, and departing from this would arouse suspicion and arm opponents of the constitution with an easy way to cast it in a negative light.

A norm or belief linking legitimacy to ratification might also exist in a polity governed by a constitution that remains sociologically legitimate and includes a provision requiring ratification. Such instances are rare however, because constitution-making usually occurs upon the deterioration of present day authorities. Nonetheless, state constitution-making in the U.S. again provides an example. Today, twenty-seven state constitutions include such provisions.

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672 Since 1780, U.S. states have adopted 146 different constitutions. 97 of these were popularly ratified and many more were submitted to referenda and rejected. All but three constitutions promulgated without ratification preceded the civil war. Only three 20th century constitutions were not submitted to the voters for approval—the 1913 and 1921 Louisiania constitutions and the Virginia Constitution of 1902. The Virginia convention planned to submit their draft to the people—the General Assembly had passed a law to this effect—but decided against it because the constitution was written to disenfranchise black voters, and they expected black voters and sympathetic whites to vote against it as a result. Subsequent constitutions for both Louisiana and Virginia include provisions requiring referenda for all new constitutions. Today, twenty-seven state constitutions include provisions requiring popular ratification for all new constitutions proposed by constitutional conventions. In general then, there is a strong expectation for constitutions to be approved by the electorate before going into effect. See LA Const. art. XVIII § 2; VA Const. art. XII § 2; Sturm, Trends in state constitution-making, 1966-1972 [by] Albert L. Sturm: 11; The Book of the States: 2011: 16; Sturm, "The Development of American State Constitutions," 1; G. Alan Tarr, Understanding State Constitutions (Princeton: Princeton University Press, 1998). 24.

673 In other words, this argument also works if conditions are such that people can be convinced that a constitution not ratified is illegitimate. For instance, most U.S. residents likely have no idea that state constitutions are nearly always ratified. However, if a state constitution-making process decided to forego ratification, opponents of the process could easily weaken the legitimacy of the constitution that emerged by pointing out that its framers departed from tradition or law by failing to make use of a cherished direct democracy device.

674 Elster, "Forces and mechanisms in the Constitution-making process," 370.
For instance, section 3(c) of article XII of the Missouri Constitution reads: “Any proposed constitution or constitutional amendment adopted by the convention shall be submitted to a vote of the electors of the state at such time.” U.S. states create new constitutions in times of stability—constitution-making occurs in order to solve institutional inefficiencies or reflect recent demographical changes rather than to create a political authority where one is absent—and therefore old constitutions maintain their legitimacy until they are replaced. Thus violating constitutionally specified procedures such as ratification would negatively impact the perceived legitimacy of the new constitution.

Similarly, we should also expect such a norm or belief in polities where a recent constitution-making attempt failed due to rejection during ratification, even if such a norm was absent pre-rejection. Albanian constitution-making in the 1990s provides an example of just such a context. In 1994, President Berisha submitted a draft constitution to the people for ratification in a referendum. There was no precedent for this action, no one else called for a referendum, and the recognized transitional constitution at the time required supermajority approval in Parliament and no popular approval. Berisha, whose party lacked the votes to push through their desired draft, made recourse to a referendum in the hopes of implementing the constitution in the face of opposition. The plan backfired when 59 percent of those voting in a November referendum rejected the constitution.\(^{675}\) When a new government took office in 1997,

\(^{675}\) Opposition parties opposed the draft constitution because, among other reasons, it enlarged the powers of the president and reduced those of the judiciary. Berisha originally proposed that the draft be submitted to a separate constituent assembly for approval, but after all parties other than the DP condemned this plan, he decided to use the referendum. This entailed pushing through a law in parliament amending the transitional constitution to allow the President to propose referendums without parliamentary approval. In the weeks leading up to the November referenda, the opposition parties banded together to highlight Berisha’s constitutional violation and to encourage voters to vote against Berisha by rejecting the constitution. Turnout for the vote was about
constitution-making began anew. In such circumstances it is hard to imagine a new constitution coming into effect without popular approval. Any attempt to do so would have easily fit into a narrative of elite control and popular manipulation. Thus, it is not surprising that the new government made use of referendum ratification. In November of 1998, fifty percent of all eligible voters went to the polls; ninety percent of them approved the constitution.

4.2.2 Self-choice & Procedural Justice

These specific contextual and path dependent explanations of procedural sociological legitimacy are insufficient for our purposes. While in certain instances implementing ratification might lead to sociological legitimacy because of predictable social norms or beliefs based on past history and institutional experience, for most constitution-making events, in both the present and future, conditions will be different or such a judgment will be impossible to make. What we need, then, is a more general reason to believe that ratification leads to sociological legitimacy for content-independent reasons.

I will consider two related possibilities: First, perhaps individuals are just more likely to consider self-chosen systems of rules legitimate, and ratification is a procedure that enables individuals to choose or feel that they have chosen their own system of rule. This explanation, “focuses on the additional value of taking part in the constitution-making process itself; it


676 An OSCE report notes: “since the failed 1994 referendum, all parties agreed that new constitutions need to be approved by referendum.”

works to the extent that arrangements generate stronger legitimacy beliefs when chosen endogenously than when exogenously imposed.\textsuperscript{678} Ndulo makes this type of argument when he touts ratification because of its ability to prevent a constitution from being "perceived as being imposed."\textsuperscript{679} Ghai and Galli similarly explain that: "If people have participated, they are more likely to have a commitment to it, even if they have not fully understood the process or the constitution, or indeed even if their participation was largely ceremonial."\textsuperscript{680} Stronger legitimacy beliefs from participation might arise for a variety of reasons: it is harder for people to complain about outcomes they create; participation leads to greater familiarity with outcomes and familiarity is conducive to legitimacy; participation inculcates a sense of duty towards what results; people tend to exaggerate the positive and downplay the negatives in outcomes for which they feel responsible; or participation increases the opportunity for generating consensus beliefs.\textsuperscript{681} There is an array of empirical findings, particularly in the experimental literature, which support these psychological conjectures. For instance, as mentioned above, Oppenheimer and Frohlich found that subjects who choose their own distributional principles were “more confident in their choices and more satisfied” than those who had an identical principle imposed on them. Sutter et al. discovered a significant positive effect of endogenous institutional choice on the level of cooperation in comparison to the same exogen-

\begin{footnotesize}
\textsuperscript{678} Esaiasson, Gilljam, and Persson, "Which decision-making arrangements generate the strongest legitimacy beliefs? Evidence from a randomised field experiment," 787.

\textsuperscript{679} Ndulo, "Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order," 193.

\textsuperscript{680} Ghai and Galli, "Constitution Building Processes and Democratization," 14.

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nously implemented institutions in groups participating in public goods games. Similarly, Esaiasson et al. observed that voting and deliberation led to higher levels of legitimacy beliefs in school children; Grossman found that Ugandan coffee farmers were more likely to contribute to public good when their leaders were elected; and Olken demonstrated that Indonesian villagers were far more satisfied, willing to contribute, and perceived greater benefits from developments projects chosen through plebiscites rather than local assemblies.682

Second, perhaps individuals are more likely to consider a procedure just if they participate in it, and more likely to consider an outcome legitimate if its stems from a just procedure. Ratification should be implemented because it indirectly promotes the legitimacy of a constitution by making the constitution-making process appear just. Tyler’s oft-cited process-based model of regulation supports this argument; it claims that legal and political compliance are heavily influenced by people’s subjective judgments about the justice of the procedures through which authority is exercised.683 Specifically, Tyler claims that a powerful reason for why people obey the law is because they believe authorities deserve obedience (sociological legitimacy), and that


683 Tyler, Why People Obey the Law; Tom R. Tyler and Yuen J. Huo, Trust in the Law: Encouraging Public Cooperation with the Police and Courts (New York: Russell-Sage Foundation, 2002); Tom R Tyler, “Procedural Justice, Legitimacy, and the Effective Rule of Law,” Crime and Justice 30(2003); ibid.; Tom R. Tyler, Patrick E. Callahan, and Jeffrey Frost, “Armed, and Dangerous(?): Motivating Group Adherence Among Agents of Social Control,” Law & Society Review 41(2007). Tyler is a psychologist and a criminologist, and initially his work concentrated on compliance with the police and courts. However, his work has been expanded and tested in a variety of contexts including prisons and corporations.
people are far more likely to develop such legitimacy beliefs due to procedural justice evaluations rather than perceived outcome fairness or outcome favorableness.\textsuperscript{684}

Participation, Tyler argues, increases the chances that a procedure or process appears just by affecting the three main antecedents of procedural justice evaluations. The first, ‘quality of decision-making,’ relates to the perceived fairness of the procedures used to reach the decision. This includes evaluations related to the perceived neutrality of the decision-maker, opportunity to have one’s say, the competence of the final decision-maker, and overall consistency in decision-making over similar cases. The second, ‘quality of treatment,’ concerns whether or not individuals are treated with dignity and respect throughout the decision-making process, and the third is focused on the degree to which an individual understand the actions of a decision-maker and their reasons for taking them.\textsuperscript{685} Participating in a procedure positively effects all three antecedent evaluations and thus leads to perceived procedural justice. Through participation people express themselves and come to believe they counter existing bias, feel included and taken seriously as a person, and gain experience-based knowledge on the outcome and the factors that led to it.\textsuperscript{686}


\textsuperscript{686} For an overview of why people are so concerned with the perceived fairness of decision-making settings and processes see John R. Hibbing and John R Alford, "Accepting Authoritative Decisions: Humans as Wary Cooperators," \textit{American Journal of Political Science} 48, no. 1 (2004).
Appealing to these explanations to justify the implementation of ratification procedures is unpersuasive for two main reasons. On the one hand, more is needed to explain why the arguments and findings concerning participation and legitimacy in normal political processes or workplaces also apply to the realm of constitution-making. Even if people are more likely to believe that a law or policy or project choice is legitimate if they help create it, the same may not be true when it comes to the creation of the rules that determines how such laws or policies or project choices are to be made and what they may or may not contain. Creating a constitution is different than choosing a distributive policy, deciding upon a range of development projects, taking part in judicial proceedings, electing a legislative representatives, or completing a corporate project, in ways that seem likely to matter. For instance, the outcome of constitution-making has less of an observable or immediate impact on an individual, decisions taken regarding the look and feel of a new constitution take place outside the bounds of an operating system of norms and rules, and the uniqueness of the constitution-making event might make normative evaluations, such as those relating to procedural justice, difficult or at least less than automatic. We cannot simply assume that legitimating beliefs arise in the same way and for the same reasons when we move to a completely different decision-making context.

The scant research on constitution-making and legitimacy provides some support for this suspicion. Moehler’s work on the creation of the 1995 Ugandan constitution, a constitution-making process frequently praised for its inclusive and participatory nature, is the most comprehensive study of this topic. Drawing upon both qualitative and quantitative analysis,

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687 As Ginsburg, Elkins, and Blount note: “The claim that participatory design processes generate constitutions with higher levels of legitimacy and popular support has been subject to only limited study.” Ginsburg, Elkins, and Blount, "Does the Process of Constitution-Making Matter?," 215.
Moehler concludes that, “contrary to the optimistic predictions of most academics and activists, my evidence indicates that participation did not have a direct effect on constitutional legitimacy” and “participants were no more or less supportive of the constitution than were the citizens who did not get involved.” Instead, Moehler found that local elites, rather than public participation, influenced whether citizens viewed the constitution as legitimate. One reason this occurred, a reason relevant to the importation of Tyler’s process-based model of legitimacy to constitutions, is because “in transitioning states, most citizens lack the information and skills to assess the fairness of the constitution-making process on their own, and so they turn to local leaders for guidance.” Thus, supporters of the constitution used the inclusion of participatory processes to convince some citizens that the constitution-making process was fair, but this did not prevent opposition leaders to convince their followers otherwise.

Comparative case studies on participatory and non-participatory constitution-making are inconclusive, with author’s findings determined by the cases selected. Samuels concludes that participatory constitution-making empowers the people and creates public support, highlighting the success of the highly participatory Rwanda and South Africa constitution-making experience, and the failure of the elite-driven processes in Nigeria and Bahrain. On the other hand, Moehler concludes that participation did not have a direct effect on constitutional legitimacy. See also Moehler, Distrusting Democrats: Outcomes of Participatory Constitution Making.
er hand, de Raadt reaches the opposite conclusion through a study of post-Soviet constitution-making in Central and Eastern Europe, concluding “open constitution-making procedures do not necessarily produce legitimate constitutions and that closed constitution-making is no certain cause for contestation.” 692 Jackson, through an analysis of constitution-making in Germany and Japan in the 1940s, Eastern Europe and South Africa after 1989, and the 2005 Iraqi constitution, concludes that participatory processes, like non-participatory processes, sometimes create legitimate constitutions and sometimes do not. 693 Finally, a recent experiment meant to stimulate participatory constitution-making in high school classrooms found “no support for the idea that participation in constitution making in and of itself generates stronger legitimacy beliefs.” 694

692 He focuses on constitution-making in Bulgaria, the Czech Republic, Estonia, Hungary, Poland, Romania, and Slovak. de Raadt, “Contested Constitutions: Legitimacy of Constitution-making and Constitutional Conflict in Central Europe,” 317.

693 Vicki C. Jackson, “What’s in a Name? Reflections on Timing, Naming, and Constitution-making,” William and Mary Law Review 49(2008). In addition, the fate of the 1996 Eritrean constitution and the 1997 Thaiian Constitution attest to the fact that incredibly participatory processes can produce constitutions that neither citizens nor elites deem legitimate. The Eritrean constitution has yet to be implemented fifteen years after being ratified in a two-step process by both the National Assembly and a special ratificatory constituent assembly, while the Thai constitution almost immediately lost the support of the coalition that created it, was soon violated extensively by Prime Minister Thaksin who nonetheless maintained popular support, and eventually died in a 2006 coup. Selassie, “Constitution Making in Eritrea: A Process-Driven Approach.”; Bjorn Dressel, “Thailand’s Elusive Quest for a Workable Constitution, 1997-2007,” Contemporary Southeast Asia 31, no. 2 (2009).

694 Esaiasson, Gilljam, and Persson, “Which decision-making arrangements generate the strongest legitimacy beliefs? Evidence from a randomised field experiment.” This experiment attempted to test the effects on legitimacy of participatory constitution-making, direct democracy, and procedural fairness. While fascinating, I have severe reservations about the external validity of the experiment, particularly when it comes to constitution-making. It is in no way clear to me whether the fact that students who chose the means of deciding whether to allocate $290 to a charity or a class party were no more satisfied with the outcome than those with a decision-making mechanism exogenously imposed on them tells us anything about the effect of participation on citizens trying to create a constitution.
On the other hand, even if we accept that participation helps legitimize constitutions, this does not sufficiently justify ratification. Constitution-making involves numerous procedures, many of which might help promote legitimacy through participation. The question is whether ratification is particularly suited to this task and whether it adds anything that other participatory procedures cannot and do not already provide. As discussed in chapter one, there are five basic stages in the constitution-making process: initiation, drafting, debating, approving, and ratifying.

In the initiation stage, citizen can participate by electing delegates to the constitution-making body and taking part in the campaigns surrounding these elections. This becomes possible if the constitution-making process is to involve a constituent legislature, legislatively constituent assembly, or a constitutional convention. This is quite common; by one estimate 62.6 percent of all constitution-making processes between 1975 and 2002 made use of one of these elected bodies. In addition, the first three stages provide extensive opportunity for public participation through consultation procedures. In the initiation phase, the public can weigh in on the procedures to be used to create the constitution and the sort of issues the constitution is supposed to address; in the drafting phase they can suggest specific provisions, institutional mechanisms, or rights to be included in the text; and in the debating phase they can voice their concerns over the draft and give input to settle divisive issues. Designers of constitution-

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695 I say ‘do not’ already provide because, as I will discuss below, the sort of arguments that justify ratification on the basis of participation and legitimacy assume that a whole host of other procedures are implemented as well.

696 Widner, "Constitution Writing and Conflict Resolution," 8. Unfortunately, note that Widner does not explain how many of these bodies were already sitting before constitution-making began. Similarly, according to the data from Ginburg, Elkins, and Blount’s random sample of 460 of the 806 national constitutions created from 1789 to 2005, 81% were created using a process involving an elected body. Ginsburg, Elkins, and Blount, "Does the Process of Constitution-Making Matter?"
making processes can use a variety of mechanisms to consult the people on these issues, including: non-binding issue-specific referenda; requests for written submissions; deliberative seminars; town hall meetings; questionnaire based surveys; deliberative seminars, town hall meetings, soliciting comments through the internet, phone lines, texting, and various social media outlets.

Examples of such participatory procedures abound.\textsuperscript{697} The Ugandan Constitutional Commission developed its agenda of constitutional reform through a variety of participatory processes implemented before drafting began. These included holding and attending 140 district seminars, with an estimated attendance of 70,000 people, and soliciting constitutional ideas through newspapers and a nation-wide student essay context.\textsuperscript{698} In Zimbabwe, the constitutional commission established by Mugabe toured all eleven provinces of the country, holding 4,321 open meeting during which individuals could express their views on the contents of the constitution. Over 500,000 people attended these general meetings, and 150,000 more attended specialized meetings meant to target overlooked minority groups.\textsuperscript{699} Constitution-makers in Kosovo setup an interactive website (www.kushtetutakosoves.info) in which citizens could read drafts as they were being produced, make comments, and exchange their views.\textsuperscript{700} In Eritrea, public meetings on constitutional proposals were held in 157 locations involving more than 110,000 participants, with an additional 11,000 Eritreans participating in similar

\textsuperscript{697} Other examples were discussed in section four of the previous chapter.

\textsuperscript{698} Allegedly, on the basis of these mechanisms, the commission successfully lobbied for constitution-making authority to be placed in an elected constituent assembly rather than the legislature. Brandt et al., Constitution-making and Reform: Options for the Process, 348-49; Moehler, Distrusting Democrats: Outcomes of Participatory Constitution Making, 281.

\textsuperscript{699} Hatchard, "Some Lessons on Constitution-making from Zimbabwe," 211.

\textsuperscript{700} Brandt et al., Constitution-making and Reform: Options for the Process, 127.
meetings in locations outside the country.\textsuperscript{701} In South Africa, constitution-makers organized workshops with civil society organizations, established a well-used telephone talk line, held general meetings, and solicited comments during all three stages leading to the final draft.\textsuperscript{702}

If participation leads to legitimate constitutions, it is unclear why these procedures are not enough. The arguments sketched above claim that people are more likely to deem an outcome just if they feel a sense of ownership over it, identify with the results, and believe themselves to be connected to the decision-making process. In particular, Tyler’s process-based approach holds that people are most likely to consider an outcome legitimate if the procedure that produced it was just, where procedural justice evaluations are effected by antecedent considerations such as having one’s say, being treated as a person and taken seriously, and understanding the mechanics of a procedure and the reasons why decision-makers acted in a certain way. All three of these antecedents can be met through elections and public consultation, and the civic education campaigns that precede them and the partially transparent constitution-making procedures that coincide with them. A person who talked with a constitution-making delegate, attended a constitutional workshop, commented on an online draft constitution, elected a delegate to a constituent assembly, watched deliberations in the assembly, or a did a combination of such things, is likely to feel that they participated and that the constitution which results is partly their creation. It is unclear what the additional opportunity of ratification would add.


5. SUBSTANTIVE LEGITIMATION

If ratification cannot procedurally legitimate a constitution, perhaps it has substantive legitimation effects instead. In other words, perhaps the fact that a constitution is ratified makes it more likely that its contents fall within the bounds of morality or appear to do so for a significant portion of the relevant populace. How might this occur? Ratification is a process through which an already drafted constitution is approved or rejected as a whole, so its effects on the substance of the text are rather limited. That is, ratifiers cannot directly insert desired provisions or vote out those they find problematic, for they are given a finished product and asked to vote it up or down. Instead, ratification might affect the contents of a constitution and substantively legitimate it in one of two ways: by preventing illegitimate constitutions created by framers from coming into effect; or by preventing illegitimate constitutions from being written. This applies for both moral and sociological legitimacy.

703 I am excluding those rare instances in which ratifiers are asked to vote separately on certain provisions separated from the main text. There seem to be three reasons to do this. First, separating a controversial issue might prevent an entire constitution from being rejected over a single provision that met with disapproval, and prevent opponents to the constitution from using such an issue to sway ratifiers against the constitution. Second, placing a controversial issue to the side might isolate public debate around the segmented provision, therefore shielding the constitution as a whole from scrutiny and negative opinion. Third, framers might simply let ratifiers decide on an issue for which there is no conclusive agreement. To my knowledge this practice is isolated to constitution-making in the U.S. States. For instance, the 1969-1970 Illinois Constitutional Convention segmented two provisions having to do with the method of election for members of the House of Representatives and judicial selection, giving voters two alternative to choose from for each. Lenowitz, "Rejected by the People: Failed U.S. State Constitutional Conventions in the 1960s and 1970s," 20; Cornelius, Constitution Making in Illinois: 154-55.

704 As mentioned, the Massachusetts Constitutional Convention attempted a more dynamic method of ratification in which voters were given the opportunity to vote on each separate provision. This proved to be an unworkable procedure, and resulted in votes being manipulated in order to produce the required consensus. Condorcet discusses the inherent flaws in such a ratification process, some of which I will discuss below. Condorcet, "On the Need for the Citizens to Ratify the Constitution," 273.
5.1 RATIFICATION AS FILTER

One might argue the following: a very good reason to implement ratification procedures is that they contribute to the creation of legitimate constitutions by serving as a final safeguard. If framers create a sociologically or morally illegitimate constitution, either intentionally or accidentally, the people or their delegates will act as a filter and reject it during ratification. Thus, ratification contributes to constitutional legitimacy by preventing illegitimate constitutions from coming into force. This sort of argument is similar for both types of legitimacy. On the one hand, ratifiers are moral experts ready to identify provisions that violate morality; on the other, ratifiers are experts on what the people will consider morally illegitimate provisions. Note that this sort of argument mainly supports ratification by referendums, for the same concerns about a constitution-making body creating an illegitimate constitution apply to a representative ratification body as well. Since our perspective is that of designer of constitution-making processes before constitution-making begins, any measures we would take to increase the changes that a non-popular ratifying body would act as an appropriate filter can also be taken for the constitution-making body itself.

5.1.1 A Condorcet Interlude

Condorcet defends ratification using this type of argument in *On the Need for Citizens to Ratify the Constitution*. Condorcet begins his essay assuming the existence of an innate right to ratify and considering three possibilities: the people give their right to the framing assembly; give their right to some other political body; or retain their right. In other words, he evaluates no
ratification, ratification by a representative body or existing political institution, and direct ratification.

He rejects the second option, ratification by a body separate from the framing assembly, for a variety of reasons. Many of these were referenced in previous chapters. For instance, he claims that allowing an existing institution to serve as ratifier is mistaken, for these institution may no longer be authoritative and will likely decide according to self-interest rather than the good of the nation. Creating a new constitutional convention to ratify the work of the first points to infinite regress, for a body elected to ratify the constitution would need the power to make changes if it rejected the constitution, “in which case a third would have to be elected to ratify these changes, and so on.” In addition, both national and regional ratifying conventions still involve entrusting representatives with the right to ratify, and therefore “approval by such a Convention would contribute nothing more to rights than approval by a National Assembly which was authorized to establish a constitution.”

Direct ratification fares no better. Condorcet first notes that a nation could never express a will on something as complicated as a constitution. If a large enough percentage of voting assemblies rejected the constitution, it would be impossible to tell from their votes what needed to change in order to create an acceptable document. If small voting assemblies voted on each

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705 Condorcet was specifically addressing the possibility of the assemblies that appointed members to the National Assembly being given the responsibility to ratify. Ibid., 275.

706 Ibid., 274. This seems like a relatively weak argument, for many reasons. One is that Condorcet does not consider the possibility of the constitution-making process simply ending upon rejection by the ratifying body. This, of course, was likely due to contextual reasons in France, i.e. it simply was not a good option, or even possible, for the constitution-making process to end without creating a new form of government. In the heat of the Revolution, the alternatives to a constitution were violence.

707 Ibid., 274, 76.
clause separately, “the clauses approved by a plurality would form an incomplete constitution,” and attempting to correct the rejected provisions would lead to a disjointed document. 708 Condorcet even notes that given the tremendous difficulty of determining the will of an assembly of 100 people—a task made easier by joint discussion, explanations, and ease of communications—“determining the plurality will become virtually impossible” when it comes to individual voters and assemblies. Condorcet mentions that individuals, unlike those entrusted with the power to make a constitution, are more likely to stray from impartiality due to vanity and selfishness.709 Finally, he claims that the people are simply too uneducated to judge a constitutional plan. Moreover, they are easily persuaded, meaning that the people who actually exercised the right to ratify would be those whose eloquence and persuasion happened to carry the day. Condorcet asks which is preferable: “for the nation to entrust its right to men who are chosen expressly to exercise it, or to allow it to be seized by anyone able to do so.”710

At this point, only the first option remains: citizens give up their right to ratify to the framers and no ratification takes place. Condorcet suggests that this is an acceptable outcome, for while it is true that he may “not accept a great many of its proposals,” is nonetheless better to have a constitution written and approved by elected framers than to preserve an individual right to ratify and, in the process, risk rejection. “Would slight imperfections in the constitution cause more harm,” he asks, “than would result from a delay of perhaps several years, dur-

708 Ibid., 273-74.
709 “Would I not be led astray by false ideas of perfection, and by the vain hope of making myself appear more worth of the honour which has been refused to me?” Ibid., 277.
710 Ibid., 273.
ing which time France would be without a constitution, or would have only an uncertain one?"711

It is here that Condorcet launches his substantive moral legitimacy argument. He claims that his prior analysis concerning the dangers of submitting a constitution to the people is only true when it comes to constitutions that offend mere opinion. However, he writes: “If my rights and those of my fellow citizens are violated, then I must of course make a forceful protest. I need not worry about delaying the establishment of an unjust constitution; on the contrary, my aim must be to prevent such a constitution from ever being established.” Condorcet goes on to suggest a two-step direct ratification procedure narrowly tailored to address rights violations. First, the assembly should write a declaration of rights and submit it to the citizenry. All citizens will be “required to pronounce, not whether it has been well or badly drafted, but whether it omits any of the true rights of man or contains any principles which violate one of these rights.” Next, the assembly should submit the constitution to the citizens. Once again, citizens should not “judge whether it is well or badly organized, but…confirm that it contains no violation of the declaration of rights, or else to point out any particular clause which does constitution a violation.”712

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711 Ibid., 277.

712 Ibid. Splitting the constitution-making process into two is not as outlandish as Condorcet’s proposal might initially seem. In a sense, the practice of laying down guiding principles before the drafting process, made popular by the thirty-four guiding principles set by the Multi-party Negotiating Process in South Africa, reflects a similar approach. The South African constitution-making process, structured by the guiding principles, was such a success that it was later replicated in Burundi and Angola in 2005 and 2010, and recently recommended for a future European constitution-making process by Bruce Ackerman. However, to my knowledge, guiding principles have never been submitted to a referendum or popularly reviewed. In fact, their creation is usually the least participatory and open part of constitution-making. For instance, the constitutional principles in South Africa were created by leaders of the main political parties in partially secret conditions and enacted by the Apartheid government; the United States, South West African People’s Organization, and the UN wrote the principles to be used in the 1989 Namibia constitution-making process; and President Sadat set principles for
We can overlook the two-step nature of Condorcet’s proposal and instead concentrate on his two main assumptions: that it is possible to ask individuals to vote on the basis of specific types of reasons; and that people who are too uneducated to evaluate a constitution can still understand whether or not that same constitution violates their human rights. Neither of these assumptions are plausible, and as I argue below they are just a few of the reason why conceptualizing ratification as a filtering device for illegitimate constitutions is unpersuasive.

4.1.2 A Faulty Filter

Conceptualizing a ratification procedure as a filter for illegitimate constitutions runs into several problems—I will sketch out four. First, it is impossible to control how ratifiers evaluate a constitution. Justifying ratification because of its ability to filter assumes that ratifiers will make their decisions on the basis of legitimacy. In other words, it assumes that ratifiers will reject illegitimate constitutions because they are illegitimate and accept legitimate ones because they are legitimate. However, we cannot be sure that ratifiers will vote in this way, for other considerations might come into play and trump legitimacy evaluations.

To better understand this claim, consider the following. Condorcet’s conception of ratification as a filtering mechanism seems to be a moral application of his jury theorem. If we assume ratifiers have a greater chance than half of identifying a morally illegitimate or legitimate constitution, a widespread popular ratification procedure would almost guarantee that morally
illegitimate constitutions never came into force. For Condorcet, this would mean that voters are more likely than not to identify significant rights violations in the text. The greater size of the electorate as a whole would make it far more likely to reach the right legitimacy evaluation than the smaller number of framers actually responsible for the draft. Popular ratification, then, would be a justified procedure within the constitution-making process because of its unique ability to track moral truth.

This argument presupposes that voters look at a constitution, ask themselves if it is legitimate, and vote according to their evaluation. In other words, it assumes that the criterion of the right answer is whether or not a constitution is morally legitimate, and that all voters are aware of this. Condorcet attempts to build this presumption into his proposal by urging the assembly to remind voters that they are to vote against the constitution only if it violates their fundamental rights, a decision he believes all are capable of making. He concludes making this very point—“By limiting the individual right of the citizens to pronouncing only on what it or is not contrary to their rights, we are enabling them to retain control over the establishment and maintenance of the social order precisely to the extent that their enlightenment permits”—and suggesting that at some point in the future, when individuals become more enlightened, all laws might be examined by the people in a similar fashion.

This argument fails because there is no way to ensure that voters adopt legitimacy as the metric for decision-making during ratification. Ratifiers might reject a constitution because they hate the sitting government and believe that voting down the constitution is an effective form of punishment. They might approve a constitution because, as discussed in chapter 2, they liked how their framing delegates acted. They might reject a constitution because they
view it as a political bargain rather than as a document meant to maximize the public good.\textsuperscript{713} Or, they might accept a constitution simply because it represents a change from an undesirable status quo. The latter reason is especially likely in contemporary cases of constitution-making during or immediately after the cessation of conflict. In these instances, voters are extremely likely to approve a constitution because they perceive any possibility that might lead to stability or the end of violence as desirable. The extremely high percentage and turnout of referendum ratification votes in favor of dubious constitutions in post-conflict African and Latin-American states might suggest that something like this is occurring.\textsuperscript{714}

If ratifiers use different evaluative criteria when deciding whether to approve or reject a constitution during ratification, then Condorcet’s jury theorem cannot apply and ratification will not serve as filter for legitimacy. The acceptance of a constitution would only signal that a majority of the electorate had reasons, or what they thought were reasons, for approving the constitution. Each one of these reasons might only be shared by a small percentage of the ele-

\textsuperscript{713} Voters in the state of New York likely voted down the constitution produced by the most recent constitutional convention for this very reason. Specifically, they perceived the Democrats in the convention of inappropriately currying favor with Catholic voters by including a provision allowing funding for religious primary schools. See Lenowitz, "Rejected by the People: Failed U.S. State Constitutional Conventions in the 1960s and 1970s."

\textsuperscript{714} For example, on March 2, 1992, 97% of all eligible voters turned out for a referendum on a new constitution for Burundi; 90.23% of those voting approved the text. Genocidal conflict had plagued Burundi since 1972, with an increase in violence beginning in 1988 and the reemergence of Hutu and Tutsi conflict beginning in 1991. Many voters in Burundi likely decided to approve the constitution without giving a second thought as to whether they considered the document, or the process that produced it, legitimate. Whether a constitution commanded sufficient moral reasons for its claim to authority was likely far less important than the simple desire for something different. This brings us to a more general point about understanding ratification as a filter. The logic of such an argument, like balancing arguments more generally, assumes that the status quo is, at the least, somewhat acceptable. Only with this assumption can a mechanism like ratification serve as a check on procedural decisions made previously. The fact that the status quo is often so terrible during constitution-making possibly explains the incongruence between the well-documented status quo bias in ordinary referenda, and the fact that constitutions are almost always approved during ratification referenda. Reyntjens, "Constitution-Making in Situations of Extreme Crisis: The Case of Rwanda and Burundi."
torate, and in this case the jury theorem would not help guarantee that even these non-legitimacy evaluations were correct. Legitimate constitutions might be accepted or rejected, illegitimate constitutions might be accepted or rejected, and there would be no way to tell when a particular outcome represented an accurate assessment of the legitimacy of the text.

Second, voter ignorance once again raises complications. If voters are too uninformed to properly evaluate a constitution and compare it to the status quo, then they are also likely too uninformed to judge whether a constitution is morally illegitimate. This is particularly problematic because illegitimate constitutions are likely to be illegitimate for subtle reasons. If framers accidentally created a constitution that falls outside the bounds of morality, than its moral flaws will likely be less than obvious. If they intended to create a constitution that is illegitimate, and they know that ratifiers will reject an illegitimate constitution, then they will do all they can to hide their morally problematic provisions.

As mentioned, Condorcet writes as if rights violations, his criterion for moral illegitimacy, would be immediately obvious to the average voter. He repeatedly claims that “every citizen is capable” of identifying a rights violating provision. However, he soon seems to admit that matters are unlikely to be that simple. After explaining the ease in which citizens would identify problematic constitutional provisions, how “only a few clauses of the constitution could threaten rights, and these are necessarily the simplest,” he writes the following:
“We must ensure that equality is scrupulously respected in the way in which people are given citizenship rights and allowed to enjoy these rights. We must also ensure that there is equality in the National Assembly; that the various provinces are proportionally represented according to the principle which conforms with national equality; that judicial power is independent of any particular authority, but subject to the laws; that the government, also bound by the laws, can make neither laws nor exemptions, nor exercise arbitrary power. In this way, we shall protect rights, and while the constitutional laws may be good or bad, they could no longer be unjust.”

When such constitutional complexities are involved in evaluating a constitution, it is hard to see how ratification through referenda is meant to function as a filter when many of the ratifiers are uninformed.

For example, perhaps one moral boundary for a legitimate constitution is that it cannot intentionally weaken the political rights of any minority group. Imagine that a constitution is put to referendum that includes provisions setting up a first past the post electoral system using voting districts that divide up a minority ethnic enclave, effectively disenfranchising the group in the absence of significant internal migration. Such a constitution would be immoral according to the above-mentioned criteria, but a voter would have to read the constitution, understand it, know enough about electoral design, and resist the inevitable bombardment of misinformation that would accompany the ratification campaign, in order to reach the proper judgment. The idea of ratification as a filter assumes that ratifiers are able to use their votes to exercise quality control on the constitution. If they are uninformed, however, this becomes impossible.

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716 Note also that moral ignorance might disable ratification’s filtering effect as well as factual ignorance. Ratifiers might simply be unaware what makes a constitution’s claim to authority justified, or what the general public considers a morally legitimate constitution to be.
Third, ratifiers might want to implement a morally illegitimate constitution. For instance, voters in Alabama overwhelmingly approved the state’s 1901 constitution, which included provisions for racial segregation and poll taxes and was written, according to the President of the convention “to establish white Supremacy in this State.”\(^{717}\) Similarly, if the Croatian Constitution of 1990 was submitted to the people in a referendum, it is entirely possible that the majority Croatian population would have endorsed the draft, despite the fact that the constitution specifically excluded Croat Serbians from being considered one of the constituent nations of the republic.

Finally, it is worth noting that historically, ratification’s performance as a filter for illegitimate constitutions is inconsistent. Referenda led to the approval of Chavez’ authoritarian constitution in 1999 and the rejection of Mugabe’s oddly decent constitution in 2001. Voters in Kenya rejected a proposed constitution in 2005 yet ratified an extremely similar document in 2010. In Rwanda in 2003, voters overwhelmingly approved a constitution that violated numerous political and social rights. These findings are in no way conclusive, but they do point to a possible weakness in conceiving of ratification, especially by way of referenda, as a filtering device for both morally and sociologically illegitimate constitutions.

5.2. CONSTRAINING THE FRAMERS

Perhaps ratification leads to a substantively legitimate constitution by helping prevent framers from writing a morally or sociologically illegitimate one. As discussed in chapter one, ratification affects the contents of a constitution through two mechanisms. On the one hand, consti-

stitution-makers must restrict their goal constitution to a range they believe is acceptable to the known ratifiers. This mechanism, which I will call goal constraint, applies regardless of the sort of motivations that a delegate has. A delegate interested in pursuing his own self or group interest needs to be sensitive to what ratifiers will accept just as much as a delegate solely interested in creating a durable just constitution. Elster notes the minutes of the Federal convention “are very revealing in this respect, with their constant references to what might or might not be approved by the ratifying conventions.”

Second, ratification also serves as means of influencing the behavior of framers by limiting the sorts of provisions they can write to those that can be justified or explained in accordance with existing norms. Following Elster, I will call this imperfect constraint. Elster explains how such a mechanism functions in the context of constitutional assemblies, noting that “for various reason it may be difficult for a member to cast a vote without justifying it before the other members of his constituency” and that such justifications are likely to be governed by norms of impartiality. In other words, a delegate will find it in his interest to cast his arguments in the language of impartiality, either “to avoid the opprobrium associated with the overt appeal to private interest in public debates,” “to present his position in a way that precludes compromising or bargaining;” or “to persuade others if he believes they are susceptible of being swayed by impartial argument.” Elster explains that, among other things, this has the effect of limiting

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718 I also explore this extensively in Lenowitz, "Rejected by the People: Failed U.S. State Constitutional Conventions in the 1960s and 1970s."


the sorts of ideal points a delegate can pursue, for certain positions will too obviously stem from self-interest and not admit to impartial justification.

This argument applies, though perhaps not as strongly, on provisions written in the text, regardless of the publicity of the proceedings. By this I mean that certain constitution-making decisions would be impossible if they too plainly appeared to be the result of sheer self-interest or partiality. If a given constitutional provision resists any plausibly public justification, a constitution-making body will have to alter it until it does, or eliminate the provision all together. This is because a ratification procedure, of any type, shines lights on decisions made during drafting. Such procedures are frequently characterized by discussions of constitutional choices, with opponents and proponents of the constitution focusing on any provision that might seem morally dubious. A norm of impartiality, strengthened by ratification, will help constrain framers by decreasing the chances that partial constitutions, tailored to promote the interests of the few over the many, are written in the first place.

Ratification’s role as a goal constraint and an imperfect constraint might contribute to the legitimacy of a constitution in a relatively straightforward manner. A framer might know that the designated ratifying authority will reject a constitution if its falls outside of the bounds of morality, or what the ratifier perceives as the bounds of morality. Such a framer will therefore shift his goal constitution—this is ratification as a goal constraint—to ensure that none of its provisions will trigger illegitimacy concerns on behalf of the ratifier. The imperfect constraint works if we assume that one of the criterion of both moral and sociological legitimacy is that a constitution appears impartial. The framer or constitution-making will create a constitution that admits to impartial justification, regardless of their motives, because of their knowledge of
the norm of impartiality. Both of these arguments are initially convincing, and in fact they represent perhaps the best means through which ratification can help legitimate a constitution, and therefore the best means of justifying ratification altogether. Nonetheless, I argue, they are slightly less convincing than they initially appear for the following reasons.

First, ratification’s function as a goal constraint and imperfect constraint requires that constitution-makers believe that ratifiers, whomever they are, will reject constitutions that appear impartial or illegitimate more generally. As I discussed above, there might be little reason for this belief and constitution-makers, then, might not hold it. For example, a constitution-maker creating a constitution for Burundi might plausibly believe that voters will not reject a constitution if it is slightly illegitimate, or completely legitimate, because she knows that voters will approve anything in the hopes of changing their status quo. Such a framer might feel no concern with writing in provisions to benefit a particular group or minimizing certain rights. Similarly, a constitution-maker might believe that voters are so uninformed about constitutional design that there is little likelihood for them to identify a morally dubious provision. Both ignorance and other decision-making factors can decrease the chances that ratification can serve as a means of content control, and if ratifiers know this, ratification’s goal and imperfect constraint functions will be less effective.

The second weakness relates to incompleteness in the above argument. It is not exactly correct to say that ratification’s function as a goal and imperfect constraint depends on framers’ beliefs that ratifiers will reject a partial or illegitimate constitution. Rather, it depends on their belief that ratifiers cannot be convinced or misled to approve a constitution despite its actual or perceived moral deficiencies. As mentioned in the previous chapter, ratification
campaigns almost always accompany ratification referenda. The same is true for other ratification types, though these campaigns might be more or less public depending upon the publicity of ratification procedure. These campaigns are incredibly effective due to the technical nature of constitution-making evaluation, the high stakes nature of the decision, the frequently unstable nature of the status quo, and the disruption of normal cue-givers. Constitution-makers can also make recourse to other devices to ensure that their draft will gain majority approval. For example, Evo Morales’ Movimiento al Socialismo (MAS), holding a slight majority in Bolivia’s constituent assembly, pushed a consultative referendum through congress asking voters their opinions on the maximum size of landholdings. The intention of this referendum was to galvanize the indigenous population for the upcoming ratification referendum by framing the constitution as yet another political contest with the non-indigenous parties.

The belief by framers that they can persuade or mislead voters to accept constitutions that they might otherwise reject due to legitimacy weakens the goal and imperfect constraint effect of ratification. This does not mean that ratification would have no effect—certain provisions might be so obviously morally problematic that they would resist any attempted persuasive or manipulation—but it weakens it ability to legitimate through this pathway substantially.

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721 Framers can also encourage ignorance by limiting the time between promulgation and ratification, though such a strategy would only make sense if one believed that ratifiers were more likely than not to approve the constitution in the absence of additional information. Such a strategy appears to be incredibly common. Pinochet submitted Chile’s 1980 constitution without any public discussion under incredibly time constraints; while the constitutional commission in Romania only allowed 16 days for the electorate to review the draft. Widner, “Constitution Writing and Conflict Resolution Project”.

6. CONCLUSION

This chapter discussed what is arguably the most popular and intuitive justification for ratification—the claim that the procedure helps create legitimate constitutions. I argued that discussions of legitimacy are often confusing because legitimacy is used to mean different things across contexts. Specifically, in the first section of this paper, I argued that political legitimacy divides into three types. Something is morally legitimate if its claim to authority is morally justified; sociologically legitimate if a significant portion of the population believes it to be morally legitimate and obeys as a result; and legally legitimate if it is legally valid according to the legal system of which it is a part.

Moral and sociological legitimacy apply to constitutions without problem. A constitution is morally legitimate if there are good reasons for its claim to be the ultimate source of legal authority in a polity, and sociologically legitimate if people believe that such reasons exist and treat a constitution as if it were morally legitimate as a result. However, legal legitimacy does not apply in the same way. Constitutions are the source of legality within a given political and legal system, and therefore there is no legal system under which they might be legally valid. Attempting to appeal to preceding legal systems or reflexive legitimating criteria within the constitution does not solve this dilemma, for the former contradicts the legal meaning and purpose of a new constitution and the latter is circular. The sense in which constitutions nonetheless appear to be legally legitimate or illegitimate can be explained by noting that legal facts are simply a particularized version of social facts, and that when it comes to constitutions social facts fill in when legal facts run out. Put more clearly, the apparent legal legitimacy of con-
stitutions is actually based upon their sociological legitimacy, and thus legal legitimacy is irrelevant for the purposes of examining the capacity for ratification to legitimate constitutions.

I next explained how ratification, like any procedure, might contribute to the normative status of its outcome. On the one hand, it might have a procedural effect. When it comes to legitimacy, this means that ratification might legitimate a constitution simply because the procedure was carried out. A constitution would be legitimate not because of its content, but rather because it resulted from ratification itself. On the other hand, ratification might have a substantive effect, i.e. ratification might actually have effect the contents of a constitution, such that it is more likely to meet some independent standard of legitimacy.

Combined, the distinction between sociological and moral legitimacy and procedural and substantive effects produces four pathways through which ratification might legitimate a constitution: procedural moral legitimation; procedural sociological legitimation; substantive moral legitimation; and substantive legal legitimation. The enunciation of these pathways is perhaps the major contribution of this chapter, for it sets a framework through which the alleged legitimating effects of a whole host of constitution-making and decision-making procedures might be analyzed and tested.

In the reminder of the chapter I examined a few arguments that fit within these four pathways. Procedural moral legitimation was represented by both CPJs and pure consent theory, both of which, I argued, fail to justify much of anything. I then looked at three potential arguments for how ratification might lead to procedural sociological legitimacy. The first, the existence of specific norms and beliefs linking ratification to legitimacy, is context specific and likely inapplicable to most cases of constitution-making. Put simply, we have little reason to
believe that the populations of present and future polities involved in constitution-making believe that a constitution cannot be legitimate unless it is ratified. The second and third arguments claim that ratification increases participation, and that participation is known to increase the legitimacy of outcomes.

These arguments have two weaknesses. For one thing, there is little evidence linking empirical findings about participation and ordinary political decision-making to the rather specific context of constitution-making. If we believe that constitution-making is a unique context, we cannot simply assume that behavioral and psychological mechanisms that operate during ordinary times apply without problem. In addition, even if we accept that participation leads to legitimacy, this does not necessarily provide reasons for recommending ratification as one of the optimal components of constitution-making design. Many other tasks are completed prior to ratification, and each one of these provides extensive opportunities to involve citizens in the process of constitution-making without risking the fate of the constitution-making process in its entirety. In addition, these procedures, which include face-to-face deliberations, public dialogue, town hall meetings, etc., seem to provide better options for participation than mere voting. However, I should note that the possibility of other participatory procedures legitimating constitutions does not give us reason not to use ratification. Such a determination would require weighing the pros and cons of ratification and its likely effects with other participatory components of constitution-making, and I did not perform such an analysis.

In the next section of the chapter I turned towards substantive sociological and moral legitimation. I claimed that ratification might help ensure that contents of a constitution meet conditions of actual or perceived moral legitimacy through one of two ways: it might filter out
illegitimate constitutions or prevent illegitimate constitutions from being written. The filtering argument, first made by Condorcet, has several weaknesses. Primarily, it assumes that ratifiers are informed enough to identify illegitimate constitution and that they will make their ratification decision based upon this criterion. I argue that neither assumption is plausible, and that therefore the filtering mechanism might not work. Finally, I examined two ways in which ratification affects the behavior of framers and briefly discussed how this might lead to legitimate constitutions. Specifically, ratification may impose a goal constraint by giving constitution-makers reason to only pursue constitutions they believe ratifiers will accept, and an imperfect constraint by preventing framers from including provisions that cannot be justified impartially. I note that though these are persuasive arguments, the conclusions of the previous analysis give us reason to doubt the performance of these mechanisms. Ratifiers might accurately believe that framers will not cast their vote on the basis of legitimacy or worry about impartiality—perhaps because of ignorance or an undesirable status quo—or that they can persuade ratifiers to accept an illegitimate constitution with partial provision. This does not prevent the constraint from functioning entirely, but weakens their overall expected effects.

Legitimacy is the most popular and likely the best source of justification for ratification. However, explaining how exactly ratification, or any constitution-making procedure for that matter, leads to legitimate outcomes is a difficult task. Thus far, little literature exists which attempts to do this. Here, I gave a preliminary overview of what seem to be the most plausible or referenced mechanisms of legitimacy for ratification. I found that all such arguments contain considerable weaknesses. These are not insurmountable, and my brief discussion of each
mechanism is in no way conclusive, but in the absence of further research simply claiming that ratification legitimates is insufficient for justifying the procedure generally.
Ratification is on the horizon for several countries. The Libyan Constitutional Commission has less than thirty days to finish a draft and thirty more days to organize and hold a referendum. In Iceland, the results of a recent referendum on constitutional proposals will be used to finalize a draft constitution, slated for ratification in spring of 2013. In both Zimbabwe and Iraqi Kurdistan, referenda will take place as soon as, or if, the major parties reach consensus on a constitution. Finally, the constitutional assembly of Egypt is rushing to finish their constitution in order to submit it to voters before the Supreme Constitutional Court rules on a case seeking the assembly’s disbandment. The results of ratification will decide the fate of each of these constitution-making processes. In this dissertation, I asked whether or not there are reasons for using these procedures at all.

To reiterate, I was not after a context specific or general social-scientific explanation for why ratification occurs. Such an investigation would be worthwhile, but it was not my focus. Instead, I was looking for normative justifications in favor of including ratification within the optimal constitution-making process. These reasons would be ex ante and not contingent on

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specific environments. Our intuitions tell us that ratification is valuable in this way. For Americans, where the ratification of the U.S. Constitution is treated with biblical importance, this is likely especially true. How can the procedure that produced the Federalist Papers be anything other than a good thing? However, intuitions are not reasons. They can be mined for reasons, but are not reasons in themselves. In the previous chapters I attempted to explore the foundations of what seemed to be the most plausible intuitions in support of ratification.

The first intuition is that ratification has something to do with representation. Framers are often conceptualized as representatives of the people, and ratification seems like one way, perhaps the only way, to keep them in check. In other words, ratification seems like an excellent accountability mechanism, and if representation is something desirable in a constitution-making process, than ratification might be desirable for that same reason. However, this intuition falls short. While accountability mechanisms are necessary for the creation and maintenance of representation, ratification cannot coherently serve as one. The function of ratification, and the central task of a ratifier, is to approve or reject a proposed constitution, while accountability mechanisms are a means for principals to indicate whether their agents truly represented them. These two tasks might point in opposite directions; a ratifier might wish to sanction their representative framer for failing to represent, while simultaneously approving the constitution. In such instances of evaluative divergence, ratification-as-accountability mechanism necessarily fails at one of its given tasks. Ratification, then, cannot serve as an accountability mechanism, does not play a role in a representative process, and is therefore not justified on the basis of the value of representation.
Next, I turned to the theory of constituent power, which embodies the intuition that constitu-
tutions must be made by those they are to govern. Constitutions are often written to en-
courage this belief. The Constitución Española starts by announcing that “The Spanish Na-
tion...proclaims its will”, and the constitutions of South Africa, the United States, South Ko-
rea, Ghana and many others begin with the words “We, the people.” Perhaps ratification is a
means of putting teeth to such expressions. I considered several ways this could occur. Ratifi-
cation might be one of several moments in constitution-making during which the people act.
This explanation lacks coherence because prior moments of constituent action turn ratifica-
tion into a redundant process or a contradictory one. Ratification could be a moment of con-
stituent action when prior attempts at manifesting the people fail. This argument is plausible,
but does not produce the sort of ex ante reasons we are looking for. Ratification could be one
of several moments meant to approximate the constituent power. Among other flaws, this
misses the point of constituent power theory, which gains normative traction from its empha-
sis on the people taking action, not indirectly approximating their will. The failure of all three
of these explanations pushes us towards a final way in which ratification might enable consti-
tuent power.

This argument, which I call the single moment justification, claims that ratification is jus-
tified because it is the sole moment in the constitution-making process where the people actu-
ally take action on their constitution and make it their own. I developed this argument by
looking at the writings of Thomas Allen and his Berkshire Constitutionalists, a group of Mas-
sachusetts revolutionaries whose protests led to the first ratification procedure in history, the
ratification of the 1780 Massachusetts Constitution. Allen argued that the people possess an
unalienable right to ratify their constitution, for alienating the right would necessarily harm
civil society. This means that constituent action only takes place during ratification, and that
only the people, acting directly, can ratify the constitution.

Unfortunately, despite the passionate nature of the Constitutionalists’ arguments and the
rich theoretical foundations of their claims, the single moment justification fails. The reason is
simple: constituent power logic requires that voters in a ratification referendum make a mean-
ingful choice—a choice that they know reflect their beliefs, interests, and values—and voters
do not know enough about constitutions to prudently compare a draft to the likely reversion
point. Framers obtain the requisite knowledge through intense research, deliberation, and
structured educational programs, but ratifiers do not undergo similar processes. Two attrac-
tive objections to these arguments fail to save the single moment justification. Information
shortcuts cannot assuage concerns about ignorance like they do in the realm of ordinary poli-
tics, for the conditions of constitution-making increase the likelihood that they misfire and
meaningful choice requires intentional action rather than inadvertent competence. Educational
programs are unlikely to educate voters sufficiently, for the knowledge gap is massive and the
effects of these programs are quickly undone by ratification campaigns whose purpose is to
persuade by any means possible.

The final intuition discussed links ratification to legitimacy: ratification is valuable because
it helps create legitimate constitutions. This intuition is powerful and opaque, as arguments
from legitimacy often are, for legitimacy is a tricky concept that is used haphazardly across
contexts. Consider the claim that referendums legitimize outcomes. On the one hand, this
seems absolutely correct. For example, the referenda on the Belfast Agreements in Northern
Ireland and the Republic of Ireland clearly helped legitimize the agreement and paved the way for peace and the termination of conflict. When voters in Venezuela rejected a constitutional referendum that would have allowed Chavez to seek reelection indefinitely, the outcome became legitimate. On the other hand, this seems wrong. The 1934 referendum making Hitler Führer und Reichskanzler did not make his ascension to this post legitimate, and neither did the passing of Proposition 8 make banning gay marriage legitimate in California. In a sense, our intuitions about legitimacy and the effects of referenda seem to depend on whether we agree personally with the outcome in question.

Much of this confusion, I argued, stems from a conflation of different forms legitimacy can take. In the political context, legitimacy divides into three. Something is morally legitimate if moral reasons justify its claim to authority and demand compliance as a result; something is sociologically legitimate if people believe that it is morally legitimate and comply as a result; and something is legally legitimate if it is lawful according to the legal system of which it is a part. When it comes to constitutions and constitution-making, only moral and sociological legitimacy are relevant, for constitutions are the source of legal validity within a legal system and thus cannot be evaluated by any other juridical standard, and when we distinguish between legally legitimate and illegitimate constitutions we are simply relying on sociological legitimacy evaluations rather than legal ones.

Procedures can change the normative status of an outcome in one of two ways. They can alter the nature of an outcome such that it is more or less likely to meet some independent normative criteria, or they can serve as the normative criteria themselves. I call the latter a substantive effect and the formal a procedural effect. Combined with the two types of legitimacy
relevant to constitution-making, this distinction between substantive and procedural effects produces four pathways through which ratification could legitimate constitutions: procedural moral legitimation; procedural sociological legitimation; substantive moral legitimation; and procedural moral legitimation.

I discussed a few examples of how ratification might legitimate a constitution through these pathways. Procedural moral legitimation is represented by constituent power justifications, refuted in the previous chapters, and pure consent theory. The latter claims that constitutions are only morally legitimate if individuals consent to their authority and take on obligations to obey. Besides classic generational problems, this argument fails to justify because the standard of morally relevant consent excludes ignorant voters and the coerced, and ratification necessarily uses a majority or supermajority threshold. In combination, these mean that most constitutions are illegitimate for the majority of their population, an outcome that does little to help justify ratification.

I considered two arguments for how ratification could involve procedural sociological legitimation. On the one hand, the voting public might believe that ratification makes a constitution legitimate, or that a lack of ratification makes it illegitimate. This argument relies on the existence of a specific norm and belief that we have little reason to believe is generally present in all or most constitution-making contexts, and thus cannot serve as the basis for ratification’s justification. On the other hand, ratification increases the degree of participation in the constitution-making process, and procedural participation is thought to increase the legitimacy of outcomes for a variety of reasons. We have two reasons to doubt this line of argument. First, it requires that we import findings about individual and collective behavior within operative and
settled political, legal, and social structures to the unique setting of constitution-making. Second, even if we disregard this importation concern, prior opportunities within the constitution-making process for participation seem capable of having the desired legitimating effects and appear more suited to do so.

Arguments for both substantive moral and sociological legitimation take the same form because ratification, as an *ex post* procedure, only effects the contents of a constitution in limited ways. It can serve as a filter, where ratifiers reject illegitimate constitutions and thus ensure the legitimacy of those that come into effect. Or, it can alter the behaviors of constitution-makers by making them restrict their constitutional goals in anticipation of what ratifiers will accept or limit their provisions to those that admit to public impartial justification. The filtering argument is weakened by its implicit assumption that ratifiers are informed enough to identify illegitimate constitutions (more pertinent for moral legitimacy) and that they will base their ratification decisions upon legitimacy, for neither of these assumptions can be made with any confidence. Similarly, the argument that ratification will alter the contents of the constitution by effecting its drafters requires that framers believe that ratifiers are knowledgeable enough to identify partial provisions and illegitimate constitutions, will weigh legitimacy significantly when making their decisions, and cannot be persuaded to overlook this factor. Again, there is good reason for doubting that framers will possess such beliefs.

Where does this leave us? Can we say that it is always a bad idea to implement ratification, or that there are never good reasons for doing so? No. Unfortunately, the findings and implications of this project are too modest to reach this conclusion. For one thing, I only addressed three general arguments for justifying ratification. These appeared most likely, plausible, and
common, but others are of course possible. In addition, my discussion of legitimacy was inconclusive, for each legitimation pathway requires further examination and, especially when it comes to sociological legitimacy, many of the arguments I made turn upon the presence or lack of findings from empirical investigations that do not yet exist.

Further, the very context-specific and path-dependent reasons I excluded from consideration might very well apply in certain contexts. When the Mubarak regime fell, protestors called for a new constitution to be ratified in a referendum. This provides reason enough for justifying ratification. In Zimbabwe, ZANU-PF is doing everything it can to wreck constitution-making, including suing the Zimbabwe Conference Select Committee, demanding the distribution of a 3000 page report it cannot afford, bussing supporters to deliberative forums, confiscating draft constitutions meant for stakeholder meetings, and intimidating opposition leaders. In such a context, using a ratification referendum might be the only way of giving the resultant document a weak sense of sociological legitimacy and associating it somewhat with the will of the 13 million people in the country.

Nonetheless, at the least, this dissertation shows reasons to doubt the automatic use of a procedure whose worth has simply been assumed rather than explained. Moreover, it shows that intuitions about constitution-making procedures, especially those based on experiences in ordinary political contexts, ill-defined normative concepts, or intentionally abstract founding myths are often unreliable. We read about and understand constitution-makers as representatives, but they cannot play this role. We assume that constitutions are made on the basis of the people’s will, but it is unclear what this means or how it can be possible. And, we debate legitimation without grasping what the concept means or identifying how procedures can actually
produce it. More constitutions are made today than ever before, and this trend will likely continue. If we want to give countries advice about how to go about creating their founding documents, this needs to be done on the basis of conceptual clarity, well-developed normative arguments, and behavioral and psychological assumptions that take the unique context of constitution-making into consideration, not because a particular process feels good, or because everyone else seems to be doing it. That is just bad reasoning.
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