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## ARTICLES

### **THE CITIZEN AS FOUNDER: PUBLIC PARTICIPATION IN CONSTITUTIONAL APPROVAL**

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*Public involvement in constitution making is increasingly considered to be essential for the legitimacy and effectiveness of the process. It is also becoming more widespread, spurred on by constitutional advisors and the international community. Yet we have remarkably little empirical evidence of the impact of participation on outcomes. This essay examines hypotheses on the effect of one aspect of public participation in the constitution-making process—ratification—and surveys available evidence. We find some limited support for the optimistic view about the impact of ratification on legitimacy, conflict, and constitutional endurance.*

#### I. INTRODUCTION

In the summer of 1787, a small group consisting mostly of wealthy, property-holding white males gathered in Philadelphia to draft a written constitution for the United States, replacing the treaty-like Articles of Confederation.<sup>1</sup> Believing that secrecy was necessary for reflection and

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1. See, e.g., ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 2 (2001)

compromise, they did not invite the public either to observe or participate in their deliberations.<sup>2</sup> When their handiwork was complete, they sent it on to the states for a more public ratification process, conducted by legislatures and specially formed constitutional conventions.<sup>3</sup> This process has been called the invention of ratification.<sup>4</sup> Notwithstanding periodic critiques of its suboptimal, and perhaps even antidemocratic, elements,<sup>5</sup> the resulting document is widely venerated and seen by many Americans as central to the country's enduring power and prosperity.<sup>6</sup> It has spurred imitation by subsequent constitutional designers from Australia to Zambia.<sup>7</sup>

Of the many innovations of the American Constitution, ratification is among the most important.<sup>8</sup> Techniques vary, but an increasingly common approach is direct public involvement in approving the constitutional draft in an up or down vote.<sup>9</sup> In France, for example, in 1795 a plebiscite ratified the French Constitution of the Year III.<sup>10</sup> Ratification is part of a wider trend toward public participation. It is widely accepted that a representative, open process with direct public input is, on balance, good for setting the course for the democratic state.<sup>11</sup> Inspired by recent high-profile cases, such as South Africa in 1993, in which public consultation was extensive, scholars and practitioners have come to view a high level of popular participation as necessary for a constitution to be regarded as legitimate and relevant by the citizenry.<sup>12</sup> Vivien Hart's report, commissioned by the United States Institute of Peace, summarizes the prevailing view

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(noting small number of delegates and observing that many Framers were slaveholders); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 11 (1996) (recounting perceived necessity to replace Articles of Confederation).

2. RAKOVE, *supra* note 1, at 13, 132.

3. *Id.* at 102–08.

4. *Id.* at 96–98.

5. See DAHL, *supra* note 1, at 15–20 (noting that Constitution contained shortcomings when judged by later generations); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 9 (2006) (criticizing Constitution and calling for new constitutional convention).

6. DAHL, *supra* note 1, at 122.

7. See, e.g., AMERICAN CONSTITUTIONALISM ABROAD: SELECTED ESSAYS IN COMPARATIVE CONSTITUTIONAL HISTORY 5–9 (George Athan Billias ed., 1990) (examining influence of U.S. Constitution in different geographic regions); Franck Moderne, *Human Rights and Postcolonial Constitutions in Sub-Saharan Africa*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 315, 332–34 (Louis Henkin & Albert J. Rosenthal eds., 1990) (discussing influence of U.S. Constitutional traditions on African countries and focusing on use of judicial review in Ghana and Zambia).

8. RAKOVE, *supra* note 1, at 96.

9. See *infra* Figure 2 for an overview of the proportion of constitutions providing public ratification procedures over the last 200 years.

10. WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION 319–20 (2d ed. 2002).

11. See Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 668 (2006) (noting benefits of more participatory and inclusive constitution-building processes).

12. Yash Ghai, *Toward Inclusive and Participatory Constitution Making*, Presentation at The Constitution Reform Process: Comparative Perspectives 7 (Aug. 3–5, 2004) (transcript available at <http://www.idea.int/news/upload/Nepal%20-%20workshop%20paper%20-%20Yash%20Ghai.pdf>).

succinctly: “[p]articipatory constitution making is today a fact of constitutional life as well as a good in itself.”<sup>13</sup>

There are, of course, multiple aspects of the constitutional design process that deserve scrutiny, ranging from the sequence and organization of drafting stages, to internal rules of order, to the selection of the actors involved.<sup>14</sup> Our focus here is on the degree of public involvement in approval of the constitution document. Drawing on our ongoing project to understand the causes and impacts of particular design choices in the creation of written constitutions, we ask whether more participatory approval processes produce systematically different types of constitutions than those with less public involvement.<sup>15</sup> Although available data are insufficient to answer many questions about participation and constitutional design, we provide some suggestive evidence here.

This Article is organized as follows. Part II discusses the concept of participatory constitutional design in general and explores the variety of ways in which citizens can have input into the constitution-making process. Part III summarizes hypotheses from the existing literature about the relationship between ratification and the constitution that emerges from the process. Part IV tests some of these hypotheses and provides some preliminary empirical evidence. Part V concludes. We find that constitution-making processes with more extensive public involvement in ratification tend to produce documents with a wider role for the public in the selection of executive leaders, as well as more direct forms of participation.

## II. PARTICIPATORY CONSTITUTIONAL DESIGN

We can say that constitutional design is more participatory if the mass public has more opportunities by which to both oversee and engage in the process. Participation through oversight, through direct input, and through ratification differ conceptually, but we treat them all as contributing to a process in which the citizen is “involved” in some sense. It is not hard to imagine how citizens would be involved, as potential roles in constitution making have direct parallels to roles that citizens play under ordinary democratic conditions.

Here we sketch the predominant forms of participation in order to provide some context. Others, notably Jennifer Widner, provide a comprehensive description of variation in the constitutional process.<sup>16</sup> In Widner’s

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13. VIVIEN HART, U.S. INST. OF PEACE, *DEMOCRATIC CONSTITUTION MAKING* 12 (2003).

14. See generally PROCEEDINGS, WORKSHOP ON CONSTITUTION BUILDING PROCESSES, A JOINT PROJECT OF THE BOBST CENTER FOR PEACE & JUSTICE, PRINCETON UNIVERSITY-INTERPEACE-INTERNATIONAL IDEA (May 2007), [http://www.princeton.edu/bobst/docs/Edited\\_Proceedings\\_1\\_\(2\).doc](http://www.princeton.edu/bobst/docs/Edited_Proceedings_1_(2).doc) [hereinafter PROCEEDINGS] (discussing multiple aspects of constitution-building processes that require further investigation).

15. Comparative Constitutions Project, <http://www.comparativeconstitutionsproject.org> (last visited Jan. 7, 2009).

16. Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513, 1525 (2008).

conceptualization, the phases of constitution making include drafting, consultation, deliberation, adoption, and ratification.<sup>17</sup> Actors involved can include members of expert commissions, legislative bodies or committees, the executive, the judiciary, national conferences, elite roundtables, transitional legislatures, specially elected constituent assemblies, interest groups and nongovernmental organizations, foreign advisors, and the public itself.<sup>18</sup> Multiple insertion points thus exist for involving the citizenry in constitutional design processes.

The modal form of participation in constitutional design is the power to ratify or approve the charter, usually by referendum on the final document as a whole.<sup>19</sup> Clearly, this final step is limited in that it involves an up or down vote. As in day-to-day operation of direct democracy, citizens are voting for a highly circumscribed and aggregated set of choices. Nevertheless, the frequency of ratification suggests that this dominant modality is even more common than other mechanisms of direct democracy.<sup>20</sup> Because, in democratic theory, the people are sovereign, it is seen as necessary to have popular imprimatur on the founding document for the polity.<sup>21</sup>

It is important to mention, however, that participation in constitutional design is increasingly more direct and penetrates more deeply—or at least earlier—in the process. One common approach is to involve the public in selecting those who will draft or deliberate over aspects of the charter.<sup>22</sup> Such is the case if the group in question is a constituent assembly elected expressly for that purpose, or a regular legislature that takes on the project in addition to other duties. While the choice between a special constitutional assembly and a legislature may have profound implications for constitutional design,<sup>23</sup> 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.

Of the two models, the model of a special assembly appears to solve a problem of conflict of interest. The legislative model involves electing a legislature to accomplish ordinary governance tasks at the same time, so that

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17. Widner, *supra* note 16, at 1522.

18. *Id.* at 1527–28.

19. *See id.* at 1525 (noting that between 1987 and 2002, over half of constitution drafts were approved in deliberative bodies and nearly half of constitutions drafts were modified by public referenda).

20. *See generally* THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 38–59 (1989) (recounting development of direct democracy in America).

21. Lawrence G. Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417, 422 (1981) (noting that ratification process legitimizes Constitution as democratic in same way that legislative process legitimizes legislation).

22. *See* Widner, *supra* note 16, at 1522 (noting that since 1987, delegates for constitution drafting were popularly elected in sixty-five percent of cases).

23. *See* Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 380–81 (1995) (noting that ordinary legislature participating in constitution-making process will tend to “give preponderant importance to the legislative branch”).

choices about constitutional design are bundled with other concerns. Constitutional preferences may be traded off against other concerns in choosing a representative. In addition, there is a suspicion that legislators will aggrandize their own institution in designing a governance structure<sup>24</sup> (although our preliminary review of the evidence suggests that this is decidedly not the case). In either case, however, the mode of public participation is decidedly indirect.

Another mode of public participation involves direct consultation with the public or representative groups at various stages, which might occur before, during, or after the drafting of the initial text.<sup>25</sup> The drafting phase would seem to be especially crucial, since we can expect a fair degree of inertia in the process. But the phase is also likely to be the least participatory, given the challenges of writing by committee, much less “writing by nation.” Indeed, in some well-known cases, the public was excluded from the drafting process and not consulted at all.<sup>26</sup>

But consultation can occur even if the drafting is monopolized by a relatively small group, and serves the function of providing information to decision makers about the preferences of the public while informing the public about possible outcomes.<sup>27</sup> This allows correction if the current proposal or draft is wildly out of sync with expectations. Consultation also plays a legitimating role, at least when there is the appearance of listening to the views expressed.<sup>28</sup>

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24. *Id.*; cf. Yash Ghai & Guido Galli, *Constitution Building Processes and Democratization*, 2006 INT'L IDEA 10 (noting that electing legislators to draft constitution may complicate process by providing one group with too much power); Kirsti Samuels, *Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies*, 2006 INT'L IDEA 29 [hereinafter Samuels, *Constitution Building Processes*] (noting that less representative processes can lead to undemocratic retention of legislative power by particular groups); Samuels, *supra* note 11, at 668–69 (noting that where one interest dominates constitution-making process, it tends to entrench its own power). See generally Ghai, *supra* note 12, at 6–7 (describing role of various institutional actors in processes of constitutional change).

25. Ghai & Galli, *supra* note 24, at 16; Ghai, *supra* note 12, at 5–6; see also Samuels, *Constitution Building Processes*, *supra* note 24, at 22–29 (discussing level of public participation in twelve constitution building processes); PROCEEDINGS, *supra* note 14, at 19 (encouraging public participation before drafting initial text).

26. In the case of Japan in 1946, a small group of American bureaucrats working for the occupation authorities drafted the initial text in a little under a week. RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR 106 (2002). Another common model utilizes “Round Table Talks,” used extensively in Eastern Europe after the fall of communism. JON ELSTER, CLAUS OFFE & ULRICH K. PREUSS, INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES 57 (1998). This is equivalent to constitutions produced in peace talks held as part of ongoing processes of conflict resolution. In these models, the fundamentals of the bargain are produced in negotiation among a small group of relevant actors, who may or may not be representative of the broader society but wield effective veto power over outcomes.

27. See James Thuo Gathii, *Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya*, 49 WM. & MARY L. REV. 1109, 1117–18 (2008) (discussing Kenyan review team’s wide public consultation); Vivien Hart, *Constitution-Making and the Transformation of Conflict*, 26 PEACE & CHANGE 153, 160 (2001) (recognizing need for public participation in top-down process).

28. See Widner, *supra* note 16, at 1519–20 (discussing consultative processes and their legitimating effects).

When it occurs, consultation can involve ordinary citizens, civil society groups, political parties, functional constituencies, or other segments of the population. A key variable here is not only who participates, but how effective such meetings are in terms of generating real input into the process. The hope is that consultation will provide direct substantive input into the constitutional draft, as opposed to relying exclusively on elites—however selected and however representative—to prepare the document. Still, consultation is a top-down, educative affair, in which elites reveal their deliberations to a larger public in an effort to solicit feedback and corroboration.<sup>29</sup> Some constitutional processes have experimented with more bottom-up methods of direct democracy, such as the citizen initiative, in which ideas can bubble up from civil society.<sup>30</sup> We cannot say much yet about the effect of such methods, although anecdotal accounts, such as the report that citizens submitted 61,000 proposals to Brazil's Congress, suggest the magnitude of the challenges involved.<sup>31</sup>

Finally, in some cases, participation and consultation are minimal, yet the public may exercise some oversight. In this mode, the public observes the process and product at various stages, without having direct input.<sup>32</sup> The media can play an important role here, as can civil society organizations. Many constitutional debates, like ordinary legislative debates, are increasingly televised.<sup>33</sup> If we believe that delegates will behave differently when facing the nation than they will when facing their colleagues (and a gallery), then such oversight can be consequential indeed. Evidence suggests, for example, that such delegates take the opportunity to express themselves in greater length or more often than they would otherwise.<sup>34</sup>

One can think about all of these forms of public participation as a constraint on the adoption of institutions. Elster develops the useful distinction between “upstream” and “downstream” constraints in the process: upstream constraints are imposed by the powers setting up the constitution-drafting body, while

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29. See Samuels, *Constitutional Building Processes*, *supra* note 24, at 11–12, 15–16 (demonstrating elite solicitation of public feedback in Colombia, Guatemala, and Fiji's constitution-building processes).

30. See DEVRA C. MOEHLER, *DISTRUSTING DEMOCRATS: OUTCOMES OF PARTICIPATORY CONSTITUTION MAKING* 28–32 (2008) (identifying examples of constitution-making processes incorporating input derived from public participation).

31. Jamal Benomar, *Constitution-Making After Conflict: Lessons for Iraq*, 15 J. DEMOCRACY 81, 89 (2004); see also MOEHLER, *supra* note 30, at 57 (discussing submission of over 25,000 suggestions from Ugandan public during constitution-making process).

32. Widner, *supra* note 16, at 1524–25.

33. See, e.g., Angela M. Banks, *Challenging Political Boundaries in Post-Conflict States*, 29 U. PA. J. INT'L L. 105, 126 (2007) (discussing televised meeting presenting draft Rwandan constitution); Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1, 58 n.239 (1990) (noting that televised debates were held in Nicaragua about draft constitution).

34. See generally Franklin G. Mixon Jr., David L. Hobson & Kamal P. Upadhyaya, *Gavel-to-Gavel Congressional Television Coverage as Political Advertising: The Impact of C-SPAN on Legislative Sessions*, 39 ECON. INQUIRY 351 (2001) (examining television's effect on increasing legislative session length).

downstream constraints result from the anticipation of final-stage gatekeepers.<sup>35</sup> Ratification is, thus, a downstream constraint that can hamstring leaders in an earlier stage who recognize that their document must ultimately obtain public approval. Although only one of many points in the process in which public participation can be realized, it is the key point, and can have significant impact on upstream processes of constitutional design.

### III. PARTICIPATION, CONSTITUTIONS, AND DEMOCRACY: SOME HYPOTHESES

Public involvement in constitutional design shares many of the characteristics, vices, and virtues that scholars ascribe to participation more generally. Participation has both costs and benefits, and in this Part we survey some of the general claims in the literature about the effects of participation in order to consider possible impacts in the constitutional setting. We consider effects on the system as a whole (that is, broad political and economic outcomes), effects on the citizenry, and effects on the constitution itself. As in so many areas of social science, the hypotheses about participation in constitution making are informed by deeper views about human motivation and the nature of social institutions.<sup>36</sup>

#### A. System-Level Effects

One prominent view highlighting the virtues of participation for democratic governance is associated with deliberative democracy.<sup>37</sup> Deliberative democracy theorists focus on the benefits of deliberation, consultation, and citizen involvement in government.<sup>38</sup> In this view, participation is not only a device to aggregate pre-existing preferences, but an opportunity to generate new ideas and institutions in the process.<sup>39</sup> Participation is said to “facilitate[] the flow of reliable information so that resulting policies are high quality, appropriate to circumstances, and congruent with citizen preferences.”<sup>40</sup> Deliberation is at the

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35. Elster, *supra* note 23, at 373.

36. See Robert H. Salisbury, *Research on Political Participation*, 19 AM. J. POL. SCI. 323, 323–24 (1975) (examining behavior in political participation).

37. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 287–328 (William Rehg trans., 1996) (discussing deliberative politics as key element of democracy); MOEHLER, *supra* note 30, at 182–85 (discussing effects of participation generally and as related to Ugandan constitution-building process); CASS R. SUNSTEIN, DESIGNING DEMOCRACY 6–8 (2001) (encouraging constitutional promotion of deliberative democracy).

38. See generally DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT (Stephen Macedo ed., 1999) (discussing value of deliberative democracy); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996) (examining deliberation in democracies in light of moral disagreement); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17 (Alan Hamlin & Philip Pettit eds., 1989) (discussing ideal deliberative democracy as one that promotes the common good and respects individual autonomy).

39. MOEHLER, *supra* note 30, at 185.

40. *Id.* at 13.

center of normative ideas about ideal democracy, and naturally is to be celebrated when considering the fundamental rules of a polity.<sup>41</sup> From this perspective, ratification is probably an insufficient instrument of engaging the public.<sup>42</sup> An up or down vote comes too late in the process to have a real impact, and the benefits of wide discussion cannot be included in the text if such discussion occurs after drafting.

Some scholars are more skeptical about the potential of deliberative democracy to really work, given the qualifications of citizens. Arguably, participation requires that citizens be capable of both moral reasoning<sup>43</sup> and basic social scientific reasoning.<sup>44</sup> We know an enormous amount about the limits of citizen competence, and what we know does not give us reason to be optimistic about the value of their contribution.<sup>45</sup> We also have reason to question citizen moral reasoning if we believe that they differ from elites with regard to their motivations. Some have suggested that citizens, to a greater degree than elites, are motivated more by self-interest than by ideals of community and good governance.<sup>46</sup> In this sense, participation may be instrumental, providing citizens an additional avenue to capture state benefits, protect interests, or gain power. Rather than promoting civil society and building democratic citizens, such self-interested participation may have the opposite effect.<sup>47</sup> These views are obviously more skeptical about the possibility of deliberation and the value of participation. From this point of view, limiting participation to an up or down ratification might be useful to achieve some legitimating benefits without sacrificing the content of the constitutions.

A related school associated with public choice economics is less skeptical about the value of participation, but more skeptical about the probability that it will occur.<sup>48</sup> Even when presented with opportunities to participate in deliberative and policy-making processes, most members of the public may

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41. See GUTMANN & THOMPSON, *supra* note 38, at 12 (describing deliberation as integral part of republican government).

42. See Ghai & Galli, *supra* note 24, at 16 (discussing necessity of continuous public engagement in constitution-making process); John M. Carey, *Parchment, Equilibria, and Institutions*, 33 COMP. POL. STUD. 735, 753 (2000) (discussing Russian constitutional failure after ratification in which there was no deliberation).

43. JOHN RAWLS, *A THEORY OF JUSTICE* 6 (1971).

44. Sidney Verba, *Would the Dream of Political Equality Turn Out to Be a Nightmare?*, 1 PERSP. ON POL. 663, 668 (2003).

45. See generally Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, in IDEOLOGY AND DISCONTENT 206 (David E. Apter ed., 1964) (arguing that citizens often lack coherent belief systems). For a contrary view arguing that the public can make reasoned political decisions, see generally ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (1998).

46. See, e.g., THOMAS R. CUSACK, *A NATIONAL CHALLENGE AT THE LOCAL LEVEL: CITIZENS, ELITES AND INSTITUTIONS IN REUNIFIED GERMANY* 91-93 (2003) (explaining that individuals with less human capital would tend to act with self-interest in choosing their governmental system).

47. Ghai & Galli, *supra* note 24, at 16.

48. See, e.g., Tom Ginsburg, *Ways of Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship*, 2002 U. ILL. L. REV. 1139, 1140-48 (describing public choice theory).

remain rationally ignorant, given the investment required to become informed about issues and the relatively small share of gains any individual will enjoy.<sup>49</sup> Those most likely to exercise voice are those with the most at stake, and so it is easy to see how interest group activity can overwhelm public-minded principles.<sup>50</sup> Of course, these arguments have always been embarrassed by rates of voter turnout that defy expectations.<sup>51</sup> Advocates of the rational model reply that voting is almost costless, such that even the negligible benefits of voting are enough to push citizens to the ballot box.<sup>52</sup> Some of the more costly modes of participation in constitutional design, however, would attract few takers. But the benefits of participation may also soar during times of “high politics” such as constitutional design.<sup>53</sup> The high stakes of constitutional politics may be more likely to induce rational participation than would those in the ordinary legislative sphere in which these ideas were developed and most often applied.<sup>54</sup> Thus, one should expect that problems of capture by narrow interest groups will be relatively less severe in the constitutional setting, while not being eliminated entirely.<sup>55</sup> In Elster’s terms, interest will be balanced with passion and reason.<sup>56</sup>

#### B. *Effects on Citizens*

Another set of claims focuses on the effects of participation on the citizenry.<sup>57</sup> Participation conceivably inculcates democratic skills, habits, and values such as trust, tolerance, and efficacy—attributes that may be good in themselves but that may also trickle up to provide system-level benefits.<sup>58</sup> Mansbridge summarizes the view, and empirical support for it, thusly: “[p]articipation does make better citizens. I believe it, but I can’t prove it. And

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49. *Id.* at 1146.

50. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

51. Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2137 (1996).

52. Gordon Tullock, *Some Further Thoughts on Voting*, 104 PUB. CHOICE 181, 181 (2000). See generally John H. Aldrich, *When Is It Rational to Vote?*, in *PERSPECTIVES ON PUBLIC CHOICE* 373 (Dennis C. Mueller ed., 1997) (examining theories of rationality of voting).

53. See Aldrich, *supra* note 52, at 374 (noting that voter turnout is higher in elections with greater political stakes).

54. Bruno S. Frey, *Economic Policy by Constitutional Contract*, 32 KYKLOS 307, 317 (1979). See generally Ginsburg, *supra* note 47 (criticizing and revising public choice theory).

55. See, e.g., Jane Mansbridge, *Does Participation Make Better Citizens?*, GOOD SOC’Y, Spring 1995, at 1, 1 (arguing that participation in politics makes better citizens), available at <http://www.cpn.org/crm/contemporary/participation.html>.

56. Elster, *supra* note 23, at 377–86.

57. See, e.g., BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE*, at xv (1984) (arguing that “democracy is the condition of autonomy” and that people cannot become individuals “[w]ithout participating in the common life that defines them”).

58. *Id.* at 152 (stating that participation strengthens democratic institutions); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 42–43 (1970) (arguing that participation makes democracy self-sustaining); Mansbridge, *supra* note 55, at 1 (noting positive impact of participation on citizen character).

neither can anyone else.”<sup>59</sup> The act of participation also serves to educate citizens on matters of public import, accelerating the acquisition of political information and equipping citizens to evaluate their government more critically.<sup>60</sup> This in turn may lead to better quality and more legitimate policies. In the constitutional setting, this argument suggests that participation in ratification promotes democratic values in citizens and educates them in the operations of democratic processes as well as the contents of the constitution.<sup>61</sup> This may increase the likelihood of the success of democracy at the regime level. Thus participation in the constitutional approval process will carry over to governance under the constitution once adopted.

A more skeptical view is implicit in an older line of theory concerned about the universality of the participation model.<sup>62</sup> Rather than enhancing democracy, participation can undermine it in some contexts, particularly if participation expands beyond the scope of elites.<sup>63</sup> In this view, the average citizen is ill informed and can be easily deceived by opportunistic politicians upon his or her entry into the public sphere.<sup>64</sup> In addition, mass participation may overwhelm the institutional capacity of some states to effectively channel mass political activities through legal avenues.<sup>65</sup> The threat of instability and disorder is deemed too high to risk widespread popular participation.<sup>66</sup> Introducing highly participatory processes in premodern societies may exacerbate conflicts among citizens over resources, identity, or other societal cleavages.<sup>67</sup> This could ultimately prevent a constitution from emerging, or hinder its operation once adopted, through the intermediate effect on citizens.

### C. *Effects on the Constitution*

Will constitutions produced through participatory processes be systematically different from other constitutions? Stefan Voigt voices a practical concern related to the consequences of participatory constitutional design

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59. Mansbridge, *supra* note 55, at 1.

60. *Id.* at 5–6.

61. See generally BARBER, *supra* note 57, at 135 (arguing that in “strong democracy” political conflicts result in civil education).

62. See, e.g., SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 97–99 (1960) (recounting examples where mass participation of middle class citizens resulted in extreme and intolerant movements).

63. See *id.* at 122 (observing that when lower classes endorse extremist party, liberty might be sacrificed for promise of equality and economic security).

64. *Id.* at 97–99.

65. See, e.g., SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 4 (1968) (noting that “rapid mobilization of new groups into politics” produced “violence and instability” in some nations).

66. See *id.* at 1–6 (correlating political instability with mass participation in political process).

67. See Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69, 91 (1959) (suggesting that conditions common to modern societies moderate conflict).

processes for textual coherence.<sup>68</sup> As Donald Horowitz notes, even under the best of circumstances, constitutional “design”—a term he reserves for a cohesive process—is quite rare, with some process of incremental construction more the norm.<sup>69</sup> Constitution making frequently consists of a combination of institutional borrowing, wholesale grafting, log-rolling, and improvisation.<sup>70</sup> As new, and more, actors become involved in the process, bargaining and negotiation become both more extensive and intensive.<sup>71</sup> In addition, the populace may be subject to cascades that exacerbate the element of “passion” in constitutional design.<sup>72</sup> The constitution that emerges from this process will almost certainly be an ad hoc creation, rife with internal inconsistencies and institutional mismatches. While the loss of design consistency may be compensated for by the resultant gains in legitimacy,<sup>73</sup> it may also render the constitutional scheme unworkable. Additionally, simply increasing the number of actors is no guarantee of a more equitable outcome. The composition of a deliberative body is as important to the ultimate outcome as the number of members; extreme outcomes can emerge from a collective decision-making process.<sup>74</sup>

A different line of critique emphasizes the difficulty of reaching agreement. More actors will, *ceteris paribus*, increase the transaction costs of negotiation, particularly when participants have veto powers over the adoption of new rules.<sup>75</sup> A more open process can also make bargaining and the granting of concessions more difficult.<sup>76</sup> This is in part because the drafters will feel the need to signal positions to their constituents outside the process, potentially leading to more extreme positions.<sup>77</sup> The drafters may also be interested in using the bargaining process to grandstand, decreasing the possibility of agreement. Open

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68. See Stefan Voigt, *The Consequences of Popular Participation in Constitutional Choice — Towards a Comparative Analysis*, in DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATIVE DEMOCRACY 199, 219–20 (Anne van Aaken et al. eds., 2004) (arguing that increased public participation in constitution drafting can lead to more conflicting interests being represented and thus less overall document consistency than would be produced by homogeneous group of drafters).

69. Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, in THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY 15, 16–18 (Andrew Reynolds ed., 2002).

70. *Id.*

71. See *id.* at 15–18, 35–36 (suggesting that participation requires concessions and bargains resulting in “constructed” rather than “designed” constitutions).

72. See Elster, *supra* note 23, at 382–84 (discussing role of “passion” in constitutional design).

73. Horowitz, *supra* note 69, at 36.

74. See SUNSTEIN, *supra* note 37, at 36–37 (noting that groups of people can reach highly polarized positions in public institutions).

75. See generally GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 17–63 (2002) (discussing inverse relationship between number and diversity of participants who have ability to veto change and likelihood of changing current policy).

76. Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191, 225 (1995); see also Elster, *supra* note 23, at 388 (stating that public process impedes genuine discussion).

77. See Elster, *supra* note 23, at 388 (noting potential for “overbidding” and “grandstanding” in public debate context).

processes of negotiation will tend to hinder tough choices and compromise.<sup>78</sup> Public ratification has two potential impacts here. First, it can constrain upstream actors, who will not want to include particular institutional choices that may be controversial.<sup>79</sup> On the other hand, the public itself might be constrained by the very knowledge that producing an agreement was so difficult.<sup>80</sup> Knowing that a rejection will send the drafters back to the drawing board can, perversely, encourage the public to ratify a suboptimal document.

One of the strongest theoretical claims about popular participation concerns a constitution's ability to constrain government. If citizens are to effectively police the actions of government, it must be sufficiently clear what constitutes a violation of the limits of governmental power so that citizens can mobilize to prevent it.<sup>81</sup> Constitutions help resolve this coordination problem by generating common knowledge about the scope of acceptable government behavior and by providing a focal point for citizens to coordinate enforcement efforts.<sup>82</sup> To the extent that popular ratification of a constitutional design process serves to construct focal points, it will facilitate the coordination needed to deter potential constitutional violations by government. In the most optimistic scenario, the presence of a focal point in the written text, when coupled with the more robust civil society that emerged as part of a participatory design process, will ensure that the constitution will be enforced and not serve as a mere parchment barrier.<sup>83</sup>

Voigt develops a set of hypotheses relating inclusive participation to substantive outcomes.<sup>84</sup> He suggests that inclusive processes will lead drafters to create more independent bodies, delegating powers away from the legislature.<sup>85</sup> This is a corollary, of sorts, to the prediction that the legislative model will concentrate powers in the legislature.<sup>86</sup> Voigt also believes that participatory documents will be more stable, in that there will be fewer demands for renegotiation down the road.<sup>87</sup> He also shares the view that participation in a

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78. *Id.*

79. *Id.* at 374.

80. *See id.* at 373–75 (discussing impact of downstream constraints on decision making in context of ratification by entity or institution).

81. Carey, *supra* note 42, at 749.

82. *Id.*; *see also* Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 246–51 (1997) (developing game theory model to explain how citizens assert their rights against their representatives).

83. Carey, *supra* note 42, at 749.

84. Voigt, *supra* note 68, at 217–24.

85. *Id.* at 219.

86. Elster, *supra* note 23, at 380; *see also* SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 141 n.52 (2004) (noting that, after East Timor mandated legislative assembly to define scope of its own powers, legislature granted itself broad powers).

87. Voigt, *supra* note 68, at 220.

ratification process should lead to more legitimate documents because the process will generate and reinforce public knowledge of the contents.<sup>88</sup>

We might also speculate on further implications for constitutional design. One influential view of constitutions conceives of them as a social contract among the citizenry, designed to limit the threat from government.<sup>89</sup> In this view, one would expect that more participatory processes work like supermajority rules. As the veto power of minorities increases, one might expect the adoption of more minoritarian institutions, such as judicial review,<sup>90</sup> bicameralism, and, assuming that relevant cleavages are geographically concentrated, federalism. Supermajoritarian processes might produce supermajoritarian rules and institutional configurations, to the extent that a rule-making body will produce others in its likeness.

We might also expect that as the power of the citizenry in design processes increases, the number and extent of constitutional rights will increase as well. The American case, in which the Bill of Rights was inserted only after public discussion and debate, makes the point quite dramatically.<sup>91</sup> The Anti-Federalists wanted to include a bill of rights in the original bargain, and were able to gain agreement on this during the ratification process as a condition of approval.<sup>92</sup> Participation, then, begat a more extensive set of limitations on federal power. In more recent examples, we might expect that participation would be associated with “positive” socioeconomic rights, as the constitution becomes an instrument of redistribution.<sup>93</sup>

A related point is that participation may also lead to more specific and detailed constitutional documents.<sup>94</sup> Analogizing to contracts literature, more diverse parties are likely to want to specify their bargain in greater detail because of distrust of counterparties and concerns about strategic nondisclosure of preferences during the bargaining process.<sup>95</sup> Thailand’s 1997 document, for example, was designed to limit political institutions by setting up a large number

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88. *Id.* at 221–22 (hypothesizing that regime will possess higher level of legitimacy if large part of population can participate in rule-creation process).

89. Christine Sypnowich, *Ruling or Overruled? The People, Rights and Democracy*, 27 OXFORD J. LEGAL STUD. 757, 759 (2007) (asserting that social contract theory is common view of constitutional interpretation).

90. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 25–30 (2003).

91. Arato, *supra* note 76, at 225.

92. See RAKOVE, *supra* note 1, at 325–28 (examining Anti-Federalist role in adoption of U.S. Bill of Rights).

93. See HART, *supra* note 27, at 168–69 (discussing subclauses of South Africa’s Article 25 allowing state to redistribute land in order to accomplish “restitution of property dispossessed by racially discriminatory practices”).

94. Stefan Voigt, Explaining Constitutional Garrulity 9–10 (Oct. 2007) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1021023](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1021023).

95. *Id.* at 11.

of watchdogs, all elaborated in excruciating detail in the constitution.<sup>96</sup> Similarly, if the public perceives opportunities for participation to be episodic, there may also be a tendency to seek to constitutionalize various institutions that would ordinarily be left to nonconstitutional politics. An example here is Brazil, whose 1988 process involved extensive citizen proposals on content.<sup>97</sup> The resulting document is one of the world's longest.<sup>98</sup>

#### D. Summary of Hypotheses

To summarize these various claims about public constitutional design, we see a number of contradictory hypotheses. Participation in constitutional design has been hypothesized to destabilize fragile societies either by exacerbating conflicts over resources, activating latent identities such as ethnicity, or both.<sup>99</sup> Some have suggested participation will produce documents dominated by self-interest, while others believe it will maximize the common good by providing a more representative sample of interests and a deliberative process.<sup>100</sup> Skeptics believe that it will make agreement more difficult and lead to incoherent documents, which implies that actors will seek to embed their preferences in the constitution, but others believe that participation will fail to materialize in any meaningful way, as citizens will have insufficient incentives to contribute their views.<sup>101</sup> Optimists, on the other hand, believe that the documents produced by

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96. See James Ockey, *Change and Continuity in the Thai Political Party System*, 43 *ASIAN SURV.* 663, 667 (2003) (discussing Thailand's 1997 constitutional provisions establishing numerous monitoring institutions).

97. Benomar, *supra* note 31, at 89.

98. See Andrea Steuer Zago & Lionel Pimentel Nobre, *The Brazilian Citizen Constitution, the Environment and Taxation*, 20 *LOY. L.A. INT'L & COMP. L.J.* 507, 508 (1998).

99. See HUNTINGTON, *supra* note 65, at 32–39 (describing how group consciousness can serve as obstacle to creation of strong political institutions); Robert Melson & Howard Wolpe, *Modernization and the Politics of Communalism: A Theoretical Perspective*, 64 *AM. POL. SCI. REV.* 1112, 1120–21 (1970) (asserting that groups lacking power will question legitimacy of political order). *But see* Lipset, *supra* note 67, at 91–98 (noting that although intergroup conflict can lead to societal disintegration, social cleavages strengthen democratic institutions).

100. See Salisbury, *supra* note 36, at 335 (analyzing empirical and survey work indicating that increased participation by group leads to greater societal harmony). *But see* Steven E. Finkel, *The Effects of Participation on Political Efficacy and Political Support: Evidence from a West German Panel*, 49 *J. POL.* 441, 461 (1987) (concluding that voting engenders positive feelings toward ruling regime and that “[v]oting is not a means of personal empowerment”). *See generally* Lawrence A. Scaff, *Two Concepts of Political Participation*, 28 *W. POL. Q.* 447, 450–51 (1975) (observing that one concept of political participation emphasizes common good while another stresses advancing one's individual interests within political framework).

101. See SUNSTEIN, *supra* note 37, at 15 (indicating that deliberation within small groups of like-minded individuals can threaten social stability and lead to more extreme views within group); Arato, *supra* note 76, at 207 (describing detrimental effects of constituent power during French Revolution); Elster, *supra* note 23, at 377–82 (explaining how personal, group, and institutional interests affect constitution-making); Horowitz, *supra* note 69, at 26 (noting constitutional actors and ethnic groups favor and disfavor certain constitutional approaches, which can result in document containing elements from various methods); Salisbury, *supra* note 36, at 327 (analyzing instrumental perspective of political participation and its view that participation is means of enhancing one's personal or one's group benefits).

participatory processes will be more legitimate and effective and will lead to a better-informed citizenry with democratic habits, skills, and values, thus enhancing democratic performance in the postconstitutional period.<sup>102</sup> Finally, optimistic scholars think participatory processes will include more rights provisions and better enforcement mechanisms to protect them, including supermajoritarian institutions, and more public involvement in selecting government agents.<sup>103</sup>

As is readily apparent, even this partial list of hypotheses generated from the existing literature is expansive and internally contradictory. Some of the hypotheses posit long-term, remote outcomes, while others are directly related to the immediate product of the process—the constitution. Most are straightforward empirical questions, testable using appropriate data, and in the next Part we will consider evidence for some of the hypotheses.

#### IV. ASSESSING THE IMPACT OF PARTICIPATION IN CONSTITUTIONAL DESIGN PROCESSES

We reiterate that despite the current optimism about the merits of participation, we have very little general knowledge about the patterns and effects of participation. In this Part, we report some results from the Comparative Constitutions Project (“CCP”) that bear on the question of constitutional design. We draw on a sample of 413 constitutional cases for which we have data available, as part of our ongoing effort to map the world’s constitutional texts.<sup>104</sup>

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102. See PATEMAN, *supra* note 58, at 42–43 (highlighting educative impact of participatory process); Samuels, *Constitution Building Processes*, *supra* note 24, at 29 (concluding that more participatory processes provide opportunity for greater democratic education of population); Steven E. Finkel, *Can Democracy Be Taught?*, 14 J. DEMOC. 137, 140–41 (2003) (asserting that civic education increases political participation and “bolster[s] the core democratic orientations of political efficacy and tolerance” based on study of adult civic education programs in three countries); Finkel, *supra* note 100, at 443 (noting that some scholars hypothesize that participation in political process will increase government’s legitimacy in eyes of participants); Mansbridge, *supra* note 55, at 1 (concluding that “participation in democratic decisions positively affects citizen character” while admitting that such changes in character are difficult to measure); Samuels, *supra* note 11, at 665–66 (stating that participatory democratic structures “ensure peace and legitimacy”); Scaff, *supra* note 100, at 452 (noting Rousseau theorized that greater public participation leads to more legitimate government and freedom). *But see* MOEHLER, *supra* note 30, at 182–85 (concluding that participation in Ugandan constitution making “contributed to a decline in institutional trust” and “did not significantly enhance feelings of political capability”); Devra C. Moehler, *Participation and Support for the Constitution in Uganda*, 44 J. MOD. AFR. STUD. 275, 276 (2006) (claiming citizens active in constitution-making process are no more assertive than those who stayed at home).

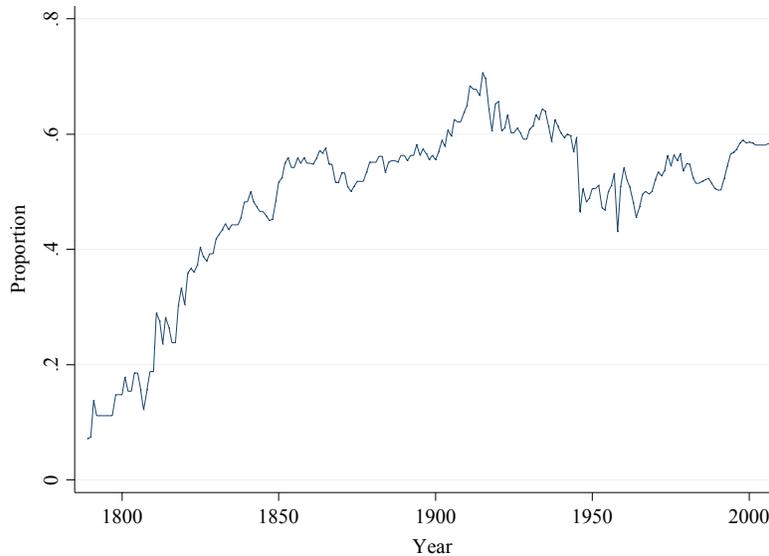
103. Samuels, *supra* note 11, at 668; *see also* Samuels, *Constitution Building Processes*, *supra* note 24, at 4–5 (asserting that inclusive processes result in constitutional drafts that provide more rights to previously neglected groups).

104. We have currently identified 801 total constitutional systems for all countries since 1789, but not all of these documents have been coded in our project at this stage.

A. *Descriptive Patterns*

Our information on promulgation comes largely from within the constitutional texts themselves. Not every such document provides details on its promulgation, but more than eighty percent do so. As Figure 1 demonstrates, there is a trend toward explicit elaboration of the means of promulgation in constitutional texts. This information was supplemented or confirmed through several outside sources.<sup>105</sup>

**Figure 1. Proportion of Constitutions in Force That Specify Some Promulgation Procedure**



Several different methods have been used to promulgate constitutions. The basic choices include promulgation by a specially constituted constituent assembly, a legislature, the executive, or the public through a referendum of some kind.<sup>106</sup> There are various combinations of these methods as well, and we identify forty-five different methods used to promulgate constitutional texts, though seventy percent of cases use one of six major methods.<sup>107</sup> Table 1

105. See generally CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1971) (providing series of updated texts, constitutional chronologies, introductory and comparative notes, and annotated bibliographies); Widner, *supra* note 16, at 1521–32 (providing comprehensive description of variations in constitutional writing process and related outcomes); Constitution Writing and Conflict Resolution, Case Files, <http://www.princeton.edu/~pewcr/data/cases.html> (last visited Jan. 6, 2009) (providing summaries of constitution-making processes of numerous countries). In the case of conflicting accounts, the promulgation process described in the constitution was controlling.

106. Widner, *supra* note 16, at 1527–28.

107. The role of executives in the promulgation process is relatively less clear. Various texts

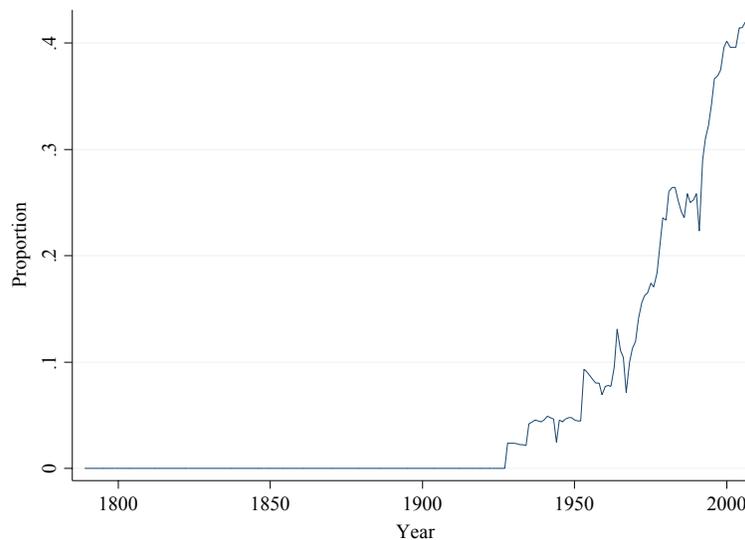
provides descriptive statistics on the frequency of various methods. It shows that some form of referendum is more frequent than either constituent assembly or legislative methods of constitutional promulgation. There is also a strong trend toward public referendum as a method of constitutional approval. Figure 2 indicates that over forty percent of constitutions currently in force have been adopted using some form of public referendum.

**Table 1. Frequency of Selected Promulgation Methods (N=413)**

Promulgation Method	Number	Frequency
Constituent Assembly Approval	59	14%
Constituent Assembly Approval and Executive Action	35	8%
Legislative Approval	57	14%
Legislative Approval and Executive Action	59	14%
People via Referendum (singly and jointly with other actors)	95	23%
Other	108	27%

**Figure 2. Proportion of Constitutions in Force That Provide for Public Ratification**

Universe: National constitutions that specify promulgation procedures



describe the executive as needing to “proclaim,” “enact,” “sign,” “ratify,” “approve,” or “promulgate” the constitution. It is not always obvious how ceremonious these actions are or if the executive is a legitimate veto player in the approval process. Rather than attempt to parse out the “true” meaning of these provisions, a broad, inclusive rule for the role of the executive is adopted. Any mention of the executive in the process is sufficient to warrant a coding of “executive action.”

*B. Does Participation Matter?*

Public approval forms a “downstream constraint” that designers must consider in selecting the substantive provisions of the constitution.<sup>108</sup> We should thus expect that constitutions that face popular scrutiny at the polls will differ from those constitutions not similarly situated. We speculate that a referendum-based promulgation process is more likely to produce constitutions with more public involvement in the ongoing operation of their government. To secure public approval, designers will likely have to produce more inclusive documents. In short, such constitutions will grant more “power to the people” than would otherwise be the case.

“Power to the people” can be conceptualized in two dimensions. The first is in the opportunity for the public to participate in the selection and removal of public officials. The second dimension relates to the ability of the public to participate directly in the law-making or constitutional amendment process. The general expectation is that constitutional provisions relating to each of these aspects of popular participation are more likely to result from a referendum-based process than from one that is not.

In terms of public involvement in selection and removal of public officials, the CCP survey instrument considers the role of the public in the selection process for six public offices: the office of head of state, head of government, deputy executive, national legislators, subsidiary legislators, and municipal officials. We expect that more of these offices will be elective under a referendum constraint in order to induce a positive endorsement by the people of the proposed constitution. Table 2 provides the patterns for referenda and the number of these offices that are elective. A simple t-test ( $p < .0006$ ) confirms that the mean number of elected executives is higher for constitutions involving a referendum (mean=2.26) than those without a referendum (mean=1.8).

**Table 2. Number of Elective Offices and Presence of a Ratification Referendum**

<b>Number of Elective Offices</b>	<b>Total Cases</b>	<b>Cases with Referendum</b>	<b>Percentage of Cases with Referendum</b>
0	45	2	4.44%
1	113	16	14.16%
2	132	44	33.33%
3	81	25	30.9%
4	36	4	11.1%
5	6	4	66.6%

108. Elster, *supra* note 23, at 374 (noting that knowledge of ratifying body’s preferences will act as constraint on what constitution drafters propose).

Conversely, where executives dominate the constitutional promulgation process we would expect that election would be less frequent. This is consistent with the idea of institutional self-interest in constitutional design.<sup>109</sup> We find some support for these speculations. In this instance, executive-only processes generate, on average, 1.17 elective offices while all other processes generate an average of 1.99 elective offices, a difference that is statistically significant at  $p < .001$ . The office of head of state is elective in just over fourteen percent of the cases in which the executive is the sole promulgator. Constituent assemblies make the office elective in fifty-nine percent of cases but this number drops to forty-three percent when an executive is added to the process. As expected, referenda appear to increase the likelihood of this office being elective, as sixty percent of referendum-only processes contain this provision and sixty-six percent of promulgation processes that include a referendum provide it.<sup>110</sup> Taken as a whole, there is reason to suspect that the presence of a referendum does indeed matter for the inclusion of this provision in constitutional texts, as does a role for the executive.

An interesting case here is the experience of the Seychelles. In December of 1991, President Albert René announced the return of multiparty elections beginning the following summer, when representatives to a constitutional commission would be chosen.<sup>111</sup> This decision brought to an end the thirteen-year monopoly of the Seychelles People's Progressive Front ("SPPF") on political power in the Seychelles archipelago.<sup>112</sup> With just over fifty-eight percent of the vote in the July 1992 election, the SPPF gained fifteen seats on the commission to just eight for the main opposition party, the Seychelles Democratic Party ("SDP").<sup>113</sup> Sessions were closed and there is evidence that René considered the drafting process to be mostly a party matter.<sup>114</sup> There was also resistance from the SDP to what they considered provisions designed to enhance presidential authority.<sup>115</sup> The final draft, which was subject to a referendum, provided for elections to the National Assembly.<sup>116</sup> Critics, however, led by the SDP, complained that the electoral formula was stacked in the president's favor to guarantee him a legislative majority; more than one-third of legislative seats were to be allocated in proportion to the presidential vote

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109. Elster, *supra* note 23, at 380–81 (defining operation of institutional interest as situation in which body involved in constitution-making process creates important role for itself, and noting tenuous distinction between personal and institutional interests when executive is involved in process).

110. Interestingly, promulgation by referenda combined with executive action yields an elective head of state in seventy-eight percent of cases. This is the only method in which the inclusion of the executive as an actor in the process does not decrease the frequency of the office being elective.

111. John Hatchard, *Re-establishing a Multi-Party State: Some Constitutional Lessons from the Seychelles*, 31 J. MOD. AFR. STUD. 601, 602 (1993).

112. *Id.*

113. *Id.* at 604.

114. *Id.* at 605.

115. *Id.* at 606; Jean R. Tartter, *Seychelles: A Country Study*, in INDIAN OCEAN: FIVE ISLAND COUNTRIES 199 (Helen C. Metz ed., 1995).

116. Hatchard, *supra* note 111, at 606–08.

share.<sup>117</sup> The SDP actively campaigned against adoption of the constitution in the November referendum, primarily on the grounds that it was undemocratic and would only perpetuate the power of the president and the SPPF.<sup>118</sup> In other words, critics charged that the democratic features of the text were a sham. Following rejection of the draft constitution by more than forty percent of the voters, the commission was reconstituted, this time with the participation of the SDP.<sup>119</sup> Proceedings were more open, with live television coverage permitted and interest groups able to put forward proposals.<sup>120</sup> The revised draft submitted to voters in June 1993 contained a new electoral formula that divorced the proportion of legislative seats from the results of the presidential election.<sup>121</sup> With the unanimous support of the SPPF and the SDP, this version of the draft constitution was approved by more than seventy percent of voters and adopted that year.<sup>122</sup> While hardly conclusive, the constitution-drafting process in the Seychelles is evidence that the referendum constraint can be binding; ratification can be more than a rubber stamp for the regime and citizens are capable of critical evaluation of a proposed text.

The second dimension of “power to the people” relates to the ability of the public to participate directly in the law-making process. We examine this issue using CCP data on popular initiatives and referenda in the ordinary, nonconstitutional setting. “Initiatives” refer to laws that are proposed by members of the public and approved by them. “Referenda” refers to direct public approval of legislation that may be proposed by other actors. Table 3 reports patterns for the number of direct democracy provisions, organized by whether the constitution is adopted by ratification referendum.

We do not observe significant patterns in our data with regard to initiative. Of our 413 cases, 53 provide this power to individuals under varying conditions. Constitutions promulgated via referendum are no more likely to include the power of initiative (seventeen percent of such constitutions do so) than are constitutions promulgated by a constituent assembly (nineteen percent) or legislative processes (eighteen percent).

Not surprisingly, a ratification referendum is positively correlated with the inclusion of the referendum instrument in a constitution ( $r=.47$ ). Eighty-seven percent of cases requiring promulgation by referendum include a referendum provision in the text as compared to only forty-five percent of texts in the sample.<sup>123</sup> Of the remaining promulgation processes, only legislative ones provide for referenda in more than half of the cases (thirty out of fifty-seven).

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117. *Id.* at 607–08 (noting formula for composition of legislature, one of several objectionable features of 1992 draft).

118. *Id.* at 605–06.

119. *Id.* at 606.

120. Tartter, *supra* note 115, at 240.

121. Hatchard, *supra* note 111, at 608 (stating changes to formula of legislature composition are among several positive modifications made to 1993 constitution).

122. *Id.* at 606.

123. Once again, the difference is significant ( $p<.001$ ).

Legislative-executive and constituent-assembly-executive processes provide for referenda about one-third of the time and executive-only processes do so in only eight percent of cases.

**Table 3. Direct Democracy Provisions  
and the Presence of a Ratification Referendum**

<b>Number of Direct Democracy Provisions<sup>124</sup></b>	<b>Total Cases</b>	<b>Cases with Referendum</b>	<b>Percentage of Cases with Referendum</b>
0	204	9	4%
1	78	18	23%
2	91	50	55%
3	19	8	42%
4	21	10	48%

In sum, public approval of constitutional texts is associated with a different set of governance institutions than found in other constitutions. Public approval is associated with higher numbers of elective offices and greater use of referenda in ongoing governance. We do not, however, find that there is significantly greater likelihood of public initiative in such constitutions.

#### V. CONCLUSION

This essay has explored the theoretical and empirical relationships among public participation, constitutions, and democracy. We found a broad consensus in the literature about the importance of public involvement as well as an apparent trend in practice.<sup>125</sup> Yet many of the assumptions of proponents of participation remain untested, and the precise relationships between participation and desirable outcomes of interest remain underspecified. Scholars have been far better at generating hypotheses than testing them. Individual case studies have provided some insights, but large-n work has been hindered by a lack of data and a need for conceptual refinement.

We have demonstrated some preliminary associations between the method of constitutional promulgation and the contents of the resulting document. We find some support for the hypothesis that participatory constitutions are systematically different from those adopted through other methods, and are more likely to include an expansive role for the public in ongoing governance.<sup>126</sup>

124. This is a cumulative count of legislative initiatives, referenda, citizen involvement in proposing constitutional amendments, and citizen approval of constitutional amendments.

125. See *supra* notes 11–13 and accompanying text for a discussion of widespread support for public involvement in constitution promulgation.

126. See *supra* Part IV for an analysis of evidence supporting the existence of the relationship between the ratification process and emerging constitution.

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To be sure, we are aware that any association between promulgation and participatory governance might also be explained as resulting from selection bias. That is, there may be a missing, unobserved variable that is causing designers to select more public involvement in both ratification and in the ongoing processes of democratic governance. One might expect that democratic political cultures would select both constitutional processes and constitutional provisions to maximize participation. Even if this is true, however, the observed correlation suggests that there is a relationship deserving recognition and further exploration.

Further research on the gamut of sometimes-contradictory hypotheses described earlier is needed before we can confidently recommend participatory referenda in constitution making as a solution to normative problems.<sup>127</sup> We also recognize that ratification is only one of many dimensions related to constitutional drafting that might be normatively valuable. Still, these preliminary results do suggest that participation may have some of the positive benefits that scholars have identified.

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127. See *supra* notes 99–103 and accompanying text for a discussion of the contradictory hypotheses regarding the effect of public participation on the constitution-making process.