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Expanding Revision Clauses in Democratic Constitutions

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Major formal constitutional change can be an important moment of popular renewal in constitutional democracies (Colon-Rios 2010, 240; Levinson 2008, 173–75). It allows the people themselves to reshape their governmental structure in order to improve governance and modernize institutions. For instance, Iceland's constitutional replacement process from 2009 to 2013 came as a response to large political outcry against an entrenched and corrupt status quo elite. To live up to this promise, however, the institutions in the constitution-making process must enhance popular representation, deliberation, and participation while avoiding a process captured by a factional majority.

The prevailing view—taken from democratic theory—is that the best process of large-scale, formal constitutional change is an "open" one involving extraordinary institutions. This democratic openness solves two problems stemming from the tyranny of the "status quo." First, openness avoids major constitution-making in ordinary institutions. This will hinder status quo interests from exploiting their dominance of ordinary institutions to push through "abusive" constitutional changes that entrench themselves in power (Landau 2013a). Second, it allows the people to circumvent attempts by an entrenched "status quo" to *block* constitutional change by allowing them to act through extraordinary institutions (Levinson 2008).

Comparative experience of formal constitutional change in democracies shows that this openness and use of extraordinary institutions can carry dangers of another kind to democratic constitution-making (Partlett 2016a). In particular, a self-interested factional majority can dominate the extraordinary institutions of constitution-making and unilaterally reshape the constitutional order in a self-interested and abusive manner. This factional problem of a majority circumventing ordinary institutions and entrenching itself has become "[p]eripheral . . . to subsequent constitutional theorists" and has therefore largely been ignored by constitution-making theorists (Levinson 2011, 662). But it remains a practical problem in formal constitutional change in many democracies around the world (Partlett 2012).

The problem of faction was not a peripheral question in eighteenth-century American constitutional theory. James Madison warned of the dangers of majority factions that would become "adverse to the rights of others citizens or to the permanent and aggregate interests of the community" (*The Federalist,* No. 10). His solution lay in clear rules of structure that would undermine factionalism by engendering "a multiplicity of interests" (*The Federalist,* No. 51). This solution—which accords with Gabriel Negretto's argument and empirical findings in Chapter 5 on the importance of pluralism in constitution-making—suggests that textual rules in *democratic* constitutions should have a role in regulating and therefore improving the process of constitution-making.[1]

As a complement to Colon-Ríos' analysis in Chapter 2 of this book about the possibility of constitution making through law, this chapter seeks to reflect on the balance between the status quo and factional concerns in the design of a democratic process of

[1] See also the Introduction to this volume about legal regulation and continuity in democratic constitution making.

formal constitutional change.[2] To do this, it will look at comparative constitution-making experience around the world. It will also draw on the subnational constitution-making experience of the American states. This subnational American constitutional experience is particularly instructive because state constitutions have more than two hundred years of experience balancing the competing demands of openness and regulation in democratic processes of constitution-making.

Drawing on this comparative experience, this chapter will employ two concepts to guide this normative inquiry. First, it will describe constitution-making institutions as serving two different *roles*. At the drafting stage, constitution-making institutions play a predominantly representative role, as they are the site of drafting and deliberation by representatives of the people. At this stage, the people's representatives *propose* a constitutional draft; it is therefore a first step in a process of constitutional change. At the ratification stage, by contrast, constitution-making institutions reflect the direct preferences of the people and in the case of the most common and democratically legitimate ratifying institution—the referendum—is not representative at all. Thus, at this stage, the people directly exercise their unlimited constituent power to *consent* to a new constitution.

Second, this chapter will examine what I call the law of constitution-making. This law can be organized into three different categories: selection rules (i.e., electoral rules), decision rules (i.e., internal voting rules), and relationship rules (i.e., rules determining the interaction of constitution-making institutions).[3] The details of these rules frequently

[2] Although by formal constitutional change I understand both amendments and replacements, this chapter is more closely focused on the latter.

[3] Brown (2008, 675) describing how scholarly analysis places emphasis on "deliberation, considerations of the general public interest, and long-term political reasoning" in constitution-making.

determine whether constitution-making is inclusive and representative of the people as a whole.

This chapter will then explore how these concepts can help to improve democratic constitutional design. In particular, it will suggest that democratic constitutions should include directive principles that guide the law of constitution-making. At the *drafting* stage, directive principles should address the various problems of specific institutional choices. For instance, in constitution-making through the institutions of ordinary politics (e.g. appointed commissions or ordinary legislatures), the status quo "abuse" of constitutional change to entrench their own power is of most concern (Landau 2013a). Constitutions should include directive principles requiring super-majority decision rules as well as relationship rules requiring popular ratification to ensure that entrenched status quo interests cannot use their dominance of ordinary institutions to push through self-interested constitutional norms. In extraordinary drafting institutions like constituent assemblies, by contrast, directive principles should call for laws that avoid the capture and manipulation of these institutions by factional majorities. One clear requirement would state that laws clearly specify extraordinary drafting bodies to be *proposing* bodies without the power to reshape the entire landscape unilaterally.

At the *ratification* stage, directive principles should call for laws that ensure ratification bodies are suitably inclusive while remaining difficult to capture. For referendums, these principles should require legislation that ensures that referendums best capture the informed consent of the people. One way to do this is to require an enabling act that agrees on the key rules of the referendum, including the wording and media rules.

This analysis thus provides lessons for constitutional drafters considering expanding revision or amendment clauses in democratic constitutions. As Joel Colon-Rios argues in Chapter 2, the constitutional regulation of constitution-making need not violate the people's right to exercise their constituent power. On the contrary, if devised carefully, laws made under these sort of directive principles can help structure a constitution-making process so that any new constitution can be "reasonably understood" as an "act of the people." Furthermore, expanded revision clauses can ensure more certainty with regard to the use of extraordinary institutions. This can allow the people to more confidently circumvent ordinary institutions without the fear of the process becoming captured by a powerful faction. In sum, this regulation can allow the people to express their original constituent power more effectively while curbing the dangers of factional majority.

To make this argument, this chapter will be divided into six parts. Part I will describe the neglected tension within democratic constitution-making between an open process and one that is not susceptible to factional manipulation. Part II will introduce the importance of legal rules and roles for the institutions involved in constitution-making. Part III will describe rules that can help improve constitutional *drafting*. Part IV will examine how rules can better structure constitutional *ratification*. Part V will explore how expanded revision clauses in democratic constitutions might respond to these lessons. Part VI will conclude.

I. Competing Demands of Democratic Constitution-Making

A significant, but largely unexplored, tension lies at the center of democratic constitution-making theory. On one hand, theorists argue that democratic constitution-making requires an open process which can allow the people to circumvent entrenched elites in ordinary institutions. On the other hand, democratic constitution-making requires rules that will ensure the pluralism necessary to reduce the chances that partisan factions will runaway with the process of constitution-making and impose constitutional rules that entrench their own power. Both sides are responding to legitimate threats of elite self-dealing. Those advocating an open process are concerned that a "status quo" will either use its dominance of existing institutions and law to block constitution-making or pass new constitutional changes that buttress its power. Those on the other side are concerned that too much openness will lead to a "factional problem" where elite factions representing popular majorities will use their control over the constitution-making process to ignore minorities and entrench their own power through constitutional law. It is important that constitution-making strike a balance between these competing concerns.

A. The Status Quo Problem

The status quo problem—the possibility that elites will use constitutional law to block democratic expression—lies at the very center of democratic constitutional theory.[4] In fact, a central "dilemma" in democratic theory has long been the fear that constitutional law will allow a powerful and entrenched minority (often a court) to stifle the will of the majority of the people. The solution to this tyranny of the minority problem is found in

[4] Levinson (2011, 666) describing one of the problems in democratic theory to be "how to prevent venal and corrupt federal officials from tyrannizing and plundering the citizens they were supposed to serve." This problem has also been called the "dead hand problem."

allowing the people to remake constitutional law by circumventing the existing rules. This "democratic openness" seeks to solve two status quo problems. First, it ensures that elites cannot rely on *existing* constitutional law or institutions to block formal constitutional change. Second, it seeks to stop an entrenched elite from using its domination of ordinary institutions to pass *new* constitutional language that further entrenches their power.

We see this concern strongly reflected in the normative literature on constitutional change since the eighteenth century. During the revolutionary period in the United States, Thomas Jefferson famously argued that constitutions should be returned to the people for revision every nineteen years in order to avoid "one generation of men binding another" (Kurland and Lerner 2000, ch. 2, doc. 23). This impulse is reflected in the current practice of some American state constitutions, which periodically submit a question to the people about formal constitutional revision.[5] This viewpoint has also been strongly expressed in work on the possibilities of formal amendment in the United States Constitution (Levinson 2008; Fritz 2008). Sanford Levinson argues that the formal rules for amendment in the United States Constitution are an "iron cage" that block the American people from changing their own constitutional order (Levinson 2008, 165).

To solve this problem, many American constitutional theorists have argued that the people have the inherent right to pursue a more open process involving extraordinary institutions like referendums and constituent assemblies to circumvent established constitutional revision procedures. For instance, Akhil Amar argues that "a majority of voters" retain an "unenumerated, constitutional right" to "call a convention to propose

[5] N.Y. Const. art. XIX, § 2 states that every twenty years, the people must vote on whether they want a constitutional convention to propose alterations to the Constitution.

revisions . . . [and] that an amendment or new Constitution could be lawfully ratified by a simple majority of the American people" (Amar 1994, 459). Sanford Levinson endorses Amar's "visionary argument" that a national electorate could call a convention and then could ratify the new constitution that emerges from this convention in a referendum (Levinson 2008, 177).

The status quo problem remains an issue in formal constitutional change around the world today. For instance, Thorvaldur Gylfason's chapter on Iceland in this volume describes how an entrenched elite in the Parliament have used their position to block popular constitutional change. In the wake of the 2008 global financial crisis, a near consensus emerged that Iceland needed a new constitution. This led to a highly participatory process, which yielded a constitutional draft that garnered a strong majority in a referendum (Landemore 2015). Yet, despite this clear message from the people for change, the status quo has (so far) used its control of the parliament to block this draft going into effect. Gylfason's analysis strongly condemns the "disrespect" of the legislature for the results of the referendum. The veto power of the legislature after a referendum is a key example of the status quo problem where the process is overregulated by pre-existing institutions.

B. The Factional Problem

The factional problem is less well discussed in democratic constitutional theory. In this tyranny of the majority scenario, a faction undermines genuine participation and deliberation by advancing a self-interested agenda that seeks to use formal constitutional alterations to entrench their own power or policy preferences. This concern dates back at

least to James Madison's famous warning about the threats to both minority rights and the "aggregate interests of the community" when "a majority [is] united by a common interest" (*The Federalist*, Nos. 10 and 51). The solution has generally been seen in rules that are more likely to engender "a multiplicity of interests" (*The Federalist*, No. 51). The importance of rules to solving this problem, however, has not comprised a large part of constitution-making theory, largely because of the centrality of the status quo problem in constitution-making theory.

Although not part of constitution-making theory, the problem of faction is a significant problem in the practice of constitution-making (Partlett 2016a). From Latin America to the former Soviet republics, self-interested factions have taken advantage of the openness of constitution-making to runaway with the process of constitution-making and impose entrench self-interested constitutional orders (Partlett 2012). They have done this by dominating institutions that have then claimed the legal power to "runaway" from the limitations of the pre-existing legal order. This kind of runaway constitution-making can lead to two problems. First, runaway constitution-making institutions controlled by self-interested factions can degrade pre-existing democratic institutions—particularly courts and legislatures—by issuing laws or ordinances removing individuals from power or disbanding institutions. Second, the products of these runaway processes themselves—written constitutional text—can themselves become the partisan tool of political entrenchment and rights reduction.

A classic example is Venezuela in 1999. In Venezuela, President Chavez issued a decree calling for a referendum to ask the people whether to call a constituent assembly to "transform the state and to create a new juridical order that would allow for the

effective functioning of a social and participatory form of democracy" (Colon-Rios 2011, 369). Chavez then took advantage of the openness to unilaterally draft rules for this constituent assembly. David Landau describes how these rules "brilliantly maximized his electoral representation and completely marginalized the opposition" (Landau 2013). In particular, Chavez created a majoritarian system of voting with single-member districts, which tends to over-represent forces with majority support nationally (ibid.). This allowed him to win 60% of the votes but take 95% of the seats (ibid.).

With control of the drafting assembly, Chavez then unilaterally declared that all existing institutions would have "to subordinate themselves not only to the word but to the concrete fact, before the sovereign mandates that emanate from here, before this center of light" (ibid., 946). Chavez's Assembly then went on to severely curtail the powers of the existing constituted powers (including the legislature). With control of this unlimited Constituent Assembly, Chavez reshaped the institutional landscape of the country in his own interests. As discussed by Bejarano and Segura in this volume, the legacy of this process was one that both degraded institutions (particularly the court and the legislature) as well as one that allowed for the concentration of constitutional power.

The danger of factions has also become a reason to avoid formal constitution-making through extraordinary institutions altogether. In the United States, for instance, the openness of constitution-making through a federal constitutional convention has been seen as a fundamental threat to the democratic order. For instance, Chief Justice Earl Warren declared that a federal constitutional convention could "destroy the foundations of the Constitution" (Caplan 1988, 74). Justice William Brennan described the prospect of a convention to be "the most awful thing in the world" (quoted in ibid., viii). The

Governor of New Jersey said that a "convention would intimidate all branches of government, confuse the financial markets, and chill international relations" (quoted in ibid.). In 1967, Senator Tydings of Maryland warned that a convention could "ignore the limitations placed on it by Congress and instead purport to speak for 'the people'" (113 Cong. Rec. 10,103, 10,104 (1967)).[6] Underlying all of these concerns is the danger that a united faction poses to genuine participation as well as to existing democratic institutions.

C. Solutions to these problems?

The institutional solutions to these competing elite self-dealing problems of constitution-making seemingly present contradictory solutions. On one hand, the status quo problem requires institutions that allow the people to circumvent established government and law in creating a new constitution. These extraordinary institutions—including constitutional conventions, constituent assemblies, and referendums—frequently act outside legal regulation. Solving the factional problem, on the other hand, requires rules and structures that reduce the likelihood of the capture of institutions—and, particularly, extraordinary ones—by a majority faction. The next section explores how to balance these competing demands.

[6] In legal academia, the debate has been strangely legalistic, centering on whether the states can limit a convention to certain topics. *Compare* Black (1972, 198) (arguing that neither Congress nor the states can limit a constitutional convention to a certain agenda) *and* Dellinger (1979, 1624) (same) *with* Van Alstyne (1978, 1305).

II. The Legal Rules and Roles of Constitution-Making Institutions

To find an adequate balance between the status quo problem and the factional problem, I will examine two key concepts. These concepts will in turn help us to better understand how democratic constitution-making institutions work in practice.

A. *The Law of Constitution-Making*

Democratic theory has tended to ignore the importance of the legal rules governing constitution-making. Experience shows, however, that even the most open and revolutionary process of constitution-making involves law; legal rules are necessary to ensuring coordination in constitution-making.[7] It is also critical in ensuring that institutions are sufficiently open to popular participation but also less likely to be manipulated by factions. In fact, these legal rules play a critical role in determining whether something functions as and is therefore rightly called a "constituent assembly" or "referendum."

There are three categories of the "law of constitution-making." First, law sets the selection rules for constitution-making. A good example is the electoral law for choosing representatives to a certain institution or legislation regulating how language is chosen for a referendum. Second, laws set decision rules that determine whether a decision has been made. In representative bodies, these might be threshold voting requirements required to ratify constitutional language; in referendums, they might be rules which determine that constitutional text is adopted. Finally, laws include relationship rules that determine how constitution-making institutions interact with other institutions. These include both how

[7] Political scientists have long understood the importance of rules in defining institutions. Institutions themselves are a set of rules. Riker (1982, 4) defining institutions as "rules about behavior, especially about making decisions."

these institutions are activated as well as their powers and capacities in relation to other institutions once they are activated.

These laws can be found in different sources. For constitutional amendment through ordinary institutions, these rules are frequently contained in the constitution itself. But, in most other cases (and particularly for constitution-making through extraordinary institutions), they are left to legislation or executive decrees. I will examine what kind of legal rules are best for advancing both a more open process and a regulated one that is less likely to be captured by a faction.

B. Roles of Constitution-Making: Drafting and Ratification

Democratic theory generally views constitution-making as a monolithic process where the people speak in the creation of new constitutional law. Experience, however, shows that constitution-making is actually a two-stage process where the people act in two distinct roles.[8] The first is the drafting stage. Because the people themselves cannot gather together to engage in drafting, this is a representative process in which popular delegates deliberate over language. This drafting process raises both problems of status quo entrenchment and factional capture. To what extent are the status quo and factional problems linked to the type of institution in the drafting stage? Are there rules that can address both problems? And, if not, how to balance rules of constitution-making to ensure that the people cannot be blocked in proposing new constitutional language but also avoid factional manipulation?

The second stage is one of ratification. In this stage, constitutional changes are approved. In most cases, the people themselves perform this task directly by accepting or

[8] See Saunders (2012) describing constitution-making as a multi-stage process.

rejecting the constitutional draft in a referendum or special election. Similar problems of balance between openness and regulation arise. What concerns are most problematic in ratification referendums? In particular, what rules might best allow a referendum to be an inclusive process but also one that is not so inclusive that it allows an entrenched elite to block it?

I will begin to explore these questions by looking at some of the key selection, decision, and relationship rules that exist at the center of the process of constitution-making in its drafting and ratification stages. This exploration will not be exhaustive, but will seek to illuminate how best to regulate a process of constitution-making from the point of view of seemingly opposed democratic principles.

III. Drafting Institutions

The drafting stage is a critical part of the process of constitution-making. This is the period when key decisions are made that potentially affect both the structure of government as well as the rights of individuals. Although the people may participate directly through submissions, drafting is largely a representative process carried out by representatives. The competing problems of factional capture and status quo entrenchment differ according to the institutional choices made. In ordinary constitutional drafting institutions, we should be most concerned about a status quo elite using its control over ordinary institutions to further entrench itself without popular input (either by blocking change or pushing through changes that reduce threats to their power). Conversely, constitutional drafting through extraordinary institutions triggers concerns about factional circumvention. It therefore requires legal rules which ensure that these

extraordinary institutions are not captured by mobilized factions or that, if they are, these institutions are not able to dominate the constitution-making process.

A. *Ordinary Institutions: Appointed Commissions*

The first institution frequently used in constitutional drafting is an appointed commission.[9] These bodies are frequently viewed as more efficient and cost-effective than elected drafting bodies as well as less of a threat to legislative power than elected constituent assemblies. These bodies—appointed by either the legislative or executive branch or a combination of both—can potentially undermine a deliberative and participatory constitution-making process. Because they are appointed, these commissions can become an opportunity for the defenders of the status quo to use formal constitutional law to their advantage. Thus, legal rules must be developed that help these bodies overcome the status quo problem.

Selection rules. Selection rules are critical for improving the functioning of appointed commissions. If the originator of the commission can appoint partisan political allies to sit on a committee, the commission will draft a constitution that reflects the current position and self-interest of the originator. A recent constitution-making process in Ukraine was criticized for this very problem (Partlett 2016b). On the other hand, if selection rules are chosen that generate a genuine bipartisan commission, this can allow the commission to play a productive role in constitution-making. In the American states, independent constitution-making commissions are frequently convened to propose minor updates to the constitution. For instance, the Florida Constitution itself contains detailed

[9] See Williams (1996) describing the increasing number of appointed commissions in constitution-making in the American states.

rules about the composition of a Constitutional Revision Committee, which includes the Attorney General, as well as representatives chosen by the Governor, Chief Justice, Senate President, and House Speaker (Fla. Const. art. XI, § 2. See also Adkins, N.d.). In Utah, a law requires members of a permanent commission to be "bipartisan" (Williams 1996, 15). Finally, experts or academics can be placed on these commissions. In certain circumstances, this can be a way to ensure a better outcome or a device for salvaging the legitimacy of these commissions.

Decision rules. Decision rules are also important in determining how appointed commissions operate. Assuming a committee is relatively bipartisan, rules that are inclusive and require more consensus are more likely to ensure that the commission cannot be manipulated for partisan ends. Furthermore, rules that require these bodies consult with the public in their deliberations are another important way of ensuring that constitution-making by commissions is more participatory. For instance, the Utah commission is required to consider recommendations from "responsible segments of the public." (ibid.).

Relationship rules. Perhaps the most important rules concerning commissions are those concerning its relationship with other institutions. A rule requiring the people to approve a draft in a referendum before it goes into effect are can help ensure that the proposers take into account the interests of the people. For instance, the Florida Constitutional Revision Committee only has the power to directly propose amendments to the people. In Utah, by contrast, a permanent appointed commission has the power to suggest amendments to the state legislature (Williams 1996). Whatever the choice, the American state examples suggest that appointed commissions should not have the power

to circumvent existing institutions; instead, they should submit their drafts to the legislature and the people in a referendum before ratification. This kind of rule enhances popular participation in constitutional drafting while also checking the ability of legislative or executive elites to use these bodies to push through self-interested change.

B. Ordinary Institutions: Legislative Amendment and Dual-Purpose, Constituent Legislatures

Ordinary elected legislatures also frequently play an important role in constitutional drafting. Legislative constitution-making poses a threat of status quo entrenchment, in particular the use by the status quo of their dominance in the legislature to entrench power. This risk is frequently mitigated by clear constitutional rules that regulate the process of legislative amendment. It is unclear, however, whether these rules apply when ordinary legislatures become "dual-purpose bodies" or "constituent legislatures" that formulate both ordinary law as well as major constitutional reform. In these circumstances, legal rules are necessary to address the problem of status quo entrenchment.

Selection rules. Selection rules for legislatures engaging in formal constitutional amendment are well established. First, ordinary legislatures are elected according to the pre-existing electoral law. Second, democratic constitutions themselves often include mechanisms such as unamendability clauses which limit the *topics* that constitutional amendment can cover. Many American states, for instance, create an amendment-revision distinction which seeks to limit the major constitutional changes that can be made by ordinary legislatures (Colantuono 1987). Enforced by courts, these types of rules

are critical in ensuring that the legislature cannot change key constitutional provisions without a more open and representative process.

For dual-purpose constituent legislatures, however, different selection rules often need to be introduced. Most important, normal electoral law should be revised in order to ensure that these bodies function in a more representative manner. For instance, in Tunisia, the dual-purpose constituent legislature that drafted the constitution was elected according to a special proportional representation rule, which maximized representativeness and encouraged the election of particular groups such as women (The Carter Center 2011–2014, 24). These rules, in turn, help to ensure that the drafting process is more representative.

Decision rules. Decision rules are also important in improving legislative involvement in constitutional drafting. Legislatures are too numerous to actually carry out formal constitutional drafting themselves; instead, they generally choose representatives who in different committees will draft the language that is then considered. A key rule determines how these committees are chosen and how they will make decisions. In many cases, democratic legislatures have rules in place requiring committee membership to be selected only after agreement amongst different parties. These rules should be extended to dual-purpose constituent legislatures as well.

Another key decision rule is how textual changes are approved by the full legislature. Democratic constitutions normally specify super-majoritarian rules for making these kinds of decisions (Lijphart 2012, 47–48). Such rules frequently include a two-thirds majority to approve specific changes. These super-majoritarian rules should also be extended to dual-purpose bodies as well. In both contexts, by requiring broader support to

agree to any change super-majority rules can prevent a bare majority from changing the constitution in order to entrench their own power. Furthermore, they can ensure more deliberation by forcing participants to push for a consensus through attention to reasons that appeal to the common good.[10] Finally, super-majoritarian decision rules can also increase participation by incentivizing coalition-formation and the publicizing of private information to garner larger majorities (Lieb 2006, 116).

Relationship rules. Finally, key laws describe the legal relationship between drafting legislatures and other institutions. For ordinary legislatures drafting constitutional amendments, there are commonly clear—and often judicially enforceable—rules outlining how constitutional amendments in ordinary legislatures are brought into force. For instance, an increasing number of democratic constitutions require constitutional amendments drafted by ordinary legislatures to be ratified in a binding referendum. (Ginsburg & Elkins, 377). For instance, in Australia, any proposed alteration to a constitution must be ratified by a majority of the people as well as a majority of the states (Australian Constitution, s. 128).

The relationship of dual-purpose, constituent legislatures to pre-existing institutions is less clear. This ambiguity could allow a partisan majority in a constituent legislature to claim the runaway power to ignore existing constitutional limitations, disband existing institutions, or ratify its own draft. To avoid this, a relationship rule should state that constituent legislatures have the power to propose a new draft but not to unilaterally reshape the existing constitutional order. A final relationship rule for a constituent legislature is how it becomes a constituent legislature. The best rule allows the people to

[10] McGinnis and Rappaport (2002) discuss how super-majoritarian rules improve consensual decision-making by encouraging negotiation and compromise.

determine when a legislature will adopt a dual role. For instance, in France in 1946, voters answered the question "Do you want the assembly elected today to be a constituent assembly" (Elster 2013, 207). After answering yes, this constituent legislature drafted France's new constitution. This also provides the people the ability to debate and question candidates over key questions of constitutional design during the election.

C. *Extraordinary Institutions: Constituent Assemblies*

Extraordinary drafting institutions are generally seen as the most democratic institutions for large-scale constitutional changes (including replacement) because they respond directly to the status quo problems of constitution-making through ordinary institutions. When elected, these bodies are thought to be "more consistent with people's sovereignty than a parliament (where sectional interests may dominate)" (Ghai 2005, 10). They are also viewed as allowing the people to break with a corrupt past or avoid the deficiencies of ordinary politics. They are also seen as better at deliberation. Because these bodies are temporary, they therefore avoid the "noise" of "regular politics" and will be more likely to operate behind a veil of ignorance (ibid.).

Despite their strong support in the normative literature, extraordinary institutions pose considerable dangers to a representative, deliberative, and participatory process of constitution-making. Because of claims about inherent powers, these institutions raise serious concerns of capture by majority factions. This capture can endanger existing institutions as well as lead to constitutional norms that undermine political competition. As a result, proper constitutional revision rules must block elected factional majorities from running away with the process and dominating the process.

Selection rules. One of the most important rules for constitutional drafting bodies is how these bodies are selected. The choice of these rules in turn plays a critical role in determining the position of the drafting body within the constitutional landscape (thus, determining its relationship rules). The most common way of selecting these specialized bodies is through elections. Elected drafting bodies—called constituent assemblies or constitutional conventions—have the strongest democratic credentials of all the potential drafting institutions.[11] Selection rules that encourage representativeness and a plurality of interests are most likely to secure this normative vision. Selection rules for an extraordinary assembly should seek to generate as much as possible what Bejarano and Segura in this volume see as being so important in ensuring the success of Colombian constitution-making: A broader distribution of power in the assembly.

The American states have experimented with a number of different ways of pursuing a more representative body. The first thing that many do is require the rules for forming an extraordinary drafting body to be the product of a bipartisan legislative act. The Kentucky Constitution requires the state legislature to create an ordinary statute calling a convention if a majority of citizens vote for a new one at the election.[12] The California Constitution also states a clear relationship rule for a constitutional convention: The people can call a convention through a vote and the legislature then calls the convention into effect.[13]

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[11] But see Article V of the United States Constitution which allows the states to call a convention to amend the constitution: U.S. Const. art. V.
[12] Ky. Const. § 258. http://www.lrc.state.ky.us/legresou/constitu/258.htm (December 9, 2016).
[13] Calif. Const. art. XVIII. http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CONS&division=&title=&part=&chapter=&article=XVIII (December 9, 2016).

These statutes creating extraordinary drafting bodies should similarly focus on the most representative selection rules. The Panama Constitution, for instance, specifies that any law governing the makeup of the constituent assembly itself must be "proportional."[14] The Missouri Constitution includes a very elaborate provision that seeks to ensure that more than one political party will be represented in the convention from each district.[15] A number of other approaches have also been tested. In other American states, elections to specialized constitutional conventions are non-partisan. For instance, Rhode Island had a non-partisan election for its 1985 constitutional convention (Morse 2014). It also provides that the election for at-large delegates be nonpartisan (ibid.). New York introduced a bill in 2015 entitled the People's Convention Reform Act which sought to introduce nonpartisan elections for the New York constitutional convention.[16] In order to reduce the influence of the political elite, the bill therefore suggests that "procedures should be established in both the selection of delegates and in the running of the convention that will reduce partisanship."[17] These procedures include rules against party affiliation and involvement in the election.

In other cases, laws creating selection rules have instead sought to enhance participation by underrepresented groups by avoiding election altogether. One recent innovation involves constitution-making bodies that are selected by lot. These bodies are

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[14] Panama Constitution, art. 314. https://www.constituteproject.org/constitution/Panama_2004.pdf (December 9, 2016).
[15] Missouri Constitution, art. XII, § 3(a). http://www.moga.mo.gov/mostatutes/moconstn.html (December 9, 2016).
[16] Bill No. A4674, N.Y. State Assembly, Last action, June 2, 2016. http://assembly.state.ny.us/leg/?default_fld=&bn=A4674&term=2015&Memo=Y (December 9, 2016).
[17] Assembly Bill A4674: Relates to the creation of the People's Convention Reform Act, 2015–2016 Leg. Sess., Last action, June 2, 2016. http://open.nysenate.gov/legislation/bill/A4674-2015 (December 9, 2016). The bill is a reaction to the fact that New York's last two constitutional conventions were "dominated by the politically connected (two-thirds of the delegates to the 1938 convention and about 83% of the 1967 delegates were present or former elected or party officials).

intended to serve a brainstorming purpose. The idea behind this is to avoid politics-as-normal and to give the people a stronger say in the drafting of constitutional language. Sanford Levinson has explored this idea in his work on constitutional reform in the United States. He argues that lottery selection in constitution-making can help to avoid the corruption at the heart of ordinary representative politics (Levinson 2012, 124–25). Akhil Amar's work also describes how selection of assemblies by lottery helps lead to fewer insider representatives, more rotation in office, and weaker political partisanship (Amar 1984).

There has recently been a large amount of experimentation in this area. Iceland is a good example. In 2009, a National Forum was convened (Landemore 2015, 169). It included 1,500 representatives, most of whom were randomly selected from the Population Register. This National Forum engaged its participants in brainstorming that would seek to ensure the broad principles for the drafting process. After this, a 25-member seat body drafted the constitution. This body was open to anyone who was not "President of the Republic of Iceland, members of parliament, their alternates, cabinet ministers and members of the Constitutional Commission and the Organising Committee."[18] In the United States, the state of Oregon created a Citizen Initiative Review Commission.[19] Each review panel is randomly chosen and demographically balanced and is brought together to evaluate a ballot measure. Finally, in Australia, a citizens' parliament was convened in 2009 that included a large number of randomly selected citizens who matched the demographics of the area that they represented. This

[18] Act on a Constitutional Assembly, art. 6. http://www.thjodfundur2010.is/other_files/2010/doc/Act-on-a-Constitutional-Assembly.pdf (December 9, 2016).
[19] Citizens' Initiative Review Commission. http://www.oregon.gov/circ/pages/index.aspx (December 9, 2016).

was intended to produce recommendations for "those in leadership that reflect the considered views of the broader community" (*Australia's First Citizens' Parliament*, 2009, 3).

Decision rules. Another set of important rules for extraordinary drafting bodies includes the way that these specialized bodies make decisions on draft constitutional language. These rules should operate much as the decision rules for appointed commissions or legislatures. In general, super-majority decision rules in extraordinary drafting bodies can help to block a majority faction from pushing through self-interested language.

Relationship rules. A crucially important rule relating to extraordinary drafting bodies is the relationship of extraordinary drafting institutions with ordinary institutions. This is particularly true with regard to *elected* constitution-making bodies. Normative theory—with its emphasis on openness—generally contends that these elected constituent assemblies must be sovereign and superior to the legal system. They are therefore seen as "a gathering of the nation" (Ghai 2005, 10) that allows the people to "reactivat[e] [their] constituent power and becom[e] the author[s] of a radically transformed constitutional regime" (ibid.). This specialized institution is about "recognizing a power superior to the constitution and giving citizens, acting outside the ordinary institutions of government, the institutional means to exercise it" (Colon-Rios 2010, 240). Under this conception, these institutions should have full power to reshape the institutional landscape. Many Latin American constitutions follow this approach. For instance, the Venezuelan constitution states that existing authorities cannot obstruct the Constituent Assembly "in

any way," suggesting it has unlimited powers.[20] In Bolivia, the constitution states that the "total reform" of the constitution requires "an original plenipotentiary Constituent Assembly."[21]

The danger of majority factions capturing these bodies, however, strongly counsels against allowing extraordinary elected drafting bodies to possess unlimited legal power. Law should therefore create clear boundaries on the powers of these drafting bodies. For instance, Panama's Constitution is one of the few Latin American constitutions to contain a relationship rule that limits the power of the constituent assembly to make "retroactive" laws or to alter the terms of office of officials "exercising their functions at the moment when the new constitution enters into effect."[22] An even better rule would state that these bodies—much as with constituent legislatures—are unlimited in their ability to propose constitutional language but not in other capacities. There is support for this concept in the practice of American constitution-making. During the American founding period, elected constitutional conventions were viewed not as all-powerful but instead as proposing bodies (Partlett 2017). One of the key participants in the Philadelphia Convention, James Wilson, explained that the Philadelphia Convention was "authorized to conclude nothing" but was "at liberty to *propose* any thing" (Farrand 1966, 253). Later on, one of the most important American treatises on constitutional conventions was written to dispel the idea that conventions had sovereign powers.[23] Underlying this approach was the idea

[20] Venezuelan Constitution, ch. III, art. 349. https://www.constituteproject.org/constitution/Venezuela_2009.pdf?lang=en (December 9, 2016).
[21] Bolivian Constitution, pt. V, art. 411. https://www.constituteproject.org/constitution/Bolivia_2009.pdf (December 9, 2016).
[22] Panama Constitution, art. 314. https://www.constituteproject.org/constitution/Panama_2004.pdf (December 9, 2016).
[23] See Jameson (2013).

that the people themselves could not be sovereign if they delegated their full power to a representative body.

Another key relationship rule for constituent assemblies is how they are activated. As long as constituent assemblies are simply proposing bodies, a rule that allows the people themselves to call a constituent assembly into place is a desirable way of ensuring that an entrenched elite cannot block popular constitutional change. We see examples of this type of relationship rule across Latin America. For instance, in Bolivia, 20% of the citizens can petition for a referendum on calling a constituent assembly. If the referendum is successful, a constituent assembly must be called.[24] In Ecuador, the Constitution states that a referendum is the only way to call a constituent assembly and that this referendum must allow the voters to also vote on the selection rules for how the constituent assembly is elected.[25] Finally, the American states also require the state legislature to convene a constitutional convention in the event of a majority vote calling for one.

IV. Ratification Institutions

The ratification stage represents a moment when the people themselves consent to or reject a proposed constitutional document. For this reason, the rules for the bodies that are involved in this process must seek to ensure that the people speak in the clearest way possible.

A. *Ordinary Politics: Legislative Ratification*

[24] Bolivian Constitution, pt. V, art. 411. https://www.constituteproject.org/constitution/Bolivia_2009.pdf (December 9, 2016).
[25] Ecuador's Constitution, art. 444. https://www.constituteproject.org/constitution/Ecuador_2008.pdf (December 9, 2016).

From a normative point of view, ordinary institutions are disfavored as ratifying institutions. In contrast with the representative requirements of drafting, ratification generally requires the direct participation of the people through voting or other form of participation. There are two exceptions to this rule. First, a new constitutional norm can be ratified if two successive legislatures approve the language with an intervening election. This form of ratification allows an intervening election to serve as a referendum on draft constitutional changes and can provide time for a partisan majority to fade after a period to "cool down and reconsider" following from the "passion of the moment" (Venice Commission 2010, 19, para. 95). Second, ordinary subnational legislatures sometimes ratify new constitutional text. For instance, in the United States, state legislatures ratify constitutional amendments proposed by the federal legislature (U.S. Const. art. V).[26] The rules concerning legislative ratification are generally well-settled laws of ordinary politics; they are therefore less likely to be manipulated by a status quo elite or a majority faction.

B. *Extraordinary Politics*: *Constitutional Referendums*

The institution favored by democratic theory for ratifying a constitutional amendment or replacement is a referendum. Referendums are seen as giving the people an opportunity to directly ratify or reject constitutional law. In general, they are widely considered to be a critical institution in unleashing popular participation and deliberation (see generally, Morgan 2015). This is underpinned by an idea that they allow "the people" to circumvent the old regime institutions of the pre-existing regime and "return

[26] Brown (1935) describing how there was some disagreement about the way in which specialized constitutional conventions should be constituted in ratifying the twenty-first amendment.

the direct power to the people" (Tierney 2009, 367).[27] Referendums therefore play a highly important role in "the most fundamental acts of constitutional self-definition" (ibid., 366). Furthermore, because of their capacity to engage the public, referendums can also help to ensure a better form of elite deliberation at the drafting stage. In particular, they place a "downstream constraint" on drafting that can help to improve the deliberation process at the earlier drafting stage.[28]

As with drafting institutions, the rules regarding referendums are critical to ensuring that referendums live up to these normative ideals. Despite the importance of these rules—including the timing of the referendum, the setting of the question, defining the franchise, regulating the campaign and ballot procedure—these rules are generally unregulated by constitutions. Recent work has sought to find some of the best ways to improve the nature of referendums. For instance, Stephen Tierney's research has sought to better understand what legal rules can be introduced to render referendums more deliberative (Tierney 2014). Looking to recent examples in Northern Ireland and Australia, Tierney argues that legal regulation can transform referendums into mechanisms that enhance "deliberative decision-making" (Tierney 2009, 44).

Selection rules. Selection rules for referendums involve important questions about the selection of the electorate as well as the rules about the way that constitutional language is proposed and understood. Rules should seek to avoid the manipulation of language for partisan outcome. With constitutional amendments, for instance, some American state constitutions contain referendum rules such as the single subject rule (Cooter and Gilbert 2010). The Florida Constitution states that any revision or amendment of the Constitution

[27] For more on dualism and referendums, see Tierney (2009, 366).
[28] Setala (2006, 718) exploring the benefits of ex post referendums in encouraging better deliberation.

"shall embrace but one subject and matter directly connected therewith" (Fla. Const. art. XI, § 3). These rules seek to ensure that referendum voting is clearer and transparent.

Another key selection rule should state that voters have access to impartial information. Some constitutions include these requirements. The Colorado Constitution, for instance, includes provisions requiring that a "nonpartisan research staff" should present a "fair and impartial analysis of each measure" that is then distributed to registered voters statewide (Colo. Const. art. V, § 1(7.5)(a)). In other cases, these rules exist at the level of ordinary legislation. For instance, Australia has a clear law on referendums that regulates the way in which information is given to voters in the election process. In particular, it provides a short case "for and against" a proposal for constitutional change to be prepared by Members of Parliament who voted for and against the bill as it went through Parliament.[29] Australian law also has extremely strict regulations governing political advertising during referendum campaigns (AEC 2015).

Decision rules. Another important rule is the threshold required for the proposed constitutional language to be ratified in a referendum. There are generally two options: the requirement of a simple majority or one of an absolute majority. For major constitutional changes, an absolute majority requirement is to be preferred as it ensures that constitutional text is only ratified in a vote that engages a large percentage of the population. For instance, in Estonia, an electoral commission decreed that the referendum would only be valid if more than 50% of the voters participated. This wide participation helped to enhance popular engagement with the new constitution (Partlett 2015).

Relationship rules. A final set of rules involves the relationship between referendums and pre-existing institutions. These rules determine both when and how referendums are

[29] Referendum (Machinery Provisions) Act 1984 s. 11.

activated and their effect (Australian Constitution, s. 128). One important principle for these rules should recognize that referendums are a second ratification step after the drafting step. Thus, referendums should automatically be called to allow the people to directly consent to language formulated at the drafting stage. Many constitutions require this, including following extraordinary bodies such as constitutional conventions. The Arizona Constitution states that a convention is for "propos[ing] alterations, revisions, or amendments" and that any changes require them to be "submitted" to the people before they become "effective."[30] Another important relationship rule should state that referendums present the binding final word on specific issues. For instance, the Colorado Constitution states that all aspects of the referendum process of amendment are "self executing."[31]

A final set of relationship rules governs the extent to which referendums can be used to activate a formal constitution-making process in the first place. In these cases, rules should be adopted which ultimately ensure that there is broad popular support for a referendum. For instance, many states include rules that require a certain percentage of the electorate to call a petition. In Oregon, for instance, a popular petition for a referendum requires it to be signed by 8% of the total number of votes cast for the previous gubernatorial election (Ore. Const. art. IV, §§ 1, 2(c)). Rules should be careful not to allow the unilateral calling of a referendum by one group; for this reason the executive branch should not be given unilateral power to call a referendum.

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[30] Ariz. Const. art. XXI, § 2. http://www.azleg.gov/FormatDocument.asp?inDoc=/const/21/2.htm (December 9, 2016).

[31] Colo. Const. Section 10. art. XIX, § 2(1) http://law.justia.com/constitution/colorado/ (December 9, 2016).

V. Expanded Revision Clauses

This analysis has clear implications for expanding revision clauses in democratic constitutions. These expanded provisions in turn can help ensure that legal rules are in place that ensure more frequent and more inclusive formal constitutional change.

A. *Nature of Regulation*

Before we consider the expansion of the constitutional regulation of constitutional change, we must confront some objections. First, one might object that the people's original constituent power requires the possibility of a constitutional replacement process that takes place outside of the legal track. Under this view, any expansion of constitutional rules governing constitutional change seemingly violate the original right of the people to draft a new constitution outside of pre-existing law (Kay 2011, 745).

This objection, however, is answerable. As described in Joel Colon-Rios' chapter in this book, the constituent power is not necessarily extinguished through regulation. Rules about certain institutions themselves need not hinder the openness of a process; they can actually help to ensure the expression of the people's constituent power. Furthermore, even the most revolutionary period of constitution-making must have rules to ensure coordination. This position accords with the view of constituent power held at the American founding. The Massachusetts General Court proclaimed in 1776 that the people have "Supreme, Sovereign, absolute, and uncontroulable Power" but this power *"never*

was, or can be delegated, to one Man, or few" (Wood 1969, 362).[32] In this view, delegating the full power of the people to a constitution-making body violates the concept of original constituent power because it would mean giving up popular power to a group of representatives. In Delaware, radicals called a runaway convention a body of "usurpers and tyrants" (Wood 1969, 333). Thus, they were careful to stress that the convention must simply propose a constitution or leave the people "with no rights at all" (ibid., 337). They argued that this body was to be "invested with powers to form a plan of government only, and not to execute it after it is framed. For nothing can be a greater violation of reason and natural rights, than for men to give authority to themselves" (ibid., 338).

Another related concern is that judicial enforcement of these rules itself raises concerns about status quo entrenchment (Tribe 1983, 436 and n. 13). In particular, if given too much power over constitution-making, an elite could use the court to block any change. One way to respond to this objection is to give courts a less active role in regulating the process. A way to do this is to place directive principles in expanded revision clauses rather than regular constitutional rules. If inserted as directive principles, these provisions could themselves be suited to local context while also helpfully structuring the politics of constitution-making. Courts can review this legislation—rather than any constitutional language itself—for its general adherence to these principles (Weis, N.d.). Thus, courts would be acting in a far less intrusive way than they would be in reviewing the substance of constitutional language (ibid.). In fact, a set of directive

[32] Underlying this fear was a deep fear of concentrating all power in one body. James Madison argued that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny": *The Federalist*, No. 47 (James Madison). Thomas Jefferson also worried about the dangers of concentrating all power in the hands of one body, commenting that "[o]ne hundred and seventy-three despots would surely be as oppressive as one": *The Federalist*, No. 48 (James Madison quoting Jefferson).

principles could help courts—as David Landau describes in his chapter—"shape" the process of constitution-making. These constitutional provisions would then be performing what Mark Tushnet describes as a "political" role by structuring political "dialogue" about the best expression of popular will in constitution-making (Tushnet 2006).

Comparative experience suggests that constitutional provisions can play an important political role in structuring the lawmaking of constitutional replacement. Bolivia's constitution included a newly drafted constitutional provision that covered the convoking of a constituent assembly. This replacement clause stated that the "total reform" of the constitution must be carried out by a constituent assembly, convoked by a "special law" approved by two-thirds of the members of the Congress, and which could not be vetoed by the president (Landau 2013, 952). During a highly contested constitution-making process, this clause forced both sides to compromise on the rules governing the constituent assembly. In particular, it placed significant constraints on President Evo Morales, because "it ruled out a strategy of making an end-run around Congress, as Chávez had done, and forced him to negotiate with the opposition in Congress" (ibid.). It also helped to generate an electoral rule that led to a highly representative electorate. Second, the law provided a key decision rule stating that the Assembly "will approve the text of the new constitution with two-thirds of the members present," and that once so approved the text would be put to the people in a referendum convoked by the executive, which would require approval by an absolute majority of votes. This in turn played a critical role in leading to what Landau has described as "a novel synthesis of ideas,

particularly in the incorporation of indigenous groups and in constructing a multicultural state" (ibid., 958).

B. *Expanded Revision Clauses*

What might such an expanded revision clause look like? One possible approach would divide it into two sections, one covering drafting institutions and the other ratification institutions. Each would contain a set of directive principles that would guide the law of constitution-making. These directive principles would ultimately seek to improve constitution-making by creating laws that avoided both status quo entrenchment and the threat of factions.

Drawing on the insights from this chapter, a section on "drafting institutions" should include a baseline directive principle that any legal regulation governing the selection, decision, and relationship rules of drafting institutions involved in formal constitutional change must be highly representative and participatory. This drafting institution section could then specify more specific directive principles. First, a selection principle could state that the selection of drafting bodies should be formulated in the most representative way possible. This would allow some different legislative solutions for elected bodies, including a proportional representation system or one that set aside a number of seats for minorities. It would also reduce the possibility that status quo interests could manipulate appointed commissions. Second, a decision principle could require drafting bodies to employ a version of a super-majority rule in making decisions—whether on text or those individuals actually drafting text. This would encourage compromise and negotiation. Finally, a relationship principle would call for laws limiting any drafting institution—

whether elected or not—from itself having the legal power to do anything other than propose constitutional text. Another relationship principle would state that the people cannot be blocked from calling an extraordinary drafting body. This would require legislation affording the people themselves the ability to circumvent ordinary institutions in calling a drafting body.

The section on "ratification institutions" should take a similar approach. A key baseline directive should state that all laws detailing selection, decisions, and relationship rules for ratifying institutions should be aimed at allowing the people to broadly consent to draft constitutional language. More specific rules should be built from this. First, a selection principle should ensure laws that provide the people with a clear choice on constitutional language. This could trigger a number of different legislative responses, which seek to ensure that the people are making an informed choice. Second, a decision principle could state that laws should be passed requiring more than a simple majority to ratify constitutional language. This would allow legislative flexibility in seeking to ensure that more people are engaged in the process of consenting to major constitutional changes. Finally, a relationship principle might call for laws stating clearly that the specified majority in the referendum is the *final* word on a constitutional draft and is not subject to review or refusal by any existing institutions.

Conclusion

This chapter has considered how the text of democratic constitutions might improve the high-stakes process of formal constitutional change. This responds to a real problem. Despite its romantic portrayal in much of the literature, formal constitutional change is a

dangerous moment for democracies. In fact, recent experience suggests that this process can be a powerful tool for those seeking to undermine democratic governance. Democratic constitutions must engage with these dangers, and seek to minimize the possibility of status quo or factional entrenchment.

This chapter suggests two main insights for improving formal constitutional change. First, it draws our attention to the critical role that normal legal rules play in ensuring that democratic constitution-making institutions allow the people to remake their constitutional order or enable an entrenched status quo or factional majority to consolidate power. Rather than ignoring the importance of these rules, democratic constitutions should include a set of directive principles which help ensure that the law of constitution-making is better designed and more productive.

Second, it demonstrates how the different *roles* played by constitution-making institutions can help devise directive principles for expanded revision clauses. During the drafting stage, the people's representatives are involved in *proposing* constitutional language. These drafting bodies should therefore have no special power to alter the constitutional landscape without the direct consent of the people. During the ratification stage, the people consent to language. If popular consent is given according to certain rules, this is an unreviewable statement of validity.

This more regulated approach to constitution-making is not just able to overcome the danger of faction. It is also more likely to encourage the people to engage in formal constitutional change in the first place. In fact, by reducing the significant uncertainty underlying this high stakes process, it will allow the people to more fully take part in their constitutional order. In this way, increased regulation will actually encourage the

people to more frequently express their constituent power and improve the nature of their constitutional democracy.

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