The Process of Constitution-Making:
A Law and Economics Analysis

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Contents

[1]This chapter is based on joint work with Ignacio N. Cofone, to whom I am very grateful for allowing me to use this work as part of my dissertation.

[2]This chapter is based on joint work with Ignacio N. Cofone, to whom I am very grateful for allowing me to use this work as part of my dissertation. Furthermore, this chapter is forthcoming in the edited volume "An Unconstitutional Constitution? Unamendability in Constitutional Democracies", which is part of the "Ius Gentium: Comparative Perspectives on Law and Justice" series published by Springer.

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List of Abbreviations

c2d	Centre for Research on Direct Democracy
CC	Constitutional Committee
CNTS	Cross-National Times Series
xconst	Executive Constraints
GDP	Gross Domestic Product
MAS	Movimiento al Socialismo
NCA	National Constitutional Assembly
NGO	Non-Governmental Organization
OLS	Ordinary Least Squares

Chapter 1

Introduction

1.1 Motivation

Constitutions are the most basic layer of the legal system and define the constraints within which judicial, political, and economic choices are made. Besides this functional importance of constitutions, they are also seen as one of the cornerstones forming the identity of a nation. Through the constitution, societies can establish a basis on which they operate. Regime changes or independence struggles are often immediately followed by a call for a new constitution. The waves of constitution-making following independence of former colonies in Africa during the 1960s and after the breakdown of the Soviet Union in the 1990s are good examples for this tendency with regard to newly founded states. When talking about regime changes, the cases of constitution-making in North Africa after the Arab Spring in 2011, which led to new constitutions in Tunisia and Egypt, spring to mind.

Given the importance of constitutions, a better understanding of how constitutions are made seems imminent. One key determinant of the content (and the success) of a new constitution is the constitution-making process. To give an illustration of how much the process can matter, one can consider the cases of South Africa in 1996 and

Iraq in 2005 as illustrations of successful and unsuccessful constitution-making processes. Both countries had experienced a drastic regime change which led to the demand for a new constitution. While South Africa was hailed for the inclusiveness of the process, the drafters in Iraq faced a short time frame to draft the constitution and considerable external influences from the United States. South Africa was able to, at least partially, lessen the strong divide between different ethnicities. Iraq, however, stumbled into ongoing conflict and domestic violence. The process of constitution-making can be seen as one key issues to explain the different pathways these two countries took.

To give another example, one can consider the two cases of constitution-making in Egypt after the Arab Spring uprising. In the process that led to the 2012 constitution, the Muslim Brotherhood had a clear majority in the constitutional assembly. They used their influence to draft a constitution which gave strong powers to the President, who was a member of the Muslim Brotherhood. Since the constitution is a cornerstone of society, a constitution that clearly favors one group often is an unstable constitution. The breakdown of the 2012 Egyptian constitution is a good example for this tendency. In the following process, the military was able to exclude the Muslim Brotherhood entirely and select candidates of their own liking to the assembly which drafted the constitution. The subsequent drift towards an authoritarian system in Egypt highlights another risk of a lopsided constitution-making process. It becomes very clear that the group of politicians with more influence during the constitution-making was able to tweak the process in their favor and thereby led to an outcome that was biased towards themselves.

These examples illustrate why the process of constitution-making matters in general. From a legal perspective, the procedural rules of constitution-making can be seen as the laws of the constitution-making process. How these rules affect legitimacy and stability of written constitutions are relevant questions for legal scholars. From an economic perspective, the questions how personal motives of drafters affect constitutional outcomes and whether devices to constrain the drafters are able to fulfill their function are

very close to questions that political economy scholars have asked for the behavior of politicians in the executive and legislative bodies.

But before we can focus on the constitution-making process itself, it is important to define what we have in mind when we argue about constitutions and other key terms of this dissertation.

1.2 Key terms

Constitutions have been defined in many different ways, but no single definition has received universal acceptance. Typically, constitutions are defined either by form or by function (Ginsburg, Melton, and Elkins, 2009, p. 38). The formal perspective argues that the constitution is simply defined as the document that is called the written constitution. The functional view, however, defines constitutions through the functions that constitutions typically have. Whether these functions are spelled out in the written document or in adjunct legislation or interpretation does not matter for the functional definition. This conceptualization is equivalent to the idea of a constitutional order as defined by Murphy (2007, p. 13).

Economists typically care about the functional dimension, especially when dealing with the effects of constitutional rules. Electoral rules in the seminal contribution of Persson and Tabellini (2003) are an example for this claim. Persson and Tabellini (2003) use electoral rules as one of the two key dimensions of constitutional rules in their large-scale empirical study, whereas Ginsburg, Melton, and Elkins (2009, p. 40) show that only around one in five written constitutions since 1789 spelled out the electoral rules for the lower house.

For the analysis of the process of constitution-making, a focus on the written constitution is nevertheless adequate. The written constitution is a central part of the constitutional order and is the document which is produced during the constitution-making. Furthermore, referendums only deal with the written text and unamendability

can only be included through (interpretation of) written text. For the purpose of this dissertation, a definition based on the one provided by Voigt (2009) is used. He defines constitutions as "...a formal and most basic layer of rules that contains the rules according to which society can provide itself with public goods. It contains rules that both constrain and enable the governing." (Voigt, 2009, p. 291). The advantages of this definition are the focus on formal, i.e. written, rules and the explicit discussion of the constraining function of a constitution. However, this definition would also include other formal rules, as long as they are part of what Voigt calls the most basic layer of rules. Given the arguments presented above about the importance of the written constitution for the scope of research of this dissertation, the following modification of Voigt's definition is proposed. Constitutions are defined as the formal and most basic layer of rules, spelled out in the written constitution, according to which society can provide itself with public goods. It contains rules that both constrain and enable the governing.

One has to distinguish the drafting of a constitution, which is the focus of this dissertation, from constitutional amendment. In constitution-making, the entire document is (re-)written. Even if large parts might be taken from previous constitutions, all provisions are up for discussion at the stage of constitution-making. In amendment procedures, only the provisions to be changed are discussed, while the rest of the constitution is maintained. One key difference between constitutional change (i.e. amendments) and constitutional choice are the different fallback options. A failed amendment process still leaves a working constitution in most cases, whereas the decision to rewrite the entire constitution is oftentimes caused by the malfunction of the *status quo* or a significant (expected) value added from a new constitution.

Furthermore, amendment procedures follow the rules spelled out in the constitution, while constitutions are silent on the procedural rules for their replacement. However, amendment might also be prohibited for certain provisions. An unamendable provision is defined as a constitutional provision that cannot be changed through the normal

amendment procedure. An example for such provisions are Article 1 and 20 of the German basic law. As specified in Article 79 (3), these two articles cannot be changed in the same way other constitutional provisions can. From the perspective of constitution-making, these provisions offer a way for current drafters to constrain future generations.

After discussing the definition of constitutions for the purpose of this dissertation and the demarcation of constitutional choice and constitutional change, it is important to highlight the scope and research questions of this dissertation.

1.3 Scope of Research

The constitution and the rules spelled out within it can be seen as the cornerstone of a society and the basis of the legal system of this society. The interpretation and analysis of constitutional law from a doctrinal point of view is one of the most fruitful disciplines within legal scholarship. The scope of this dissertation, however, is different in nature. Instead of focusing on constitutional laws themselves, this analysis looks towards the process through which these laws are made. In the moment of constitutional choice, constitutional laws still need to be made.[3] The process of constitutional choice itself can thus not be explained with constitutional law. Therefore, doctrinal constitutional law is outside the scope of this dissertation despite its huge practical importance for lawyers and legal scholars in other areas.

To understand the process of constitution-making, a different approach is required. One possible approach is using economic methods to analyze the process of constitution-making. This research programme is also known as constitutional economics. Within the field of constitutional economics, we can distinguish two main branches. Normative constitutional economics, starting with the seminal contribution of Buchanan and Tullock (1962), asks how constitutions and the constitution-making process should be

[3]This argument also holds for constitutional choice in situations where a society decides to rewrite its entire constitution. This process is not regulated by the old constitution, but rather a break with the old rules.

set up. Positive constitutional economics has rather focused on the economic effects of constitution (see Voigt, 2011, for an overview). So far, the main focus of research in constitutional economics has been either on broad normative questions (e.g. the general majority requirements in constitution-making in Buchanan and Tullock (1962)) or on the specific economic effects of constitutional rules (the seminal contribution is Persson and Tabellini, 2003).

Fewer articles have analyzed the reasons why certain constitutional rules are chosen (cf. Ticchi and Vindigni (2010) and Robinson and Torvik (2016), which are discussed in more detail in the next chapter). Those articles mainly focus on explanatory factors such as political ideology, preferences for public goods or income inequality. The major gap in this literature is the lack of attention paid to the procedural rules of constitution-making. The overarching question of this dissertation is how the process of constitution-making affects the written constitution. To shed more light on this issue from a broad perspective, positive and normative research questions are dealt with.

This dissertation proceeds by first asking the basic question whether the process of constitution-making really matters for the outcome. A rational-choice model of the choice of form of government is a first step to answer this question. The reason to focus on one constitutional feature is to allow for a more specific analysis. After affirming that the process indeed matters in this case, the dissertation can proceed to look at the effect of different procedural rules. Chapter 4 looks at the ratification rules in more detail and highlights how different procedural rules can lead to very different constitutional setups. Constitutional referendums are identified as one of the key procedural rules in the ratification process. However, their efficacy depends on the circumstances of constitution-making. Chapter 5 follows up on this finding and discusses which majority rules can strengthen the effect of constitutional referendums on legitimacy and stability of the constitution. When referring to constitutional stability, unamendable provisions are another device that drafters often employ. Chapter 6 discusses unamendability rules from a functional perspective to gain a better understanding for which reasons drafters

use these rules. To be more specific, the chapter analyzes whether unamendability is better understood as credible commitment to solve a time-inconsistency problem or as paternalistic behavior of constitution-makers. To sum up, the four specific research questions to be answered are:

1. Does the constitution-making process affect the form of government?
2. Which procedural rules lead to constitutions that constrain future government more?
3. Which majority requirement for constitutional referendums should be chosen?
4. Is unamendability better described as a credible commitment device or as paternalistic behavior of drafters?

The first and second question are clearly positive questions, whereas the third and fourth questions also include normative elements. In a simplified way, this structure can be conceptualized as shown in Figure 1.3.

Despite dealing with positive and normative issues, one assumption underlying all chapters is the idea of self-interested drafters. In line with methodological individualism, this dissertation aims to understand the behavior of individuals, even when dealing with collective decision-making. Drafters of constitutions are not assumed to act in the general interest, but rather to act in their self-interest given the constraints they face. One main argument why drafters should be less selfish in the case of constitution-making relates to the personal relevance of their decisions for their own future benefits. Given that drafters enact more general rules, their personal interest should play a smaller role. While many authors argue that drafters are less self-interested then politicians in normal times (see for example Ackerman, 1991; Elster, 1995), this by no means implies that constitutional drafters do not pursue their personal aims while drafting a constitution. It can be assumed that drafters of constitutions are also, at least partially, motivated by their private interests and thus cannot be expected to impose selfless clauses. While

Figure 1.1: Visual Representation of Thesis Structure

it is easy to see that this problem is more likely in non-democratic settings with an unelected constitutional assembly, the case for selfish drafters does not disappear in a representative, elected assembly. Constitution-making is a rare event, which reduces the possibility for citizens to hold drafters accountable, since there is no option to vote them out of office.[4] More generally, the notion that politicians are rational and self-interested is not novel, it is the main foundation for the research field of public choice and political economy. From our perspective, there is no good reason to think that drafters are different. In most cases the drafters belong to the same group of politicians who will subsequently hold the important political positions. In this case, drafters know that their group will likely be in power once the constitution is ratified and can decide upon rules that tweak the rules of the political game in their favor. The example of Egypt in 2012 and 2013 can be seen as a good illustration of this argument. Neither of the constitutional assemblies followed selfless motives. The constitutional outcomes are better understood as tools to increase or fortify the power of the group dominating the assembly.

1.4 Scientific Contribution and Societal Relevance

The questions raised in the last section are relevant for scholars from different academic disciplines as well as for policymakers. This section will discuss the contribution to issues of economic and legal research and the societal relevance of the questions posed in this dissertation.

The analysis of institutions as the rule of the game has been part of mainstream economic research ever since the contributions of Nobel Laureate Douglas North (North and Thomas, 1973; North, 1990). The constitution can be seen as the most basic set of rules. Nevertheless, the institutions within which this set of rules is made also matter. The focus of this dissertation on constitution-making highlights this argument.

[4] Referendums as part of the constitution-making process can be seen as one mitigation for this problem. However, the use of simple majority referendums might not be sufficient to constrain drafters, especially in times of crisis. This issue is extensively discussed in chapter 5.

Chapter 3 uses an abstract model of choice of form of government and modifies the way in which the institutional framework of constitutional choice has been modeled previously in the literature. It is shown that explicitly modeling the stage of constitution-making changes the predictions of the established literature in this field with regards to the determinants of constitutional choice. This result is an example how a better knowledge of the institutional details can improve economic models.

Not only the institutional details matter, but also the circumstances under which institutions operate. Chapter 4 models how exogenous uncertainty affects the effectiveness of procedural rules. Referendums as an example for procedural rules in constitution-making are shown to be less effective in establishing government constraints when uncertainty is high. This finding highlights why similar institution might lead to diverging (economic) performances in different countries.

Finally, property rights are among the most important legal rules from an economic perspective. The model in chapter 4 highlights how the conflict between citizens and government can be changed by institutional rules such as the rules guiding the process of constitution-making. A democratically elected constitutional assembly is less likely to be dominated by a single group and more likely to promote a constitution that establishes secure property rights.

The general focus on procedural rules improves the understanding of the constitution-making process. A better understanding of this process is important for legal scholars because it can help to increase the legitimacy and stability of constitutions. To give a more specific example, this dissertation analyzes constitutional referendums from different perspectives. The conditions under which referendums can increase the constraints placed on drafters as well as the normative analysis of majority rules for these referendums contribute to the more general aims of increasing legitimacy and stability of the constitution. Chapter 5 highlights for example that a higher majority requirement for constitutional referendums can improve the legitimacy of the constitution.

More generally, the economic analysis of law is one of the most important method-

ological developments for legal scholars in the second half of the 20th century. The seminal textbook of Posner (1973) has been cited more than 12,000 times. The research in this area started from typical areas of private law such as tort law or intellectual property law, but has spread across all areas of law. One of the key underpinnings of the economic analysis of law is methodological individualism. This methodology allows to discuss how legal rules shape individual incentives and furthermore how lawmaking is shaped by individual incentives. This dissertation uses this methodological foundation to analyze constitution-making. Instead of focusing on constitutional moments and self-less drafters (Ackerman, 1991), this dissertation shows that self-interested drafters need to be taken into account to understand constitution-making. Once the veil of uncertainty for drafters is lifted, they are more likely to install constitutions that serve their own interest.

The issue of self-interested drafters can be directly linked to the contribution of this dissertation with regards to popular participation. A better understanding how and when referendums can constrain drafters is particularly important in situations when the self-interest of drafters is at cross with the interest of the general public. Chapter 4 discusses the interaction of the decisions of drafters and the requirement of a referendum to ratify the constitution.

Chapter 6 shows how economic rationale can contribute to a better understanding of legal phenomena such as unamendable provisions. The concepts of credible commitment, which plays a key role in game theory, and paternalism are used here to analyze how unamendable provisions can be understood from a functional perspective. This combination of the two disciplines can help to get a deeper understanding of unamendable provisions.

Policymakers might wonder why they should consider results from research on the process of constitution-making. However, the rules of this process do not fall from heaven and policymakers can use some of the findings from this dissertation. Chapter 4 discusses the effect of different ratification procedures on executive constraints in

the constitution. This research informs policymakers who need to design the rules of constitution-making. Chapter 5 delves deeper into one specific procedural rule, namely the majority requirement in constitutional referendums. Especially for policymakers concerned with the issues of legitimacy and stability of the new constitution, the toolkit provided in this section can be useful. Finally, chapter 6 provides a discussion whether the use of unamendable provisions as a commitment device is desirable.

With regards to potential takeaways for policymakers, a more cynical approach highlights that this dissertation identifies the situations in which drafters can get away with pursuing their self-interest. The finding that referendums work least well when most needed is an example for this claim. However, NGOs and international organizations can also use this results to improve popular participation in these very situations.

1.5 Methodology

1.5.1 Rational Choice Theory

One important feature of this dissertation is the strict focus on methodological individualism. Even if groups, parties or governments make decisions, those can always be broken down to the individual level. This methodology is inherent to rational choice theory and game theory, where strategic behavior of individuals is modeled.[5] Since the situations in which constitutions are drafted are often full of strategic considerations, game theoretic modeling has been the typical choice in the constitutional economics literature and will also be used in this dissertation. These strategic considerations include for example bargaining in the constitutional assembly, the voting behavior for ratification or the use of unamendable provisions for self-interested purposes.

Furthermore, the focus on individual actions of drafters and citizens emphasizes the incentive effects of procedural rules. Opposed to the idea of constitutional moments and

[5] As opposed to for example general equilibrium models, where actors don't show strategic behavior.

selfless drafters, we aim to explain constitutional outcomes by understanding the motives and rationales of the involved actors. The typical arguments for less self-interested drafters are due to the more general level of the rules in constitutions compared to normal legislation and the closer attention citizens pay to constitution-making as compared to normal politics, thereby providing another check on drafters (Ackerman, 1991). We argue that drafters are nevertheless able to form expectations whether or not they will be part of the future political elite of the country. Especially in emerging democracies, few societies have the resources to prevent drafters from taking up governmental positions after the constitution has been ratified. Therefore, politicians do have an own interest when drafting the new constitution. With regards to the closer attention citizens pay, chapter 4 analyzes the example of referendums and whether citizens really pay more attention to political issued during constitution-making in more detail.

From the perspective of rational choice, the situation of constitution-making is no different from other cases of rule-making. When making decisions about constitutions, individuals are assumed to compare the costs and benefits of their alternative decisions and decide for the most favorable one. The results from the rational choice models can be seen as a kind of benchmark result. Once the results of this kind of model are established, it is still possible to check whether findings from behavioral economics might be included or would be necessary to substitute for assumptions made in the process. However, the scope of this dissertation is limited to rational choice modeling. While taking this potential drawback into account, it is possible to go a step further and take a look how the theoretical results could be empirically supported.

1.5.2 Empirical Methods

Following the set of guiding questions for empiric analysis posed by Angrist and Pischke (2008), the starting point is to clearly state the causal relation of interest. In the case of this dissertation, the key empirical question is which factors are driving a societies' choice of constitutional features. More specifically, does the process of constitution-

making matter for the chosen form of government? Do referendums constrain drafters and thereby affect the written constitution?

After defining the causal relation of interest, the next step in the agenda is to think of the perfect (hypothetical) experiment to test for this causal relation. If we would be able to design such an experiment, we would like to test the effects of random changes in the dimensions of interest. This experiment would test in which way modifications to the constitution-making process affect the final constitution. For example, we would like to randomly assign processes with and without referendums for ratification to test how this procedural rule influences the written constitution.

However, the real world does not allow for this kind of controlled experiments and natural experiments are rare. The next step is the definition of an identification strategy for the relations of interest. The main aim is to exploit differences in procedural rules to test the theories developed in the formal model. Nevertheless, identifying stable measures of the variables of interest can be problematic. For example, when dealing with referendums, they can be initiated by different actors and might be mandatory or not. The question whether all referendums that were used for ratification should be considered part of the procedural rules is an example for these identification issues.

The mode of statistical interference for the research question posed is not an obvious choice. After the issue of properly identifying the relation of interest is resolved, this fourth and final of the guiding questions posed by Angrist and Pischke (2008) leads to further complications.

Starting with the most straightforward approach, a cross-sectional analysis at one given point in time, suffers from two problems. First, only a small amount of countries change their constitutions at any given point in time. Second, even if such a point could be identified (e.g. wave of new constitutions after world war II), the analysis would suffer from omitted variable bias. It would be very hard to control for all relevant differences between countries of interest.

Another possibility would be a time series analysis of one country of interest. The problem here is the slow rate of change in constitutional features. Due to this problem, the approach suffers from a too large amount of null values and cannot solve the inference problems.

Finally, a panel data approach might offer some consolation to the problems with the other two approaches. Omitted variable bias can be more easily prevented in a panel setting through country fixed effects, while a large number of countries increases the number of relevant events significantly. Nevertheless, especially when including country and time fixed effects, the small number of observations would become an obstacle due to the low number of degrees of freedom.

Following the problems in the identification strategy as well as the mode of inference, large scale quantitative methods suffer from problems for the questions posed in this thesis. In light of this methodological problems, case studies offer some interesting possibilities (Gerring, 2006). He defines case studies as "...an intensive study of a single unit for the purpose of understanding a larger class of (similar) units." (Gerring, 2004, p. 342). As he further argues, it is important to be aware that temporal and/or spatial variations within the unit are necessary for a case study.

Compared to large cross-case studies, case studies are equipped to take heterogeneity into account, since a more detailed analysis of the case is conducted compared to cross-case procedures (Gerring, 2006). Additionally, case studies are a good option to generate hypotheses about the causal mechanisms and in general useful for theory generating purposes. When looking at a small number of cases in great detail, the direction of the causality might become more obvious. Nevertheless, one should be aware that the set-up of a case study as compared to cross-case studies has limited power to actually test these hypotheses.

The combination of large-scale quantitative methods with case studies can be seen as a promising venue to overcome the difficulties when dealing with constitutions as dependent variables. Case studies can add further support to large-n empirical methods,

as for example in chapter 4. In this analysis, the problem of a very small number of failed referendums can be mitigated by closely analyzing those few cases of failed referendums.

1.5.3 Analytic Narratives

Bates et al. (1998) have promoted a new research program for the social sciences. In their own words, "[w]hat is distinctive is their use of a particular methodology, analytic narrative, to blend rational choice analysis and narration into the study of institutions" (Bates et al., 1998, p. 8). Taking into account the considerations above regarding usual econometric techniques, this approach offers a fruitful way to merge formal, theoretical consideration with empirical findings from real-world examples. Typical examples for the use of narrative elements in constitutional economics are the Glorious Revolution and the American constitution from the time of drafting until the civil war (cf. North and Weingast, 1989; Weingast, 1995).

As another example, Acemoglu and Robinson (2006) used the analytic narratives approach to model and explain the decision between democracy and autocracy. The formal model in the first chapter of this dissertation is inspired by the design presented in their contribution, hence a detailed discussion of their model will be conducted in chapter 3.

1.5.4 Legal Positivism

In a sense, this dissertation addresses an insufficiency of legal positivism by focusing on the process in which constitutional laws are made.[6] From this perspective, constitutional provisions are the legitimate basic layer of formal rules because they were made following the procedural rules of constitution-making. Whether these provisions are considered just or fair does not make them any more or less constitutional. However, analyzing the

[6] A detailed discussion of legal positivism goes beyond the scope of this dissertation. Two of the seminal contributions are Kelsen (1945) and Hart (1961). Simplifying heavily, one can think of legal positivism as the idea that the legitimacy of a rule depends on whether it was made in a lawful way and not on its outcomes, i.e. whether it is just or fair.

procedural rules themselves goes a step further. Instead of taking the process for granted as a base to evaluate the lawfulness of the constitution, this dissertation analyzes how different procedural requirements affect the constitution.

1.6 Thesis Outlook

This dissertation starts by giving an overview of the key literature in chapter 2. Chapter 3 deals with the question whether the process of constitution-making affects the choice of constitutional features. A rational-choice model shows how the introduction of a stage of constitution-making influences the constitutional choice of form of government. The set of assumptions used for this model fits particularly well for new and unstable democracies, which are at the same time the kind of countries that often change their constitution. So far, income inequality has been argued to be a key determinant for the choice of form of government (Robinson and Torvik, 2016). This chapter arrives at a different conclusion and shows that the effect of income inequality is determined by the composition of the constitutional assembly. Chapter 4 looks further into the details of the constitution-making process and discusses which procedural rules can effectively constrain the drafters. To analyze this question, we use a theoretical model as well as a regression analysis. The model highlights that drafters are willing to constrain themselves even without external rules when long-term rents are important to them. In situations with high uncertainty, these rents become less important and procedural rules are needed to constrain drafters. Ironically, the model shows that referendums work best as a tool to constrain drafters when uncertainty is low and worst when uncertainty is high. Thus, referendums alone are insufficient to properly constrain drafters.

Following this positive analysis, chapter 5 and chapter 6 deal with more normative issues. Chapter 5 follows up on the issue referendums for the ratification of constitutions and discusses the advantages and disadvantages of simple and qualified majority requirements. We argue that the nearly universal use of simple majority requirements

cannot be normatively justified, especially given that most ratification procedures in constitutional assemblies require a qualified majority. We argue that path dependency and self-interest of drafters are the likely reasons for this double-standard of ratification. Chapter 6 focuses on one specific channel through which drafters can influence the constitutional development in the future, namely unamendable provisions. The function of these provisions is often described as a commitment device. We argue that a better way to understand their use is the view of paternalism, while their desirability for commitment purposes is questionable. A final chapter summarizes the findings in light of the limitations of this dissertation and discusses paths for future research.

Chapter 2

Key Literature

2.1 Scope of Literature Overview

The aim of this chapter is to provide a summary of the key literature relevant for this dissertation. The main focus is on the strands of literature generated by constitutional economics and the legal and political research on the process of constitution-making. This rather narrow approach is taken in light of the scope of this dissertation. This dissertation does not deal with constitutional law or the political process *per se*, but rather focuses on the (political) process through which constitutional law is made. However, to motivate why dealing with this question matters in the first place, a short overview on the literature why a constitution is created and on the literature dealing with the economic effects of constitutions is necessary.

2.2 Why a Constitution?

It is useful to discuss why a constitution is created in the first place and what distinguishes it from ordinary laws. The definition of a constitution provided in the last chapter highlights two main functions of a constitution, namely enabling and constrain-

ing the government. With regards to the enabling function, the constitution can be used to set up the basic mechanisms for preference aggregation in society to allow for political decisions. Furthermore, the judicial system and thereby the ability to provide jurisprudence to society is enabled through the constitution. However, the main focus of this dissertation lies on the ability of constitutions to constrain the governing.

Assume that a society is willing to create a government with a monopoly of force to provide secure property rights for all citizens. As soon as the government is strong enough to enforce sanctions against property right violations, it is also strong enough to transgress on the citizens and expropriate their property (cf. Weingast, 1993, 1995). This situation can be coined the dilemma of the strong state (Dreher and Voigt, 2011). Hence, an important question is how a government can credibly commit itself not to abuse the power delegated to it without losing its ability to enforce sanctions. One possible solution to mitigate the dilemma of the strong state is the use of a constitution, which clearly defines the boundaries of the government and thereby protects citizens from unjustified expropriation.

This solution relies on the credibility of the commitment that is captured in the constitution. A written constitution which *de jure* guarantees a high level of property rights and puts strict boundaries on the government does only help if the government is also *de facto* bound by the constitution. *De jure* can here be defined as the constitutional constraints "in the book", while *de facto* in this context refers to the real constitutional constraints faced by the government. If for example basic human rights are guaranteed by the constitution, but in practice governments can ignore these rights without facing any consequences, these rights would be described as only *de jure*, but not *de facto* existent. Sham constitutions, which offer high levels of *de jure* promises but fail to obtain those promise in practice, are surprisingly common. Law and Versteeg (2012) compare an indicator of constitutionally promised rights with actual human rights performance indicators. For South Asia, on average more than 50% of the promised rights in the constitution are not upheld (Law and Versteeg, 2012, p. 908). Except Western Europe

and North America, all regions show a significant gap between the rights promised and the rights upheld. This finding is important to understand why issues such as majority requirements play an important role for constitution-making. When more people voluntarily agree to a constitution *ex ante*, the enforcement of these rules in later stages becomes more likely.

The enforcement of constitutional rules is one key difference from ordinary laws. While ordinary laws require external enforcement through a third player (i.e. the state), the constitution cannot rely on this kind of enforcement and must hence be self-enforcing (cf. Hardin, 1989; Ordeshook, 1992). There is no international actor who would be able to enforce these rules. Levinson (2011) takes up the question of self-enforcing constitutions and analyzes how constitutional rules can function as credible commitment devices. His main distinction is between rules dealing with substantive outcomes and decision-making mechanisms. The decision-making mechanisms spelled out in the constitution are better suited for this purpose according to Levinson, since they deal with a broad array of future decisions and are able to attract specific investment by politicians (i.e. it becomes more difficult for politicians to switch to another decision-making rule).

In this light, it is also interesting to discuss the unanimity requirement raised by Buchanan and Tullock (1962). Following their argument, the legitimacy of a constitution hinges critically on unanimous consent from citizens. This reasoning is in line with the idea of a constitution as a social contract (cf. Brennan and Buchanan, 2008). However, it has been argued that the main elements of a constitution are of coordinative nature. In such a situation, a set of conventions is a better description of the constitution than a contract (cf. Hardin, 1989; Ordeshook, 1992). This argument also sheds some doubts on the unanimity requirement. If players only need to coordinate, it is highly likely that some players prefer one and others prefer another constitution. However, as long as they acquiesce to the solution spelled out in the constitution, there is no need for an unanimity (cf. Hardin 1989). The difference from acquiescence to consent is that acquiescence requires the chosen constitution to be better than the *status quo* of

no constitution at all, while consent might trigger strategic considerations in the voting process. Using a qualified majority requirement can be seen as a middle ground between these two concepts.

The analysis of constitutions with the economic toolkit has received increasing attention ever since the seminal work of Buchanan and Tullock (1962). While the normative quest for the design of optimal constitutions has dominated the literature in the direct aftermath of Buchanan and Tullock's contribution, the closely related positive analysis of constitutions entered the mainstream stage in the past 20 years. The two main research areas in the field of positive constitutional economics deal with (i) the analysis of the economic effect of constitutional features and (ii) the explanation for the emergence of certain constitutional features in a given country; i.e. the choice of constitutional rules. The next sections review those areas in turn.

2.3 The Economic Effects of Constitutions

Do countries, from an economic perspective, perform differently according to their constitutional set-up? The research into the link between constitutions and economic policy has received a strong boost following the seminal contribution by Persson and Tabellini (2003). In their book, the authors provide empirical evidence for the economic effects of constitutions and aim to show that the causal chain runs from constitutions to economic outcomes. They focus on two constitutional features, namely electoral rules and the form of government.

The electoral rule describes the way a society elects their legislature. This includes the electoral formula, district magnitude and ballot structure. Following Persson and Tabellini (2003, p. 75), most of the combinations of these three elements observed in the real world can be clustered in two main categories. On the one hand, majoritarian systems are described by small electoral districts, plurality rule and voting with regard to alternative candidates. On the other hand, proportional systems combine large electoral

districts,[7] proportional representation and voting on different party lists.

When talking about governmental systems, two main categories can be distinguished. In a presidential system, the chief of the executive (i.e. the president) does not rely on the constant support of the legislative, while a parliamentarian system includes the option of a non-confidence vote, which replaces the chief of the executive (i.e. the prime minister) (Persson and Tabellini, 2003, pp. 28-29). Following Persson, a second key difference is the greater separation of power in a presidential system, conditional on veto power allocated to the president. However, if the president is allocated with substantial power which does not require legislative control, this argument might be turning around and a presidential system could lead to a larger concentration of power (cf. Aghion et al., 2004). Note that a mix of the two systems is also possible and often referred to as semi-presidentialism. For the purpose of this dissertation, we will only focus at the two polar cases.

Instead of going into a detailed review of Persson and Tabellini (2003), only some of the main results and criticisms will be presented here. For a more detailed discussion on the economic effects of constitutions and also a survey of other empirical results, see Voigt (2011).

Persson and Tabellini (2003) find that the form of government has economically (and statistically) significant effects on several indicators of economic performance. The central government spending in a presidential system is roughly 6% of GDP lower compared to parliamentarian systems, while the welfare state is also between 2 and 3 % smaller. Additionally, presidential systems show a lower level of corruption.

Regarding the electoral rules, the findings also indicate economic and statistic significance. Majoritarian rules reduce central government spending by 3% of GDP compared to proportional rules and the welfare state is found to be 2-3% smaller in majoritarian systems. When looking at the finer details of the rules, a higher number of individually elected candidates induces lower levels of corruption, while smaller electoral districts

[7] In the extreme case, the whole country constitutes a single electoral district

actually lead to higher levels of corruption. These details show that the absolute effect of the difference between the systems with regard to corruption is rather unclear.

Through the use of econometric techniques, Persson and Tabellini (2003) try to argue that the reported effects are not mere correlations, but actually causal effects. If this result would be true, they would have uncovered a mechanism for countries which are currently using a proportional electoral rule and a parliamentarian system to reduce their government spending by 10% of GDP as well as the welfare state by around 5% through a simultaneous switch to majoritarian electoral rule and a presidential system.

Three main arguments can be brought forward against this line of reasoning.[8] First, it is relevant to ask whether the results also hold for slight modifications and extensions of the data set. This has been done by Blume et al. (2009), who increase the number of countries in the data set, use more recent data and change the definition of the government spending slightly from central government spending to total government spending. In their replication of the study, the form of government loses its statistical significance. However, electoral rules maintain a significant effect on the economic policy outcomes. Interestingly, it is mainly the finer details of the electoral rules that shape this result. Despite qualifying the original results, the replication study is yet another argument for a better understanding of the mechanisms of constitutional features and also supports the argument that there is indeed an economic effect of constitutional features.

Second, as argued by Acemoglu (2005), the observed links might not be causal relationships after all. One key criticism is the argument of omitted variable bias. There might be underlying factors which influence the choice of constitutional rules as well as the economic policy outcome. Acemoglu argues that the instrumental variable approach used by Persson and Tabellini (2003) is not sufficiently working to mitigate this concern.

Third, it can be doubted that constitutional features can be easily changed. It takes

[8] Note that Persson and Tabellini do not use their findings to bring forward strong normative recommendations themselves, but this argument follows closely from their result.

more effort to change the constitution than to change an ordinary law and it is highly likely that other considerations than the pure economic effects play a role in the choice of the constitutional features. If one gains a better understanding of the underlying determinants of constitutional features, omitted variable bias can be more easily avoided. Additionally, a better knowledge of these determinants might also provide new tools to understand the transmission channels from constitutions to economic policy and thereby allow to give better policy recommendations.

Around the world and across societies, a multitude of different constitutional features and combinations thereof exist. Taken the findings on the economic effects of constitutions as given, these differences in constitutional choice are puzzling. Similar to the argument made by Ginsburg, Melton, and Elkins (2009, pp. 2-3) for constitutional stability, we can think in the two broad categories of environment versus design when explaining constitutional choice. Environmental factors would include heterogeneity of the society (e.g. ethnic fractionalization), ideological differences and income inequality. Design factors are related to the rules of the constitution-making process. So far, most explanations for constitutional choice are based on environmental factors. An overview of this literature will be presented in the next section. To structure the overview, an organization along constitutional features is useful.

2.4 Explaining Constitutional Choice

2.4.1 Electoral Rule

Ticchi and Vindigni (2010) set up a model motivated by the findings of Persson and Tabellini (2003) with regard to different fiscal policy outcomes of electoral rules. In their model, they are using a situation where three classes of citizens differ in size and income and have to first decide on the electoral rule in a constitutional stage and afterwards elect the government, which thereafter implements its preferred fiscal policy.

The main result in the model relates the degree of income inequality within a society to the choice of electoral rule. The richer citizens prefer less taxation, while the poor citizens prefer a higher level of taxation. The larger the income inequality, the higher is the tax burden for the rich.

The interesting results appear when political rents from being in office are also taken into account. In a majoritarian system, the elected representative is not bound by any coalition considerations and only provides the public good his group prefers. As long as no group has an absolute majority, the rich will always want to provide the smallest amount of public goods and are always elected (since other players prefer lower taxes if they do not profit from any public good provision).

In a proportional system, a coalition will decide upon public goods provision. Hence, two public goods will be provided. Possible coalitions are poor and middle class as well as middle class and rich class. The link to income inequality comes through the price of "buying" a coalition partner for the middle class in the majoritarian setting. The higher income inequality, the more expensive is it to convince the poor to join in the ruling coalition. Hence, assuming a high level of income inequality, the authors expect to see a ruling coalition of middle class and rich. This actually leads to a preference for a majoritarian system of the poor in case of high inequality. The favored public good of the poor will not be provided under either system in this case, but the taxes are lower in a majoritarian system.

In light of these results, the actual chain of causality might run another way than expected in light of the hypotheses from Persson and Tabellini (2003). If the level of inequality is high, societies choose the majoritarian rule as a kind of self-selection since they prefer lower fiscal spending. At the same time, a more equal society chooses the proportional system in the first stage and is also willing to have higher taxes. Therefore, it is not due to the inherent effects of the electoral rule, but rather due to the underlying structure of the society that the observed differences in fiscal policies are explained.

One additional argument not covered by the simple model presented by Ticchi and

Vindigni (2010) is the incorporation of utility from having the own group in power. How political ideology can be incorporated in this type of model can be readily seen in the next section, where models of the choice of the governmental system will be discussed.

2.4.2 Form of Government

Only a handful of papers have explicitly tried to model the constitutional choice of the form of government. The first contribution is Aghion et al. (2004), which asks how insulated the leader in a political system should be, where insulation is used to measure unchecked power. While a high level of insulation allows the leader to undertake beneficial reform policies more easily, it also allows him to expropriate citizens. This dilemma is central to answering the question of how insulated a leader should be. Their main result indicates that a low risk aversion will lead to a high insulation and *vice versa*. If one lifts the veil of ignorance and assumes that a minority group is able to write the constitution and will come into power once the constitution comes into force, this should also lead to higher insulation. This can typically be found in an autocracy, where the ruling class is setting up a constitution with the aim to further strengthen its power.

Nevertheless, there is a case for doubting the strength of the direct link from the form of government to the insulation of a leader. Insulation can be achieved not only through the form of government, but also through other political institutions such as federalism or an independent judiciary. Therefore, the effects of insulation might be combining multiple constitutional features at the same time and not exclusively the form of government.

Clearly, looking at the form of government from different angles might offer valuable insights. Robinson and Torvik (2016) set up a model based on a society divided into two main groups, out of which one forms a majority. Both groups differ in their appreciation of public goods and in their ideological perspective.[9] Some citizens of these groups run

[9]Therefore, they get a higher utility simply from having a member of their group in power if the

(exogenously motivated) for office and are elected under the rules of either a presidential or a parliamentarian setting. The politicians decide upon the public good provision and the political rents extracted by voting in parliament after the election. However, voting procedures differ between the two systems. While the president is the residual claimant of the rents and has full agenda setting power, the prime minister can only determine the absolute amount of rents (through his public goods provision proposal), but cannot affect the distribution. Hence, a presidential system should see a lower level of public goods and a higher level of political rents. They also find that a strong ideological preference or large conflict with regards to public goods (e.g., high income inequality) makes a change from a parliamentarian to a presidential system more likely.

The model presented above offers valuable insights into the decision-making process of parliamentary versus presidential systems. Nevertheless, some weaknesses can be identified. The timing of the model begins with elections under the current system. Using this starting point overlooks the scenario of a civil conflict or war, when the old constitutional rules have broken down. Therefore, the model is a good fit for explaining constitutional change, but is less effective for explaining constitutional choice. This drawback highlights the need to include the constitutional choice as the first stage in a model of constitutional choice.

2.5 Procedural Rules Matter

Despite the findings provided in the last subsection, it is unlikely that all differences in constitutional features can be attributed to environmental factors. Another approach would be to focus on differences in procedural rules as an explanation. From an empirical perspective, only few contributions have explicitly dealt with the question whether the process of constitution-making matters.

ideological preference is stronger.

Carey (2009) focuses on measures of inclusiveness of the constitution-making process and their effects on the success of the constitution. As measures of constitutional success, he focuses on democracy, government constraints and longevity of the constitution. The main finding is that multiple, democratically elected actors in the constitution-making process lead to constitutions that are more democratic and contain more government constraints. Interestingly, referendums by themselves do not lead to more democratic constitution or more government constraints. The methodology employed by Carey requires to be cautious about interpreting the results. First, he relies on a low number of cases. Furthermore, the results represent correlations and should only be taken as indicative evidence. Second and more important, his measures of constitutional success are based on *de facto* indicators. Whether or not a country is more democratic according to the Polity IV measure and whether the executive faces more constraints is not only affected by the written constitution, but also by other political and legal developments. This issue makes the identification strategy of the article and thereby its findings less convincing.

Another empirical approach is taken by Ginsburg, Elkins, and Blount (2009), who use their data gathered through the Comparative Constitutions Project as a measure of constitutional outcomes. Through this approach, the measurement problem of Carey (2009) is avoided. The authors find that public referendums increase the number of rights in the written constitution. A later study highlights further that inclusive processes (including referendums) are able to increase the longevity of a constitution (Ginsburg, Melton, and Elkins, 2009, p. 139). These findings, despite also being correlations, indicate that referendums do actually have an important effect on the written constitution.

Widner (2008) analyzes the effect of constitution writing on violence and constitutional stability in cases of post-conflict constitution-making. The outcome measures are reductions in violence over a 5-year time period, whether the new constitution is suspended within the first 5 years and whether rights are protected by the constitution. With regard to procedural rules, the main finding is that more consultative process do

not lead to a stronger rights protection. In other words, "[b]ased on this evidence, one might say that that the choice of procedure does not really matter much."(Widner, 2008, p. 1532).

Altogether, the empirical evidence on the effects of procedural rules is rather mixed. Furthermore, none of the three articles has clearly focused on single constitutional features as discussed above when analyzing the effect of procedural rules. All of the articles have some methodological limitations and further research into the workings of procedural rules is required to get a clearer picture. In the words of Ginsburg, Elkins, and Blount (2009, p. 219), "[a] key normative question is whether aspects of process can be manipulated to reduce the probability of failures, but this question requires much more positive work on the complex relationships among process, content, and outcomes."

2.5.1 Constraints on Constitution Drafters

A larger part of the literature on procedural rules focuses on constraints faced by the drafters in the process of constitution-making. This research was spawned by the breakdown of the Soviet Union and the following process of constitution-making in 15 newly established countries and in the former satellite states of the Warsaw Pact. One can distinguish constraints due to procedural rules of constitution-making, constraints due to popular participation, and time constraints. The literature on these three sets of constraints will be reviewed in sequence.

2.5.2 Procedural Rules

The process of constitution-making is organized according to a set of procedural rules. These rules are one of the key factors in constraining the drafters of the constitution. Landau (2012) has argued that the design of the process determines the outcome of the process. The rules include, among others, the selection of members of the constitution-making body, the voting rules within the constitution-making body, and the mode of

ratification.

How the members of the constitution-making body are selected directly influences the composition of the constitution-making body and has thereby strong effects on the final outcome. The main selection methods are members drawn from existing executive or legislative bodies or a specifically elected constitutional assembly. It has been argued that a constitution-making body created from members of the existing legislative or executive branches of government will be biased in favor of their own branch and generally more inclined towards short-term interest considerations (cf. Elster, 1995; Voigt, 2004). These considerations led Elster to the belief that a specifically elected constitutional assembly would be beneficial, since the drafters would not be driven by the future interest of their own position in one of the branches.[10] Electing an assembly takes time, however, and time is often scarce in moments of constitution-making. It has also been argued that a better knowledge of the preferences and ideologies of other members of the constitution-making body allows the members to reach a more stable agreement (and a more stable constitution) (cf. Mnookin, 2003). This knowledge is generally higher among members of an existing body than in a specifically elected one.

Empirical evidence only partially supports the claim that constitution-making bodies created from members of the executive or legislative branches tend to behave in a self-serving manner. While Ginsburg, Elkins, and Blount (2009) confirm this self-serving hypothesis for executive-centered processes, they do not find support for this hypothesis with regard to legislative-centered processes. This finding seems to indicate that executive-centered processes are more self-serving. Another possible explanation for this finding lies in the empirical method. Since Ginsburg, Elkins, and Blount (2009) compare executive- and legislative-centered processes to the ones with specifically elected assemblies, a bias within these elected assemblies can also drive the results. Individuals involved in a specifically elected assembly recognize that it is unlikely that they

[10]This claim would only hold if the drafters are taken from a different pool of politicians than the future government. Given the large number of constitution-making bodies which consist of executive or legislative bodies, this claim appears doubtful.

will obtain executive branch offices after the ratification of a new constitution and are, therefore, unlikely to give additional power to the executive. Conversely, these drafters are more likely to obtain a position within the legislative body after ratification and, therefore, are more likely to pursue provisions that are biased towards the legislative. Unfortunately, the analysis of Ginsburg, Elkins, and Blount (2009) does not allow to evaluate this explanation.

The literature altogether indicates that the case for opting for a certain selection mechanism is not as clear-cut as suggested by Elster. Both mechanisms have advantages and drawbacks and the decision involves a trade-off between a more democratic specifically elected assembly and the lower costs in terms of time and information offered by an assembly based on members of the legislative or executive.

While voting rules play a certain role in the process of selecting the drafters of a constitution, they play a more important role during the drafting and ratification process. Voting rules governing the constitution-making body that require a simple majority are the polar opposite of voting rules that require unanimous consent. These two cases suffer from different drawbacks. A simple majority rule increases the risk of a unilateral actor dominating the constitution-making process (for a detailed discussion of the risk of a single dominating actors, see Landau, 2013). The unanimity requirement creates opportunities for strategic bargaining and increases the risk of a holdout problem (Mnookin, 2003).

Between the two polar cases, there is a large set of other possible voting rules. Qualified majorities are the typical example and aim to overcome the holdout problem while still maintaining some veto power for minority actors. The decision for choosing a particular set of voting rules needs to weigh the costs and benefits between a fast, yet potentially one-sided process, and a more inclusive, yet more time-consuming and risky process. In practice, some form of a qualified majority requirement has dominated the picture in recent years (Democracy Reporting International, 2011).

The manner in which a constitution is ratified adds further constraints for the constitution-

makers. A constitutional bargain that fails to be ratified is worthless for the drafters. Hence, the expected interests of the actors ratifying the constitution are already relevant for the process of constitution-making itself. Ratification through the executive or legislative requires taking the preferences and interests of these bodies into account when drafting the constitution. The more interesting case, however is the direct participation of the public through a referendum. This case will be considered in the next subsection, which discusses public participation in general.

2.5.3 Public Participation

Public participation has been of growing importance in constitution making in the past 50 years. Using data from 480 constitutions adopted between 1789 and 2005, Ginsburg, Elkins, and Blount (2009) found that around 44% of all constitutions require a popular referendum as a mean of ratification. Examples such as the extremely participative process in South Africa in the 1990s further indicate the relevance of constraints through direct involvement of the general public. Public participation could also take place indirectly. One example of this would be the involvement of democratically elected veto players into the process of constitution-making (cf. Carey, 2009). Ackerman (1991) argued, although based on the debatable argument of the particular attentiveness of citizens, that a broad public involvement is beneficial for the constitution-making process. In general, the theoretical literature is very fond of public participation in constitution-making.

However, the empirical evidence, at least on the effect of referendums for ratification, is mixed. Ginsburg, Elkins, and Blount (2009) have found a positive effect of referenda on the longevity of constitutions, while Carey (2009) found that the mere existence of a referendum does not increase the constraints placed on the future government.[11] Carey puts the emphasis on the importance of legitimized institutional actors and thereby

[11] With regards to policy implications, one might consider adopting the majority requirements of referendums. Chapter 5 provides an analysis of the arguments for and against qualified majorities in constitutional referendums.

indirect participation. One of the problems with referendums is an increased uncertainty for constitution-makers causing the greater risk of failure of the negotiations (cf. Banks, 2008; Ginsburg, Elkins, and Blount, 2009).

To sum up, public participation is theoretically one of the main constraints faced by the drafters. However, despite the fact that public referendums are the most common form of participation, the evidence on their impact remains mixed.

2.5.4 Time Constraints

Timing is an essential part of the constitution-making process. The bargaining power of specific members or groups in the constitution-making body is based on their relative political strength at the moment in time when the process starts. The same consideration applies for the relative (im)patience of the drafters. These considerations are especially relevant after a drastic regime change or a violent conflict. Jackson (2008, p. 1291) writes "[...] the moment for constitution-drafting is not always, or even usually, an entirely autochthonous choice in post-conflict settings.". She further argues that time pressure was one of the key factors leading to the failure of the Iraqi constitution-making process in 2005.

Assuming that constitution-making actually suffers from time pressure, three main problems arise. First, complete negotiations become more costly and actors might accept incomplete bargaining, leaving important issues unresolved in the constitution (cf. Brown, 2008). Second, if the actors in the constitution-making body face different discount rates, the bargaining result might be unstable in the long run (cf. Vanberg and Buchanan, 1989; Negretto, 1999). Third, if the citizens also face time pressure, they might agree in the referendum to a constitution that is unstable in the long run due to the high costs of saying no and waiting for a new constitution to be drafted. To sum up, time pressures can force the ratification of a constitution that otherwise would not have been chosen. This issue will be more explicitly dealt with in chapter 4.

To sum up, the literature stresses several constraints faced by the constitutional drafters. While public participation and procedural rules can substantially limit the options available to drafters, these constraints themselves might falter under certain conditions. Drafting a new constitution under severe time pressure is one typical example for these "unconstraining" conditions. While procedural rules have received attention in the literature, they have so far not been formally used as determinants of constitutional choice. The next chapter sets up a formal model of the choice of form of government similar to established models and adds a constitutional assembly to fill this gap.

Chapter 3

Assemblies Matter: Analyzing the Choice of Form of Government in Unstable Democracies

3.1 Introduction

One consequence of the Arab Spring uprising in Egypt was the popular demand to draft a new constitution. This process was seen as one of the key steps to ensure stable democratic rule in Egypt. The constitutional assembly, however, failed to include minorities in the process, which led to a lop-sided constitution. This development contributed to a popular uprising in 2013, followed by the military leadership taking power and suspending the constitution. In the subsequent drafting of a new constitution, the Muslim Brotherhood was completely excluded from the process, despite still having strong support among the population. This constitution has been criticized for giving too much power to the military. Looking at this case of two assemblies, it appears that the com-

position of the constitutional assembly is an important factor for the shape and the success of the final constitution.

Several questions arise from the situation in Egypt. Why does a society choose a particular constitution? Which factors contribute to this choice and what role do the constitutional assembly and civil society play? To keep the analysis tractable, it can be useful to start by looking at only one constitutional feature at a time and see whether it is possible to draw conclusions of general relevance from the analysis of each feature.[12]

One logical starting point for this research question is the form of government. The reason for this claim is that the form of government is one of the two constitutional features that has been analyzed by Persson and Tabellini (2003). Many researchers have contributed to the examination of the economic effects of constitutions since this seminal contribution.[13] However, the question of why societies choose a form of government in the first place remains open and is the key motivation for this research.

Using a rational-choice model, this chapter finds that the composition of the constitutional assembly does play a key role for the choice of form of government. Especially when the policy conflict within the society (measured by income inequality in the model presented here) is strong, a change in the majorities in the constitutional assembly has an effect on the choice of form of government. The basic intuition behind this finding is that the group dominating the constitutional assembly will choose the constitutional rules that serve their interests best. Further influence factors are the cost of taxation, the obtainable rents for politicians and the sensitivity of citizens to policy changes. The main finding is in contrast to the existing theoretical literature on choice of form of government, which established a positive relationship between higher income inequality and a presidential form of government.

Before starting with the analysis itself, it is important to be clear on the distinction between the different forms of government. Two main forms of government can be

[12] It has to be noted that a downside of this approach is the lack of attention paid to effects of logrolling in the process of constitution-making.

[13] For a detailed overview of this more recent literature see Voigt (2011).

distinguished, namely presidential and parliamentarian systems.[14] Following Lijphart (1999), three main elements which differentiate the two systems can be identified. First, while the head of government in a presidential system (president) is elected for a given period and cannot be removed from his position under normal circumstances, the head of a government in a parliamentarian system (prime minister) requires the constant support of the legislative assembly due to the possibility of a vote of no confidence. Second, the election of the president is either direct (e.g. in France) or indirect (e.g. in the US) through a popular vote, whereas the election of a prime minister is through a vote in the legislative assembly. Third, there is a difference between the two systems with respect to the person in the executive. Parliamentarian systems have collegial or collective executives, whereas presidential systems have non-collegial executives. This distinction refers to the power that the president or prime minister have with respect to their cabinet. While the cabinet is directly accountable to the president, the prime minister does not wield the same level of power over his cabinet and has to consult them for the most important decisions.

In the course of this chapter, the main distinction between the presidential system and the parliamentarian system lies in the different levels of political power held by the head of government. This distinction is in line with the three elements from the definition of Lijphart (1999), but is different from the definition used in Persson et al. (1997).[15] The additional checks and balances from the stricter horizontal separation of powers in a presidential system are not modeled here. The reason for this difference is the diverging levels of power presidents wield across the world. Many presidents in Latin America or Africa do not contribute as a check on power, but concentrate most of the political power in their office (cf. Robinson and Torvik, 2016). From this perspective, this chapter resembles the contribution by Robinson and Torvik.

As highlighted by the initial example of Egypt, constitution-making often occurs following times of crises and instability. Widner (2008) found that more than 200 consti-

[14] A mix of these two, namely semi-presidentialism, is excluded from the analysis.
[15] The definition of Persson et al. (1997) resembles an US-type of presidential system instead.

tutions in the last forty years have been drafted under the threat of internal violence, highlighting that the risk of an uprising is a common situation during constitutional choice. In these scenarios, the assumption that presidential systems give unchecked power rather than checks and balances seems more realistic than in established democracies. To lend further support to the argument that political instability is common in constitution-making, Table 3.1 shows the new constitutions written from 2005 to 2013 and the countries ranking in the Failed State Index (Fund for Peace, 2015) and the Political Stability Index (World Bank, 2014) in the year of constitution-making. A higher ranking means that the country is less stable and it can be seen that most countries in the table are in the upper regions of the ranking. Exceptions like Montenegro in 2009 (after the country gained independence) and Hungary in 2011 (after a populist right-wing party gained a sufficient supermajority to rewrite the constitution) exist, but cases such as Iraq and Somalia are more common and motivate the focus on unstable countries.

With regards to the policy relevance of this analysis, policy recommendations for constitutional drafters require two steps. First, it is necessary to understand why societies opt for a certain governmental system and what underlying factors influence this decision. This knowledge helps the individuals who hold the policy makers accountable to better judge their motives, especially in the case of legal transplants. Second, once the evolution and the economic effects of the form of government are better understood, normative constitutional economics can provide policy makers with recommendations for the most beneficial form of government in a given situation. This research attempts to contribute to the first step.

The next section presents a short overview of the relevant literature. This is followed by the setup of the model. After solving the model and discussing the results, a final section concludes.

Table 3.1: New Constitutions and Political Stability

Country	Year	Failed State Index[a]	Political Stability Index[b]
Iraq	2005	4	2
DR Congo	2005	2	4
Burundi	2005	18	15
Swaziland	2005	.	73
Kyrgyz Republic	2006	28	24
Serbia	2006	.	.
Thailand	2007	86	28
Kyrgyz Republic	2007	42	36
Montenegro	2007	135	97
Myanmar	2008	13	29
Ecuador	2008	69	43
Maldives	2008	67	81
Turkmenistan	2008	46	124
Bhutan	2008	51	140
Kosovo	2008	.	.
Niger	2009	23	31
Bolivia	2009	52	58
Guinea	2010	9	10
Niger	2010	20	27
Kenya	2010	13	28
Madagascar	2010	63	31
Kyrgyz Republic	2010	45	32
Angola	2010	58	77
Dominican Republic	2010	92	89
Morocco	2011	86	70
Hungary	2011	140	140
Somalia	2012	1	1
Syria	2012	24	2
Egypt	2012	32	15
Zimbabwe	2013	9	.
Fiji	2013	66	.

[a]Since 2014, this index is called the Fragile State Index. The number of countries covered for the Failed State Index is 75 in 2005, 145 in 2006 and 175 thereafter.

[b]The number of countries covered for the Political Stability Index is 191 in 2005 and 192 thereafter.

3.2 What Explains the Choice of Form of Government?

Only a handful of papers have explicitly tried to model the constitutional choice of the form of government. The first contribution is Aghion et al. (2004), which asks how insulated the leader in a political system should be, where insulation is used to measure unchecked power. While a high level of insulation allows the leader to undertake beneficial reform policies more easily, it also allows him to expropriate citizens. This dilemma is central to answering the question of how insulated a leader should be. Their main result indicates that a low risk aversion will lead to a high insulation and *vice versa*. If one lifts the veil of ignorance and assumes that a minority group is able to write the constitution and will come into power once the constitution comes into force, this should also lead to higher insulation. This can typically be found in an autocracy, where the ruling class is setting up a constitution with the aim to further strengthen its power.

Nevertheless, there is a case for doubting the strength of the direct link from the form of government to the insulation of a leader. Insulation can be achieved not only through the form of government, but also through other political institutions such as federalism or an independent judiciary. Therefore, the effects of insulation might be combining multiple constitutional features at the same time and not exclusively the form of government.

Clearly, looking at the form of government from different angles might offer valuable insights. Robinson and Torvik (2016) set up a model based on a society divided into two main groups, out of which one forms a majority. Both groups differ in their appreciation of public goods and in their ideological perspective.[16] Some citizens of these groups run (exogenously motivated) for office and are elected under the rules of either a presidential or a parliamentarian setting. The politicians decide upon the public good provision and the political rents extracted by voting in parliament after the election. However, voting

[16]Therefore, they get a higher utility simply from having a member of their group in power if the ideological preference is stronger.

procedures differ between the two systems. While the president is the residual claimant of the rents and has full agenda setting power, the prime minister can only determine the absolute amount of rents (through his public goods provision proposal), but cannot affect the distribution. Hence, a presidential system should see a lower level of public goods and a higher level of political rents. They also find that a strong ideological preference or large conflict with regards to public goods (e.g., high income inequality) makes a change from a parliamentarian to a presidential system more likely.

The model of Robinson and Torvik (2016) offers valuable insights into the decision-making process of parliamentary versus presidential systems. Nevertheless, some weaknesses can be identified. The timing of the model begins with elections under the current system. Using this starting point overlooks the scenario of a civil conflict or war, when the old constitutional rules have broken down. Therefore, the model is a good fit for explaining constitutional change, but is less effective for explaining constitutional choice. This drawback highlights the need to include the constitutional choice as the first stage in a model of constitutional choice.

To date, the empirical literature on the determinants of the form of government has focused on explaining constitutional change and the determinants of changes from presidential to parliamentary systems and *vice versa*.[17] Hayo and Voigt (2010) use a proportional hazard model to show that geographical factors and former colonial status are the main contributing factors to changes in the form of government. In a further study, Hayo and Voigt (2013) employ a panel design to test which underlying factors are the main drivers for the observed changes in the form of government. They find that political factors are significant, while socio-economic factors, including income inequality, do not show statistical significance. This result, whicht is at odds with the theoretical conjectures of Robinson and Torvik (2016), provides additional motivation for the model presented in the next section.

[17]Since changes in the form of government are more frequent than initial choices of the form of government, empirical strategies to identify the factors of the initial choice are harder to find and so far, to the best of my knowledge, no paper has rigorously tried to test for the factors.

Research on the relationship between income inequality and taxation is another strand of related literature. The seminal papers to analyze this link are Meltzer and Richard (1981) and Romer (1975). Meltzer and Richard (1981) model a situation where productivity, and thus income, are unevenly distributed within a society. When the distribution is skewed to the right, the median voter earns less than the mean income and he will favor a positive tax rate to redistribution. A median voter above mean income will prefer no redistributive taxes. Romer (1975) has a similar finding in the sense that a low-earner will prefer a higher marginal tax rate, whereas high earners will prefer a lower marginal tax rate. Following the rationale of these papers, a more unequal distribution will increase the conflict between rich and poor.

It is useful to briefly discuss what the literature in other fields has contributed to the discussion. Political scientists, like economists, have dealt mainly with the question of the (political) effects of presidentialism and parliamentarism and not given a lot of attention to the underlying factors motviating a particular choice of form of government.[18] One exception is Cheibub (2007, p. 152), who argues that historical coincidences and institutional stickiness are the main reason for the initial choice and prevalence of presidentialism in Latin America. This contribution shows that path dependency might play an important role in the choice of form of government.

For legal scholars, the main interest in the discussion about the choice of form of government appears to be the underlying procedural rules followed in the process of constitutional choice and not the explanation of the outcome of this constitutional choice conditional on these procedural rules (cf. Klein and Sajo, 2012). In short, it can be argued that the question of what drives the choice of form of government has not been satisfyingly answered in other disciplines either. However, the process of constitution-making might be one of the key determinants of the choice of form of government. This institutional element is combined with the existing economic models in the next section.

[18]The main debate in political science has been concerned with the question of the inherent political stability of presidential and parliamentarian systems as well as their main advantages and drawbacks, see for example Linz (1990); Horowitz (1990).

3.3 Modeling the Choice of Form of Government

The multi-stage model of constitutional choice in this section draws its main inspiration from Acemoglu and Robinson (2006), Aghion et al. (2004) and Robinson and Torvik (2016). The first contribution endogenises the choice of democracy versus dictatorship offering a tractable framework. The second contribution includes a model starting at the constitutional stage. The third contribution was the first to include an explicit choice of the form of government as well as a focus on political rents. None of the three models are, by themselves, not sufficiently comprehensive to give a complete picture of the choice of form of government. Acemoglu and Robinson (2006), while providing a neat analytical framework, focus on a different topic. Aghion et al. (2004) measure multiple constitutional features at the same time rather than isolating specific aspects of the process. Despite being closest in approach to the model in this chapter, the contribution of Robinson and Torvik (2016) does not model the constitutional assembly explicitly and thereby cannot capture the potential effects of differences in the composition of the constitutional assembly.

Before setting up the model, a final note of caution is required. One of the main findings in Robinson and Torvik (2016) is that higher political rents can be obtained in a presidential system. In order to make a comparison of the results simpler, the model presented here assumes this finding is correct. Therefore, the differences in rent are not endogenously derived in this model to strengthen the focus on the role of the constitutional assembly. A more in-depth discussion of this assumption and of other simplifying assumptions of the model is carried out in section 3.4.

3.3.1 Setup

The players in the game are distinguished by two characteristics. First, individuals differ in terms of their income and are either rich or poor.[19] The incomes of the rich

[19]Other models, such as Ticchi and Vindigni (2010), are based on three income classes and include a middle class. Since the focus is on unconsolidated democracies, it can be argued that these societies

and the poor are $Y_r > Y_p$, respectively. The average income for all n individuals is therefore $\bar{Y} = \frac{1}{n} \cdot \sum_{j=1}^{n} Y_j$. The total population can be normalized to 1, with a share $(1-\delta) > 0.5$ being poor with the fixed income Y_p. Using this notation, we can define income inequality (θ) as following:

$$\frac{Y_p}{\bar{Y}} = \frac{(1-\theta)}{(1-\delta)} \quad \text{and} \quad \frac{Y_r}{\bar{Y}} = \frac{\theta}{\delta} \tag{3.1}$$

Note that an increase in θ is equivalent to an increase in income inequality. Income inequality plays a key role in the model. It can be interpreted as a proxy for the political conflict within the society. Several political economy models use income inequality or similar conflicts to explain the form of government (Robinson and Torvik, 2016), electoral rules (Ticchi and Vindigni, 2010) and democratization (Acemoglu and Robinson, 2006).

Second, each individual belongs to an exogenously determined class, namely either the political class (Z) or the citizen class (X). Individuals in the political class have the ability to draft the constitution as well as run for office. Individuals in the citizen class can contribute to the political game by participating in the general election. Politicians who hold office are the only players in the game with the ability to extract political rent. Political rent is simply the ability to use resources from the government budget for private benefit. These private benefits can be either the direct extraction of funds or in more indirect forms such as, for example, nepotism.[20]

The policy options for the political class in this game require further elaboration. The only policy option available to the government in power is redistributive politics. This assumption excludes the provision of public goods such as national defense, which might be mutually beneficial for all individuals. Assuming that efficiency-increasing policies and redistributive policies can be clearly separated, the model subsumes from all efficiency-increasing policies given the focus on modeling the policy conflict between

typically lack a strong middle class. Furthermore, the decision to not include a middle class increases the focus on the conflict between rich and poor, following the baseline model in Acemoglu and Robinson (2006).

[20] This model formally assumes only direct extraction of government funds.

poor and rich (cf. Acemoglu and Robinson, 2006). The results would not change if public good provision was included.[21]

The model assumes that the members of the political class with an initially low income Y_p (hereafter left-wing politicians) view redistributive policies more favorably then the members of the political class with an initially high income Y_r (hereafter right-wing politicians). Furthermore, politicians are not able to credibly commit to a tax rate at the election stage.[22]

Hence, a total of four different types of players exist: rich citizen, poor citizen, right-wing politician, and left-wing politician. The model also assumes that citizens are more numerous than politicians and that there are more poor citizens than rich citizens. No assumption is made for the number of left-wing and right-wing politicians.

Utility Functions

The utility of each individual is derived from the income tax rate τ, the rate of extraction of political rents λ as well as their initial income Y_j. For simplicity, two different indirect utility functions are introduced. The first indirect utility function is characterized as follows:

$$V_X(Y_j|\tau, \lambda_i) = (1-\tau)Y_j + (1-\lambda_i)(\tau - c(\tau))\bar{Y} \tag{3.2}$$

This function applies to all citizens and the subset of politicians who do not hold a position in the government. The first term on the right-hand side represents an

[21] Even assuming that the Pareto optimal level of public good provision is known to all players, there would still be conflict about the amount of public goods provided. This conflict is due to the fact that with proportional taxation the rich pay a larger part of the costs of public goods than the poor. Using the Kaldor-Hicks criterion to assess these different preferences, the preferred level of the poor would lead to an oversupply of the public good, while the preferred level of the rich would lead to an undersupply of the public good (Persson and Tabellini, 2000). Therefore, the poor would prefer a higher level of public good provision than the rich. Hence, the assumption that only redistributive taxation is a policy option is used to highlight the conflict concerning the amount of public spending.

[22] This assumption is in the spirit of the contribution by Acemoglu (2003), who argues that the lack of a political Coase theorem is exactly due to the lack of commitment devices in politics.

individual's income after taxation. The second term represents the lump-sum transfer made from the government budget.[23] The size of the redistribution is negatively affected by the magnitude of political rents($\lambda_i \in [0-1]$) where the superscript i indicates the two different forms of government) extracted by the government and by the cost of taxation ($c(\tau)$).

The cost of taxation refers to the increasing marginal costs of tax collection. This marginally increasing cost has been called the "leaky bucket" of taxation by Okun (1975). Following Acemoglu and Robinson (2006), this cost includes the cost of creating a bureacuracy to administer the process of tax collection as well as the costs of the actual collection of taxes. Furthermore, the tax resistance of citizens can be assumed to increase with the tax rate. In the remainder of this model, the functional form of $c(\tau) = k * \tau^2$ will be adopted. In this representation, k is between 0 and 1 and measures the effectiveness of the tax system. The lower the value of k, the more effective the tax system. This setup is used to allow for differences in bureaucratic efficiency and tax enforcement across countries. For a value of $k = 0.5$, the formulation of the quadratic tax distortion is identical to the one used by Bolton and Roland (1997).

The second utility function allows the model to distinguish between politicians who hold an office and politicians who do not hold an office. The utility function of politicians who do not hold office is identical to the utility function of citizens.

Politicians who are in office can profit from the opportunities of political rent extraction. This distinction is shown in the following indirect utility function:

$$V_Z(Y_j|\tau,\lambda_i) = \begin{cases} V_X(Y_j|\tau,\lambda_i) \text{ if not in government} \\ V_X(Y_j|\tau,\lambda_i) + (1-\pi)\frac{n}{m}\lambda_i(\tau - c(\tau))\bar{Y} \text{ if in government} \end{cases} \tag{3.3}$$

[23] The net redistribution (tax - transfer) is always negative for the rich and positive for the poor, given that the costs of taxation and the expropriation are not prohibitively high. The functional form is used following Acemoglu and Robinson (2006).

in the second function, π stands for the risk of a citizen uprising and is bound between 0 and 1.[24] This risk increases when the tax rate is further from the citizens preferences.[25] Since politicians "choose" the amount of rents available to them by setting the tax rate and the choice of tax rates is the only policy variable, the citizens will base their decision whether or not to stage an uprising upon this variable. Indirectly, this risk is also linked to the rate of extraction, λ_i, through the effect of rent extraction on tax rates. An increase in the amount of extracted tax revenue affects the differences between the desired tax rates of politicians and citizens. The desired tax rate of poor citizens decreases with rent extraction, whereas the desired tax rates of politicians goes up. The uprising constraint is not explicitly modeled here to keep the model tractable. The important element is that it is increasing in tax rates and thus can be seen as serving as an upper bound on tax rates from the citizens' perspective.

Furthermore, m is the number of politicians that end up in office and among whom the political rents are divided. Politicians are assumed to be risk neutral.

Strategy Spaces

Politicians have two distinct choices as events unfold. First, they choose which form of government to establish under the constitution. In terms of the formal model, this decision is the choice of λ_i. Their two options are either a presidential system (p) or a parliamentarian system (w).[26] The main difference between the two systems is that the president has more power at digression than the prime minister.[27] To keep the model tractable, the political processes of each form of government are not explicitly modeled. Instead, the result from Robinson and Torvik (2016), namely that the extractable political rents are higher in a presidential system, is assumed to hold.[28] In this way, the

[24] π is used as a simplification of notation and always refers to $\pi(\tau)$).

[25] In a setting with political rent extraction, it is unlikely that the politicians choose a tax rate that will be too low from the citizens perspective. Thus, it is hereafter assumed that π increases in τ.

[26] The index w is chosen since the parliamentarian form of government is often directly associated with British parliamentarism and the Westminster.

[27] Thereby following Robinson and Torvik (2016).

[28] A more in-depth discussion of this assumption is carried out in section 3.4.

choice of form of government can also be seen as a choice of the extraction technology for the politicians. Second, conditional on being in government, they can set the tax rate τ, which can take values from 0 to 1. Citizens have one distinct choice, namely the vote that they cast in the general elections.

Timing

The timing of the different stages of the model is as follows:

1. The political class decides upon the constitution; i.e. the form of government
2. All citizens cast their vote in the general election [29]
3. The new government constitutes itself and sets the tax rate τ

When citizens cast their vote in the second stage, their considerations take into account that more redistribution, i.e. higher tax rates, always comes at the cost of more rent extraction. This trade-off makes the choice for poor citizens non-trivial and will be one of the key features of the model. The choice of form of government can be described as the choice of extraction technology (which is one key constraint for the extraction of political rents), whereas the risk of an uprising acts as another constraint on political rents through its effect on chosen tax rates.

The key structural difference of this model when compared to Robinson and Torvik (2016) is the timing of the first stage. Robinson and Torvik (2016) start their model with general elections, introducing the option of constitutional change only at a later stage of the game. By moving the stage of constitutional choice to the beginning in this model, the importance of the constitutional assembly and its composition can be highlighted. A key assumption here is the idea that the composition of the assembly is exogenously given. This important assumption is motivated by the idea that, especially

[29] Since there are a lot more citizens than politicians, the votes of politicians are left out as a simplification. The median voter is assumed to be decisive. There are no further assumptions on the details of the electoral rule.

following a period of internal violence or crisis, the winning faction will often be able to dominate the constitution-making process.[30] Additionally, the model is able to address situations that start without a constitution in place, while the model of Robinson and Torvik (2016) requires a form of government in the beginning under which the elections are held.

3.3.2 Solving the Model

Following the timing of the stages of the model presented above, it can be solved using backward induction. Therefore, we start with the last stage of the game, i.e. the taxation decision of the government.

Stage 3: Choice of Tax Rate

To analyze the choice of the tax rate, one needs to look at the utility of the politician in office with respect to the tax rate. The indirect utility function of the politician in office is as follows:

$$V_Z(Y_j|\tau,\lambda_i) = (1-\tau)Y_j + (1-\lambda_i)(\tau - c(\tau))\bar{Y} + (1-\pi)\frac{n}{m}\lambda_i(\tau - c(\tau))\bar{Y} \tag{3.4}$$

Instead of deriving a specific tax rate, the interesting question is how the chosen tax rate is affected by changes in the type of politician (as measured by his initial income, Y_j) or extractive capacities (λ_i). The extractive capacities depend on the form of government, assuming that more political rents can be extracted in a presidential system. In this way, the choice of form of government (modeled below in stage 1) can be seen as the choice of an extraction technology by the politicians. In this way, the

[30] We assume democratic policies for the later stages throughout the paper. This assumption can be seen as a limitation when a majority in the assembly expects to not emerge as the winning party in a general election, since a group dominating the assembly could try to rig future elections to ensure that they remain in power.

decision about the tax rate is (partially) driven by the choice of form of government.

For the two parameters Y_j and λ_i, the hypotheses are: (1) a right-wing politician in office (i.e. $Y_j = Y_r$) reduces the chosen tax rate and (2) a higher extractive capacity (λ_i) reduces the tax rate. The reasoning behind the counter-intuitive second hypothesis is that citizens will gain less from redistribution if a larger part is used for political rent extraction. In this case, they are more inclined to start a protest at a given realized tax rate (since their preferred tax rate decreases if the gains from redistribution decrease). Thus, a utility maximizing politician will reduce the tax rate to balance the gains from higher political rents and the increased risks of an uprising.[31] This hypothesis depends on the ability of citizens to respond with an uprising to a tax choice they dislike. One could also argue that politicians can set a lower τ to achieve a given rent in cases where λ_i is higher.

Proposition 1. *With regard to the tax rate, the following two conditions hold:*

1. *The tax rate will be lower if a right-wing politician is in office.*
2. *The tax rate will be lower under presidentialism, given that citizens are sufficiently attentive to tax rates (i.e.* $(1-2k\tau)\bar{Y}[1-\frac{n}{m}(1-\pi)]+\frac{n}{m}\bar{Y}[(\tau-k\tau^2)\frac{\partial\pi}{\partial\tau}]>0$*)*

Proof. To formally check whether these conditions hold true, monotone comparative statics will be used. The general idea behind this method is to inform about the effect of changes in parameters on an optimization decision. Here, we are interested in the effect of changes in income or extraction capacity on the taxation decision. If the differences of the utility function with respect to a parameter and the choice variable are strictly increasing, then we know that an increase in the parameter will also lead to an increase in the optimal value of the choice variable. If we want to show that an increase in the parameter will decrease the optimal choice variable, it is required that the differences with respect to the negative of the utility function are strictly increasing. Therefore, we

[31] This finding, although arrived at through a very different theoretical model, can be empirically supported by the finding of Persson et al. (2000) that parliamentarian systems have larger governments (and thus higher taxes).

will analyze the behavior of $-V_Z$ below. For a more detailed description of monotone comparative statics, see Milgrom and Shannon (1994). With regard to our question of interest, the following conditions need to hold:

$$\text{(a)}\frac{\partial^2(-V_Z)}{\partial\tau\partial Y_j} > 0 \quad \text{and} \quad \text{(b)}\frac{\partial^2(-V_Z)}{\partial\tau\partial\lambda} > 0 \tag{3.5}$$

Solving these equations using (3.4) leads to

$$\text{(a)}\ \frac{\partial^2(-V_Z)}{\partial\tau\partial Y_j} = 1 > 0 \tag{3.6}$$

$$\text{(b)}\ \frac{\partial^2(-V_Z)}{\partial\tau\partial\lambda} = (1-2k\tau)\bar{Y}[1-\frac{n}{m}(1-\pi)] + \frac{n}{m}\bar{Y}[(\tau-k\tau^2)\frac{\partial\pi}{\partial\tau}] \tag{3.7}$$

While (a) is always holding and thereby confirms the earlier stated conjecture, (b) requires further analysis. To see under which circumstances the conjecture holds, it is useful to rewrite equation (3.7).

$$\frac{\partial^2(-V_Z)}{\partial\tau\partial\lambda} = \frac{n}{m}\bar{Y}[(1-2k\tau)(\pi+\frac{1}{\frac{n}{m}}-1) + (\tau-k\tau^2)\frac{\partial\pi}{\partial\tau}] \tag{3.8}$$

To find out whether the right-hand side is positive or negative, it is useful to look at its components step by step. For $1-2k\tau$, a very high tax rate would be required to make the expression negative. However, since this would also assume a very high cost of taxation, these tax rates are not chosen by the politicians and hence it can be assumed that $(1-2k\tau) > 0$. [32]

Given this assumption, the sign of the first expression on the right-hand side depends on $(\pi + \frac{1}{\frac{n}{m}} - 1)$. If the risk of an uprising does not approach 1, the sign of $(\pi + \frac{1}{\frac{n}{m}} - 1)$

[32] Even if the sole aim of the politicians would be tax revenue maximization, they would choose $\tau = \frac{1}{2k}$. This is the extreme case and it can safely be assumed that $\tau < \frac{1}{2k}$.

will be negative. However, the overall sign of the right-hand side can still be positive. The crucial element here is the change in the risk of an uprising ($\frac{\partial \pi}{\partial \tau}$). One can interpret an overall positive sign as follows: if citizens are reactive enough, politicians will choose a lower tax rate to accommodate the citizens.

To illustrate the conditions with regard to π, we can use equation (3.5) and equation (3.8) to state:

$$\frac{n}{m}\bar{Y}[(1-2k\tau)(\pi+\frac{1}{\frac{n}{m}}-1)+(\tau-k\tau^2)\frac{\partial \pi}{\partial \tau}]>0 \tag{3.9}$$

Solving this inequality for π highlights the importance of the uprising constraint for the finding that tax rates will be lower with a presidential system.

$$\pi > 1-\frac{m}{n}-\frac{\tau-k\tau^2}{1-2k\tau}\cdot\frac{\partial \pi}{\partial \tau} \tag{3.10}$$

One can easily see that a higher risk of an uprising (π) and a higher responsiveness of this risk to changes in the tax rate ($(\frac{\partial \pi}{\partial \tau})$) both make the inequality more likely to hold. Recall that the inequality is the condition under which a presidential system will have a lower tax rate.

□

Situations with citizens who are relatively more attentive to tax decisions can be thought of as cases where π and $\frac{\partial \pi}{\partial \tau}$ are higher. Both of these cases make the conjecture more likely to hold. In other words, this model is better suited for scenarios that allow for a moderate to high likelihood of a citizen uprising than for scenarios where the risk of an uprising approaches zero. This finding fits well with our focus on unstable democracies.

Before moving on to the next stage, a check on how a change in income inequality affects the model is in order. When income inequality increases, taxation becomes

more attractive for the poor and less attractive for the rich (due to the part of the tax burden they are sharing). Hence, increasing income inequalities will lead left-wing politicians to prefer an increasingly higher tax rate under both systems, while the right-wing politicians favor lower tax rates, *ceteris paribus*.

Stage 2: Election of Government

Taking into account the results of the last section, it is now possible to analyze the voting behavior in the election of the government. Recall that left-wing politicians will set a higher tax rate than right-wing politicians. Citizens are aware of this difference when they are casting their vote in the election. In the model with two classes of citizens, the median voter will always be a poor citizen (recall the assumption that there is a greater number of poor than rich citizens). Unlike the rich citizens, poor citizens favor a positive tax rate as long as their benefits from redistribution are larger than their share of the burden of taxation.

Proposition 2. *A left-wing government will be elected if the following condition holds:*

$$\frac{(1-\theta)}{(1-\lambda_i)(1-\delta)} < 1 - \frac{k(\tau_l^2 - \tau_r^2)}{\tau_l - \tau_r}$$

Otherwise, a right-wing government is elected.

Proof. The maximization problem for the poor citizens is as follows:

$$vote = \begin{cases} \text{right-wing if } V_X(Y_p|\tau_r, \lambda_i) > V_X(Y_p|\tau_l, \lambda_i) \\ \text{left-wing if } V_X(Y_p|\tau_r, \lambda_i) < V_X(Y_p|\tau_l, \lambda_i) \end{cases} \tag{3.11}$$

Here, τ_r represents the tax rate a right-wing politician would choose and τ_l the tax rate a left-wing candidate would choose. To express this situation more formally, the utility functions as spelled out above can be employed. Hence, the poor citizens choose the right-wing politician if

$$(1-\tau_r)Y_p + (1-\lambda_i)(\tau_r - k\cdot\tau_r^2)\bar{Y} > (1-\tau_l)Y_p + (1-\lambda_i)(\tau_l - k\cdot\tau_l^2)\bar{Y} \tag{3.12}$$

Rewriting equation (3.12) and using $\frac{1-\theta}{1-\delta} := \frac{Y_p}{\bar{Y}}$, where δ is the relative share of rich citizens in the society and θ is the relative income inequality, one arrives at

$$\frac{(1-\theta)}{(1-\lambda_i)(1-\delta)} > 1 - \frac{k(\tau_l^2 - \tau_r^2)}{\tau_l - \tau_r} \tag{3.13}$$

Hence, an increase in the possible rent extraction (λ_i) or the share of rich citizens as part of the total population (δ) increase the likelihood that the poor citizens vote for the right-wing candidates. If there is more possible rent to extract (which can happen through both of these variables), poor citizens are more inclined to prefer the lower tax rates of the right-wing politicians. At the same time, an increase in relative income inequality (θ) makes the election of a right-wing politician less likely, since redistributive policies are now more attractive for poor citizens.

The effect of the anticipated tax rates depends on two elements, namely on how efficient the tax system works (k) and on income inequality. The less efficient the tax system becomes, the more likely it is that a right-wing politician will be elected. This effect can be explained by a right-wing politician's preference for lower tax rates. However, similar to the direct effect of income inequality, more inequality will also increase the differences in anticipated tax rates between the politicians. In other words, more inequality will increase the gap between poor and rich in terms of income as well as in terms of preferred tax rates of their politicians. The larger this difference, the lower is the likelihood of a right-wing politician being elected. □

Stage 1: Choice of Form of Government

Having used backward induction to solve the stages 3 and 2, it is now possible to look at the constitutional stage and derive the form of government chosen by politicians. Recall the assumption that the composition of the assembly is exogenously given. Note that it is assumed that the constitutional assemblies use a simple majority decision-rule, which will be further discussed in section 3.4. Two cases can be distinguished, namely one where the right-wing politicians have the majority in the constitutional assembly and another where the left-wing politicians have the majority. Since the last section showed that poor voters might prefer the right-wing politicians, it is necessary to look at both possible outcomes for each case. The composition of the assembly is supposed to be exogenous. This is an important assumption and has significant impact on the outcome of the model. The reasoning for this argument is that the political circumstances which lead to a demand for a new constitution are often driven by internal crisis or conflict and it is the result of this crisis or conflict that determines the composition of the assembly.[33] One could also relate this argument to the concept of constitutional moments (Ackerman, 1991). Recall the example of the two very different assemblies in Egypt in 2012 and 2013 as an example for this situation. A more detailed discussion of this assumption can be found in section 3.4. This stage will be analyzed by looking at the two cases of exogenously given compositions of the assembly in turn: First, what happens if the ring-wing politicians have a majority in the assembly and second, what happens if the left-wing politicians have a majority in the assembly.

Case 1: right-wing politicians have the majority in the constitutional assembly

To analyze the situation with a majority for the right-wing politicians, we can make use of the analysis of the (expected) election result (stage 2). Here, we assume that

[33] Citizens are assumed to be unable to change the constitution throughout the model, except through an uprising. This assumption builds on the idea that the constitution cannot be easily changed in the short-run. While the long-term dynamics would be interesting, they are outside the scope of the model presented here.

politicians are perfectly able to predict whether or not they will end up in government. Nevertheless, releasing this strong assumption would not change the key results of this analysis. If right-wing politicians know that they will be in government after the election, they choose the form of government that offers the higher payoff to the politicians in government. This decision is conditional on the respective tax rates which are optimal for the politicians under each system. Hence, a presidential system will be chosen if the following condition holds.

$$\begin{aligned}&(1-\tau_p)Y_r + (1-\lambda_p)(\tau_p - c(\tau_p))\bar{Y} + [(1-\pi_p)\frac{n}{m}\lambda_p\bar{Y})](\tau_p - c(\tau_p)) > \\ &(1-\tau_w)Y_r + (1-\lambda_w)(\tau_w - c(\tau_w))\bar{Y} + [(1-\pi_w)\frac{n}{m}\lambda_w\bar{Y})](\tau_w - c(\tau_w))\end{aligned} \tag{3.14}$$

Using $\frac{\theta}{\delta} := \frac{Y_r}{\bar{Y}}$ and rearranging both sides of the equation gives the following condition for the choice of a presidential system

$$\frac{\theta}{\delta} > \frac{(1-\lambda_w + (1-\pi_w)\frac{n}{m}\lambda_w)(\tau_w - k\tau_w^2) - (1-\lambda_p - (1-\pi_p)\frac{n}{m}\lambda_p)(\tau_p - k\tau_p^2)}{\tau_w - \tau_p} \tag{3.15}$$

The choice depends on the level of income inequality on the left-hand side of the equation and the differences in gains from redistribution and political rent extraction between the two forms of government, weighted by the tax rate differences, on the right-hand side. If the gains are larger under a presidential system, then the presidential system is always preferred. This effect relies on the result that the tax rate is lower under a presidential system and thus the right-hand side would always have a negative sign.

However, if the gains from redistribution and political rent extraction are higher under a parliamentarian system, then a trade-off exists between the larger gains under this system and the larger costs in terms of taxation. Given this trade-off, a parliamentarian

system will be chosen only if the difference in gains (weighted by the difference in tax rates) is larger than the level of income inequality. Thus, a large income inequality makes a presidential system more likely.

This leads to the question how the differences in tax rates affect this condition. At this point, it is useful to mention that politicians are assumed to have no means to credibly commit to a different tax rate than the one that maximizes their utility in a given form of government. *Ceteris paribus*, if the difference between τ_w and τ_p increases, the risk of a popular uprising as well as the amount of redistribution and political rents obtainable in a parliamentarian system increase. When the costs in terms of an increased risk of an uprising are already high with the initial tax rates (i.e. citizens are reactive to tax changes), a marginal increase in the difference makes a presidential system more likely.

If it is anticipated that left-wing politicians will end up in government after the election, one can see that right-wing politicians have the same indirect utility functions as rich citizens (cf. equation (3.3)).[34] In this case, they choose the governmental system which delivers the higher utility for them as citizens. Using equation (3.2), it can be seen that the presidential system is preferred if:

$$(1-\tau_p)Y_r + (1-\lambda_p)(\tau_p - c(\tau_p))\bar{Y} > (1-\tau_w)Y_r + (1-\lambda_w)(\tau_w - c(\tau_w))\bar{Y} \tag{3.16}$$

Using $\frac{\theta}{\delta} := \frac{Y_r}{\bar{Y}}$ and rearranging both sides of the equation gives the following condition for the choice of a presidential system

$$\frac{\theta}{\delta} > \frac{(1-\lambda_w)(\tau_w - k\tau_w^2) - (1-\lambda_p)(\tau_p - k\tau_p^2)}{\tau_w - \tau_p} \tag{3.17}$$

The interpretation is similar to the case presented above, but note that the politicians

[34] This observation holds in non-repeated games, while a more complex version might include future stages and the effect of expectations about future office holders.

do not care about political rents if they know that they will not end up in government. Thus, the right-hand side is composed of the difference in gains from redistribution, which are again weighted by the difference in tax rates. An increase in the level of income inequality increases the portion of the tax burden for rich citizens. This effect makes a presidential system more likely, since the rich citizens face a larger cost in a parliamentarian system.

Since the rich citizens in this model have no interest in redistribution in the first place (recall that they would favor a tax rate of zero) and politicians who know they will not end up in office share an indirect utility function with rich citizens, the right-wing politicians favor lower taxes when they anticipate they the will not hold office. Thus, a larger difference in tax rates increases the likelihood of a presidential system.

Case 2: left-wing politicians have the majority in the constitutional assembly

Following the procedures in case 1, it is useful to first check what will happen if the left-wing majority in the assembly anticipates to end up in government after the election and thereafter look at the situation when they anticipate that they will lose the upcoming election. If left-wing politicians expect that they will be in government after the election, then they choose the system with the higher political payoff to the politicians in office. This choice leads to a presidential system if the following condition holds:

$$\begin{aligned}&(1-\tau_p)Y_p + (1-\lambda_p)(\tau_p - c(\tau_p))\bar{Y} + [(1-\pi_p)\frac{n}{m}\lambda_p\bar{Y}](\tau_p - c(\tau_p)) > \\ &(1-\tau_w)Y_p + (1-\lambda_w)(\tau_w - c(\tau_w))\bar{Y}) + [(1-\pi_w)\frac{n}{m}\lambda_w\bar{Y}](\tau_w - c(\tau_w))\end{aligned} \tag{3.18}$$

Using $\frac{1-\theta}{1-\delta} := \frac{Y_p}{\bar{Y}}$ and rearranging both sides of the equation gives the following condition for the choice of a presidential system

$$\frac{1-\theta}{1-\delta} > \frac{(1-\lambda_w+(1-\pi_w)\frac{n}{m}\lambda_w)(\tau_w-k\tau_w^2)-(1-\lambda_p-(1-\pi_p)\frac{n}{m}\lambda_p)(\tau_p-k\tau_p^2)}{\tau_w-\tau_p} \tag{3.19}$$

The right-hand side of this equation is identical to equation (3.17) and thus the interpretation also remains the same. The key difference is that the impact of income inequality changes the sign because of the different preferences with regard to redistribution. From a cost perspective, a larger income inequality means that the part of the tax base that is paid for by the rich is larger. Thus, the part of the costs of redistribution and rent extraction increase with income inequality. This cost effect is another explanation of why a left-wing assembly will favor a parliamentarian system (which leads to higher taxes) when income inequality increases.

When the left-wing majority in the assembly anticipates that the right-wing politicians end up in government after the election, they prefer the system where the tax rate realized by the right-wing politicians is closer to their own preferred tax rate. Recall that if left-wing politicians are not in government, their indirect utility functions are the same as those of poor citizens (cf. (3.4)). They choose the governmental system which delivers the highest utility for them under this condition. Hence, a presidential system will be chosen if the following condition holds.

$$(1-\tau_p)Y_p+(1-\lambda_p)(\tau_p-c(\tau_p))\bar{Y} > (1-\tau_w)Y_p+(1-\lambda_w)(\tau_w-c(\tau_w))\bar{Y} \tag{3.20}$$

Using again $\frac{1-\theta}{1-\delta} := \frac{Y_p}{\bar{Y}}$ and rearranging both sides of the equation gives the following condition for the choice of a presidential system

$$\frac{1-\theta}{1-\delta} > \frac{(1-\lambda_w)(\tau_w-k\tau_w^2)-(1-\lambda_p)(\tau_p-k\tau_p^2)}{\tau_w-\tau_p} \tag{3.21}$$

Again, only the left-hand side changed compared to the situation where right-wing politicians have the majority and know that they will not end up in government. Income inequality enters in the same way for left-wing politicians and left-wing citizens, given the cost argument as well as the preference for redistribution.

The finding from the two cases can be summarized in the following proposition:

Proposition 3. *When income is equally distributed (i.e. $\theta = 0.5$), the composition of the constitutional assembly has no effect since there is no policy conflict. A higher level of income inequality makes a presidential system more likely if right-wing politicians have a majority. If left-wing politicians hold the majority in the constitutional assembly, a higher level of income inequality makes a presidential system less likely.*

Proof. One can easily see that equations (3.15) and (3.19) as well as equations (3.17 and (3.21) are the same when $\theta = 0.5$. Thus, the first part of the proposition holds. In equations (3.15) and (3.17), income inequality enters with a positive sign. Those two conditions apply if right-wing politicians have the majority in the constitutional assembly. Thus, a presidential system becomes more likely in these constellations when income inequality increases. For equations (3.19) and (3.21), income inequality enters with a negative sign. Since these two conditions apply if left-wing politicians have the majority, it becomes clear that a higher income inequality makes a presidential system less likely in this case. □

These results are graphically shown in Table 3.2 and are the key differences with the results of Robinson and Torvik (2016) and Ticchi and Vindigni (2010) and show how the composition of the constitutional assembly affects the choice of form of government. One interpretation of the differing effect of income inequality lies in the different preferences for redistribution that both groups face. While right-wing politicians favor the lower taxes of a presidential system (especially with a high income inequality), left-wing politicians know that high income inequality makes the higher tax rates of a parliamentarian system more attractive. The other interpretation given above is the difference in

the proportion of the costs of redistribution and rent extraction borne by rich and poor citizens, respectively.

Table 3.2: Effect of an Increase in Income Inequality on Presidential System

	Left-wing drafters	Right-wing drafters
Left-wing government	-	+
Right-wing government	-	+

3.4 Making Sense of the Main Assumptions

A discussion of the main assumptions of the model will help assess these results. The most relevant assumptions of the model refer to political rents under different forms of government, uprising of citizens and the constitutional assembly.

First, the assumption that political rents are higher in a presidential system is in contrast to the findings of Persson et al. (1997, 2000), who conclude that the highest rents are obtainable in parliamentarian systems. These authors attribute their result to the higher degree of separation of powers in a presidential system. The degree to which a presidential system is contrained by a separation of powers is not part of the model presented here. Nevertheless, it can be argued that in countries with very strong presidents (e.g. in Africa or Latin America) the presidential system does not have inherent checks and balances, but rather allows the president to have unchecked powers. Additionally, in unstable democracies the balancing effect of a strong separation of powers can be doubted. As argued in the introduction, constitution-making happens oftentimes in countries which lack political stability. The differences in political rents for cases in Africa, which often fit the description of unstable democracies, has been attributed to the argument of Robinson and Torvik (2016) regarding the threat of a vote of no confidence in parliamentarian systems. Since our model also focuses on unstable democracies, the result from Robinson and Torvik has been assumed throughout this chapter. A further argument in favor of the explanation of a vote of no confidence threat in a parliamentarian system can be found in Carlson (1999), who argues that this threat

increases the bargaining power of the members of the parliament with their leader and thereby provides a check to power only available in parliamentarian systems.

Second, it is assumed throughout the chapter that citizens are attentive to the policy choices of the ruling politicians and will react to a higher tax rate with an increased probability of an uprising. This assumption is based on the observation that many constitutions are made in times when there is a threat of internal violence (cf. Widner, 2008) and further assumes that the citizens are able to solve the collective action problem inherent in fomenting an uprising. As criticized by Apolte (2012), this assumption does not necessarily hold true, as can be seen in the case of North Korea. Apolte highlights that policy choices that are opposed to the preferences of citizens are not a sufficient criterion for an uprising. If the government succeeds in undermining citizen's coordination and instilling a climate of fear, an uprising will not take place. Therefore, the model is more appropriate for situations where the citizens are able to solve the collective action problem.

Third, it is assumed that the composition of the constitutional assembly is exogenous to income inequality. In normal times, this assumption seems very strong, especially for a simple model with income differences as the main driver. However, keep in mind that most constitutions are made during "abnormal" times. Typically, crises or conflicts pre-date the decision to draft a new constitution. The assemblies which are (s)elected in those times are mainly influenced by the events that led to the need for a new constitution in the first place. The case of a Muslim Brotherhood dominated assembly in Egypt after the Arab Spring and the assembly completely lacking the Muslim Brotherhood just one year later serve as a powerful example how the political circumstances of the conflict/crisis drive the composition of the assembly. In addition to the Egyptian example, the process of constitution-making in Thailand in 2007 provides a good case. After a military-led coup, the junta was able to select a candidate pool of 2,000 eligible candidates for the constitutional assembly. This group of 2,000 potential drafters then held an internal vote and after determining the 200 candidates with the most votes, the

junta selected 100 based on their own preferences. The composition of the assembly in this situation can be seen as purely driven by the winners of the prior conflict, namely the military junta.

For the stage of constitutional choice it is also assumed that the simple majority of the politicians can decide the outcome. This assumption opposes the unanimity criterion, which has often been proposed for constitutional choice (cf. Buchanan and Tullock, 1962). However, this normative ideal is never observed in real-life situations due to the high decision-making costs involved. Most constitutional assemblies in practice use a qualified majority criterion, but as soon as one group has a sufficiently large majority and is able to dominate the assembly, this rule is effectively the same as an assembly with two groups and a simple majority rule. Especially after a conflict, the victorious side is often in a position where it can dominate the assembly, as was the case with the Muslim Brotherhood in Egypt directly after the Arab Spring and the military government in the subsequent Egyptian constitution. If both parties would have veto power, a bargaining situation with regards to the choice of form of government would arise. While being beyond the scope of this chapter, the general issues of bargaining in constitution-making will be explored in chapter 4.

Having discussed the strengths and weaknesses of the major assumptions of our model, we turn our attention to the five main differences in modelling choice with regard to the contribution of Robinson and Torvik (2016). First, the stage of constitutional choice is explicitly modelled. In the contribution of Robinson and Torvik, constitutional change is only possible at a later stage of the model. This setup does not allow for an analysis of constitutional choice at the time of a new constitution's introduction, which is why the model presented here follows a different approach. Second, in the model of Robinson and Torvik, the citizens are only able to constrain the politicians through their vote. To allow for an explicit constraint outside of the formal political system, i.e. the threat of a violent uprising, an uprising constraint is included. Third, instead of focusing on different preferences for public good provision, this model focuses on differences in

initial income inequality. This choice is more in line with Ticchi and Vindigni (2010). Fourth, the political process within the two different systems is more fine-grained in the contribution of Robinson and Torvik. These elements are left aside in this model to focus on the effect of the constitutional assembly. Fifth, the distinction between politicians and political leaders made by Robinson and Torvik is dropped in the model presented here for analytic simplicity.

3.5 Conclusion

In this chapter an argument has been presented that the influence of initial income inequality on the choice of the form of government can be better understood if the timing of the model begins with the stage of constitutional choice. Overall, an increase in income inequality has effects across all stages and most importantly directly affects the choice of form of government. However, the sign of the effect on the form of government depends on the composition of the constitutional assembly. Hence, a high income inequality can lead to a preference for a presidential system or to a preference for a parliamentarian system, conditional on who has the majority in the constitutional assembly.

This findings shows the relevance of the composition of the constitutional assembly, especially in cases of unstable democracies. This effect is driven by the (inherently) different preferences of the two groups when it comes to redistribution. When the policy conflict (i.e. income inequality) is low, the rent extraction of politicians (motivated by their personal interests) dominates. As income inequality increases, the ideological differences between the groups gain importance.

Furthermore, the result that poor citizens might vote for right-wing politicians is quite counter-intuitive. However, taking the cost of political rents and tax distortions into account, this result might explain why right-wing politicians occasionally find support among the poor. This result is similar to the finding of Ticchi and Vindigni (2010), who also find a case where the poor might support the rich. The key difference between the

two models is that the model in this chapter arrives at this result without the inclusion of a middle class. In the model of Ticchi and Vindigni (2010), the poor have no chance to bring representatives of their own group into the government. In the model presented here, they consciously vote against representatives of their own group, thereby making the finding even stronger.

Having established that the constitutional assembly does affect the outcome of the constitution-making process, it seems appropriate to take a closer look at the ways in which the drafting process can affect the outcome. As discussed in the introduction to this dissertation, the two main functions of a constitution are to enable and to constrain the governing. With regard to the constraining function, drafters might face different incentives to include constraints on future governments conditional on the procedural rules for ratification of the draft. The procedural rules can add additional veto players to the process, which in turn will have an effect on the outcome. This issue will be dealt with in detail in the next chapter.

Chapter 4

Ulysses' Bonds: Are Drafters Constrained by Referendums?

4.1 Introduction

Drafting a constitution is one of the cornerstones of state building. The new constitution has important symbolic value, it provides the basic set of rules for the legal regime in power, and also has important economic implications. There has been a great deal of research in recent years on the economic effects of constitutions,[35] but less focus has been given to the actual drafting process. In the literature, agreeing on a set of basic rules has been described as being similar to a bargaining process (Heckathorn and Maser, 1987; Elster, 1995, 2000a; Voigt, 1999). While legal scholarship has recently started to focus on the process of constitution-making (see for example Banks, 2008; Jackson, 2008; Tushnet, 2008; Barnett, 2009; Partlett, 2012; Landau, 2012, 2013), the literature concerned with constitutional economics has been remarkably quiet on the topic. To my knowledge, no attempt has been made to formalize the constitution-making process while incorporating the institutional details that constrain the process. In this vein, the attempt of this chapter is closely related to the research program of law & economics.

[35] See Voigt (2011) for an overview

This program often relies on three pillars to organize the method of research. The first pillar is the selection of a legal topic as the subject of interest, the second pillar is the use of an economic methodology, and the third pillar is drawing on institutional knowledge to strengthen the analysis. Following this approach, this chapter uses the findings of legal and political scholars with regards to the constraints involved in the process of drafting a new constitution to inform the formal model's setup.

For this venture, it is important to recapitualte how constitutions and their functions are viewed in this chapter. According to Buchanan (1975), one of the key functions of a constitution is to establish what he calls a protective state. The protective state functions as an impartial arbiter to enforce contractual relationships between the citizens. However, the ability to enforce contracts (or employ sanctions due to breaches of contracts) requires a government powerful enough to accomplish this task. As soon as the government is strong enough to enforce sanctions against property right violations, it is also strong enough to transgress on the citizens and expropriate their property (cf. Weingast, 1993, 1995). This situation highlights a potential conflict between the enabling and the constraining functions of a constitution. Citizens might reconsider investing their income if they are aware that the government can expropriate them at any given time. Therefore, politicians have an incentive to bind themselves to the constitution's rules and a constitution can be argued to be a two-sided mechanism, enabling and constraining the government at the same time. It enables the government by defining the basic government structure, setting up the necessary institutions and laying out the legal system's most basic layer. The constraining function is based on the idea that the rule of law should also apply to the government and citizens can benefit from a constitution that provides checks and balances as well as focal points to react when the government transgresses against them (Weingast, 1993). This chapter focuses mainly on the constraining function of constitutions.

One can argue that the key conflict in the process of constitution-making is between the drafters and the citizens. This conflict relates directly to the constraining function

of the constitution. Citizens would prefer a government that is not able to expropriate them, while politicians have to weigh the costs and benefits of binding themselves.[36] The benefits are the improved long-term growth prospects of the society, which in turn increase the politicians' future income. It can be argued that the costs are the lost benefits of extracting short-term rents, e.g. from expropriation. If the prospects of long-term growth benefits outweigh the lost short-term rent collections, politicians might voluntarily bind themselves.

The idea that a government might be willing to constrain itself due to long-term benefits is similar in nature to the idea of "stationary bandits" of Mancur Olson (1993). An autocratic ruler might enjoy more benefits if he can convince his citizens that their property will not be taken from them. If he maintains some property protection and thus increases long-term investment by the citizens, he is better off due to the growth generated by this behavior. While the autocrat receives a smaller percentage of the pie when compared to his percentage received from expropriations and takings, he is still better off because the pie is much bigger. One mechanism for an autocrat to credibly commit to a long-term perspective is a new constitution.[37]

Another reason why politicians draft a new constitution is regime change. More than 200 constitutions in the past 40 years have been drafted under a threat of violence (Widner, 2008); furthermore several countries such as Egypt, Tunisia and Libya recently started drafting new constitutions after the Arab Spring transitions. The conditions under which these countries are working on their new constitutions are characterized by uncertainty about future developments and a need for the constitution to be quickly enacted, thereby marking a step on the way back to normal times. Nevertheless, the drafters and citizens still face the same conflict of interest as discussed above.

The key question for this chapter is how the constitution-making process affects the creation of the drafted constitution, especially the constraints this constitution places

[36] With regards to expropriation, it is assumed that politicians are not able to utilize targeted transfers to citizens as a policy tool. Thus, citizens will always oppose expropriations in general.

[37] Nevertheless, even autocrats not interested in committing themselves might use a sham constitution. Thus, precedent in following the constitution is a key element to make the commitment credible.

on future governments. For instance, do the procedural rules of requiring democratically elected assemblies or public referendums lead to more constrained governments? How do the circumstances of constitution-making affect the working of these procedural rules? The transmission channel proposed here is that these procedures place additional constraints on the drafters, but are themselves also affected by uncertainty. The analysis highlights that effective constraints on the drafters increase with intra-elite conflicts and a required referendum, but decrease with uncertainty. These variables also interact with each other, where uncertainty mitigates the impact of referendums and intra-elite conflicts. In other words, in situations fraught with uncertainty, which is often the case for constitution-making, drafters are least constrained by procedural rules.

The next section provides a short overview of the literature discussing the constraints faced by the drafters. Following this step, a constitutional choice model is presented based on insights gleaned from the literature review and then applied to the decision problem of constitutional drafters. To support the assumptions made in the model section, the subsequent section presents some regression analyses to test the relationship between uncertainty and yes-votes in referendums. Finally, a short discussion and concluding remarks are given.

4.2 Constraints on Constitution Drafters

An extensive theoretical discussion, which focused on moments of constitution-making and the process itself, began two decades ago with the seminal contributions of Ackerman (1991) and Elster (1993, 1995, 2000a).[38] Ackerman draws a distinction between times of normal politics and constitutional moments. While times of normal politics are characterized by the short-term interests of politicians left unchecked by citizens who pay little attention to the political process, constitutional moments feature politicians mainly concerned with the greater good and citizens attentively following the political

[38]Beard (1913) was the first to look at the economic motives of constitutional drafters, but did not focus on the process itself.

developments. Elster argues for a similar point and distinguishes two modes of constitution making, namely arguing and bargaining. Bargaining is driven by self-interest, while arguing allows for deliberative reasoning without the constraints of self-interest. In a sense, both authors see deliberation as the fitting mode for constitution-making as compared to bargaining. However, it appears doubtful that self-interest miraculously evaporates in constitution-making. As argued above, it is often the case that drafters know that they are part of the political elite and have good chances to obtain a political office once the constitution is ratified. This expectation will lead them to take their future interest in account. Furthermore, if drafters are not constrained by their own interests, it can be questioned why they would spend a lot of effort on drafting a good constitution (cf. Voigt, 2004). This dissertation will rather employ a rational-choice perspective of self-interested drafters, who act under constraints.

The strand of literature generated by Ackerman and Elster's contributions discusses two different kinds of constraints, namely upstream and downstream constraints (Elster, 1995, p. 373). Upstream constrains are those related to the creation of the constitution-making body, as for example a president calling a constitutional assembly and through the selection of the assembly's delegates constrains their actions. Downstream constraints are related to the ratification of the constitution. A referendum, which constrains the set of constitutional drafts that would be ratified, is an example for a downstream constraint. The categories provided by these two constraints do not, however, offer a complete description of relevant constraints that apply to the constitution-making process. Consider how the voting rules within the constitutional assembly, or time constraints brought to bear in times of crisis, might also constrain constitution-making. Therefore, a different taxonomy of constraints will be used for the purposes of this dissertation. One can distinguish constraints due to procedural rules of constitution-making (including what Elster defined as upstream constraints), constraints due to popular participation, and time constraints. The literature on these three sets of constraints is extensively reviewed in chapter 2. Before we focus on these constraints and their effect on the conflict between drafters and citizens, it is useful to

shortly discuss the bargaining situation among politicians in the drafting body. The reason for this digression is that the conflict among drafters can also affect the way in which the constitutional assembly interacts with the citizens. Therefore, the next section will highlight the key determinants of bargaining power within the constitution assembly based on economic theory and the constraints faced by the drafters.

4.3 Bargaining and Constitution-Making

Whereas the formal model of this chapter focuses on the conflict between drafters and citizens, the conflict among drafters with regards to the distribution of rents is the focus of this short digression. As soon as multiple factions are involved in reaching a decision, one can look at the process itself as a bargaining situation. The conceptualization of the constitution-making process as a bargaining game is well established within the literature (Heckathorn and Maser, 1987; Elster, 1995, 2000a; Voigt, 1999). However, so far no attempt has been made to include procedural constraints as a variable which might influence the bargaining process. Game theory, and especially bargaining theory, is appealing to model this scenario, since "[...] context can be incorporated within formal models as part of the constraints that the actors are subject to." (Voigt, 2004, p. 33). This section uses bargaining theory and the literature on the constitution-making process to provide a theoretical overview in which constraints are relevant for a model of constitutional bargaining. Throughout this section, a two-player bargaining scenario is used for simplification.[39] It is assumed that both players enjoy veto power for the division of the rents. Given the typical voting rules in assemblies, a qualified majority requirement makes it likely that (at least) two groups with veto power emerge.

It is useful to delineate the most important features in bargaining models and highlight the link to the constitution-making process. Bargaining situations are generally characterized by two players who both benefit from reaching an agreement, but face conflict over which outcome will be chosen from the set of possible beneficial outcomes.

[39] An n-player setting can converge into a two-player setting if coalitions are allowed to form.

Bargaining theory aims to explain the rational outcome in this kind of situation. For simultaneous bargaining, Nash (1950, 1953) has proposed his famous bargaining solution, which can be, with some simplification, summarized to the rule "share the profits proportionally to the bargaining power of the players".

Rubinstein (1982) popularized sequential move games in bargaining theory. In his model, the first player (the proposer) offers the second player (the responder) a surplus division, which the responder can accept or reject. If he rejects, the roles switch and the second player acts in the next round as the proposer. It has been argued that procedural rules can be modelled using sequential games (Shepsle, 1989), which makes this bargaining protocol better suited to model negotiations in a political assembly. However, if one faction has a clear majority, it is unlikely that both sides will take turns in proposing. Baron and Ferejohn (1989) have used a random-proposer model to discuss bargaining in ordinary legislatures. The difference between the Rubinstein model and the random-proposer model is that in each round, the proposer is drawn randomly instead of sequentially changing roles. Using the seats obtained in the constitutional assembly as the probabilities for the draw, one can easily model the choice of the proposer in the constitutional assembly in a more realistic way.

Whether or not the bargaining game features repeated opportunities for bargaining is an important determinant of outcomes. If games are played more regularly, factors like reputation start to play a role. However, constitutional bargaining can be considered a one-shot game. Constitutions are generally made to achieve longevity and the average life expectancy of a constitution is 19 years (Ginsburg, Elkins, and Blount, 2009, p. 2). Taking this evidence into account, it seems unlikely that the same drafters will face each other again, justifying the notion that constitutional bargaining is a one-shot game. Once the bargaining game's rules are spelled out, we can focus on the potential determinants of the bargaining outcome.

Discount factors are an important feature to determine the outcome. If one player discounts future benefits less heavily than the other player, he is able to use this patience

to increase his bargaining power. For constitutional assemblies, the discount factors of all actors are influenced by the general political situation in the country. In times of crisis, players are more uncertain about the future and thus will discount possible future benefits more heavily. This effect is driven by the risk that a successful constitutional bargaining can become obsolete if the crisis turns into violence. However, it is possible that the players are affected in different ways by these developments and thus have diverging discount factors. In this case, discount rates can have a substantial effect on the bargaining outcome.

The players' outside options are another important determinant in bargaining theory. A player who has better options if negotiations break down can increase his bargaining power by using this option as leverage during the negotiations. However, for constitution-making, outside options lose importance. It is difficult to imagine a situation where the drafters decide not to write a constitution and employ a different solution for all the tasks the constitution is made for. This view relates to Hardin (1989) and Ordeshook (1992) and their conceptualization of constitution-making as a coordination game. Having any constitution is superior to a state of no constitution and thus the drafters have no incentives to revert to an outside option.

One might argue that the *status quo*, e.g. the old or interim constitution that is in place during the negotiations, could be seen as an outside option. However, this argument fails to recognize that this rather resembles an inside option. In bargaining theory, inside options describe the utility derived during the negotiations while the players are still in disagreement. This description fits well with the *status quo* during the constitution-making process and highlights the importance it has on the outcome. If one player has a better inside option, his costs to disagree and continue the negotiations are lower. He can use this advantage as increased bargaining power and thereby obtain a larger share.

Another impact factor to the bargaining outcome is an external risk of breakdown in negotiations. When a party has to decide whether or not to accept an offer, the party is more likely to accept if the risk of breakdown seems imminent. Thereby, a high risk

of breakdown favors the first proposer's position. The risk of breakdown can stem from two sources. One is within the negotiations, namely one player becoming angry and leaving the table as an impulsive action. The other risk is through external causes, such as third parties intervening in the process or the rules of the game changing. While the first case is relatively unlikely in constitution-making due to the large stakes that are involved, the second case is possible. The Polish case, where the constitutional assembly changed following a general election, is an example for this. Another risk could be citizen protests or an uprising during the negotiations.

A mandatory referendum for ratification is not a factor directly influencing either side's bargaining power. A referendum occurs after ratification by the assembly and no side can credibly commit to campaign against a constitutional draft which provides mutual gains. As long as the new constitution provides an improvement compared to the *status quo*, the referendum does not affect the bargaining outcome.

To sum up, the relevant elements are the probability of being the proposer, the drafters' inside options, the discount factors and the risk of breakdown. The first three elements combined are measuring the respective group's power. A group with better inside options, more seats in the assembly and a lower discount factor has a much better bargaining position. The risk of breakdown can increase this power, given that the strong party is most likely the first proposer.

4.4 Three Types of Constraints in Constitution-Making

4.4.1 Foundations

Having discussed the constraints faced by constitution-makers and the conflict within the constitutional assembly from a bargaining theory perspective, we are now ready to set up the formal model. There are three types of actors in this setting, two types of politicians from different groups in the constitution-making body and the voters. The

politicians are the new constitution's drafters and derive their utility from the political benefits available to the political class. In the light of the empirical literature on the self-interest of drafters discussed above and following rational-choice theory, the model assumes that politicians are motivated by their own self-interests. The citizens act only if there is a procedural rule requiring a referendum. Citizens derive utility from having a new constitution that forms the basis of a protective state and from a constrained government that is unable to expropriate them. These constraints on the government do not mean that redistribution should be prohibited, but rather that the use of government funds for the private benefit of government members is not allowed. Thus, a law allowing eminent domain with full compensation could be in the interest of the citizens if they favor an active government. These redistributional considerations, albeit interesting, are not modeled. The main conflict of interest here is political rent creation, where both political factions have a joint interest in rent maximization and citizens are generally opposed to those rents. In cases where referendums (and thus citizen input) are not required, the drafters might nevertheless be constrained by motives of self-binding or an intra-elite conflict regarding the division of the rents.

An important assumption throughout this model is the binding force of constitutional provisions. Drafters and voters alike are assumed to expect the constitution to bind future governments, given that constraints are put in place. The issue of enforcing a constitution has been extensively discussed in the literature emphasizing the crucial problem related to the lack of external enforcement of a constitution. Thus, a constitution needs to be self-enforcing if it is to effectively bind future rulers (see for example: Hardin, 1989; Ordeshook, 1992; Voigt, 2004; Weingast, 2005; Mittal and Weingast, 2013). Weingast (1995) provides a possible illustration of how a constitution might work in this way. He argues that transgressions by the government are easier to identify and punish when the citizens use the constitution as a focal point to create a joint understanding of a government action that is a violation of the rules spelled out by the constitution. In this way, it can be argued that a government that breaks the rules established by the constitution increases the risk of an uprising by the citizens, which can be seen as one

reason why the politicians *ex ante* assume that they are bound by the constitution.[40]

4.4.2 Modeling the Process of Constitution-Making

The model's timing is as follows. First, the drafters decide on the constitution. The decision on the constitutional rules determines the political rents for the drafters. In a second step, the citizens have to ratify the constitution if the procedural rules require this step.

The drafters draw utility from two types of political rent, one short-term and one long-term. While the short-term rent can be seen as the extraction of government funds, the long-term rent is derived from the benefits of staying in office and increasing compensation due to a higher growth rate.[41] While these rents are framed in a temporal fashion, the model does only feature one point in time when drafters can act, namely the stage of constitution-making.

The constitution's key function being analyzed in this model is its ability to constrain the government from abusing power. The better the constitution works in this dimension, the more long-term rents for the government increase based on better protection for property rights. When property rights are fully protected, however, limits are placed on the ability of politicians to extract (short-term) rents. Different constitutional rules increase either short-term or long-term rents, but never both at the same time.

Using the language of game-theory, the short-term rents can be seen as a zero-sum game. Each unit of rents the politicians gain is lost by the citizens. Long-term rents, however, represent a positive-sum game. Both citizens and politicians profit from economic growth. The link from a constitution that constrains the future government to economic growth works through the incentives to invest. If citizens know that the government will be unable to steal their property in the future, investment becomes

[40] It is nevertheless possible that the costs of breaking the constitution are lower at some future moment in time than adhering to the document. In this paper, it is assumed that this special case does not affect the decisions of the drafters.

[41] These benefits include the regular salaries of the government members.

more attractive. Since investment is a key driver of growth, more constraints on the government are assumed to lead to higher growth in the long-run.

This model attempts to link the constraints on the drafters to the constraints in the draft they produce. In the following subsections, the constraints on drafters discussed in the literature review are introduced step by step.

Constitution-Making in an Autocracy

The baseline model is that typically found in autocracies. Specifically, we model a constitution-making process without public participation and veto players in the assembly. Here, we assume that the drafters know that they will be the government after the constitution has entered into force and expect to remain in power as long as the constitution is in force. This model is similar to the stationary bandit's scenario discussed by Olson (1993). In terms of timing, the drafters (knowing that they will end up in government) decide on their preferred level of constraints in the constitution, given an exogenous risk of constitutional breakdown. This model does not attempt to model the long-term developments by having multiple stages, but includes them directly in the choice of the drafters.

The politicians' maximization problem is as follows:

$$\max_{c} U_p(c) = r_s(c) + \rho \cdot r_l(c) \tag{4.1}$$

where $r_s(c)$ and $r_l(c)$ are the rents politicians can obtain from the chosen constitution (c). Formally, the constitution-making body chooses a constitution along a single dimension which can take values from $0 - 1$.[42] A situation where $c = 0$ is a constitution which does not constrain the government at all. For the citizens, this case provides the

[42] It is important to note that the model presented here highly simplifies the situation of constitutional choice. Reducing the complex construct of a constitution to a single dimension is a daring venture. The reason for this decision is to highlight the conflict between politicians' ability to (ab-)use their power in the short run and the positive long-term effects of binding their hands.

same level of protection for their property as if there was no constitution at all. This situation offers no incentives for long-term investment and no long-term political rents. At the other extreme, $c = 1$, the constitution binds the government completely with regard to the extraction of funds. Therefore, short-term political rents are zero in this case. The draft of the constitution can take any value between 0 and 1. Thus, both rents are functions of the constitutional choice.

ρ is used to incorporate the risk of a constitutional breakdown. The idea behind this modelling choice is that the long-term benefits of a given constitution depend on the constitution staying in force. This parameter captures the uncertainty in the model and is considered exogenous.[43]

It is further assumed that both functions have a concave shape, which is represented by the negative second order derivative. The conditions faced by the drafters with respect to the utility from long-term and short-term rents can be formally written as follows:

$$r_s(1) = 0, \quad \frac{\partial r_s}{\partial c} < 0, \quad \frac{\partial^2 r_s}{\partial c^2} < 0 \tag{4.2}$$

$$r_l(0) = 0, \quad \frac{\partial r_l}{\partial c} > 0, \quad \frac{\partial^2 r_l}{\partial c^2} < 0 \tag{4.3}$$

If the members of the constitutional assembly are unconstrained in their constitutional choice, they simply set c to maximize their utility. To solve this maximization problem, the first order condition needs to be derived.

$$\frac{\partial U(c)}{\partial c} = \frac{\partial r_s(c)}{\partial c} + \rho \cdot \frac{\partial r_l(c)}{\partial c} \tag{4.4}$$

Setting this equal to zero and using some algebraic manipulations gives the following equation

[43] Since constitution-making is often triggered by a crisis or conflict, uncertainty can be assumed to be derived from the general situation and not from the constitution-making process itself, thus making uncertainty an exogenous variable. See Widner (2008) for a more detailed discussion of post-conflict constitution-making.

$$\rho = -\frac{\frac{\partial r_s(c)}{\partial c}}{\frac{\partial r_l(c)}{\partial c}} \tag{4.5}$$

In a baseline situation without uncertainty, $\rho = 1$, and with only one dominating faction,[44] the marginal changes of long-term and short-term rents must be equal for this condition to hold. Thus, based on the countries' characteristics, the drafters must balance the benefits of committing to property rights in the long-run with the loss of discretionary power in the short-run. An autocrat with a firm grip on power would be an example for such a setting without uncertainty.

It is also possible that the marginal change in long-term benefits is always larger when compared to the change of short-term benefits if the of both kinds of rents is sufficiently large. In a situation like this, the drafters will, out of pure self-interest, choose a constitution that completely binds them. However, in all but the extreme cases, drafters choose a constitution that is located somewhere between full constraints and no constraints at all to satisfy the optimization condition spelled out in (4.5).

When an autocrat faces uncertainty about his future position, the results of the analysis change. Formally, for a value of ρ lower than 1, long-term benefits are traded-off against short-term rents. When compared to a situation without the shock, an external shock leading to more uncertainty (i.e. a decrease in ρ) prior to the drafting will cause a decrease in c.[45] This relation represents the conjecture that constitution-making during a crisis leads to constitutions which are less effective at binding the government. Since citizens prefer a constitution that binds the government, it is useful to consider procedural rules that lead the drafters to choose more binding constitutions especially during times of crisis. One example for such a procedural rule is a democratically elected constitutional assembly combined with a qualified majority requirement. This combination is very likely to produce a process that has multiple factions with veto power.

[44] The same result holds for two factions of equal bargaining power

[45] As long as the long-term benefits are large enough, a change in p may not affect the choice of $c = 1$. However, the focus here is on the more interesting case where the choice of constitution is conditional on the risk factor.

Constitution-Making by a Democratically Elected Assembly

A key change in the analysis occurs when one considers an assembly with multiple veto players. For simplicity, we discuss the case with exactly two veto players. A specifically and democratically elected assembly would be an example of this, given that no party has enough votes to dominate the assembly. Both groups of politicians have a shared interest, namely maximizing the amount of political rents available for distribution. However, the minority group is, generally speaking, less interested in short-term rents, since they are aware that they are less likely to end up in government and enjoy these short-term benefits. Their interest in short-term rents will decrease in accordance with the weakness of their bargaining power.[46] It is assumed that all factions that are strong enough to be veto players for the constitution-making process act behind a veil of uncertainty as to which faction will end up in government in the long-run. Furthermore, the growth-enhancing effects of a strong constitution creates a positive-sum game for both groups in the long-run. For the short-run, both factions expect that their share of seats in the assembly is a good approximation of their probability of ending up in government in the short-run. The maximization problem of a politician from the majority group is:

$$\max_{c} U_p(c) = \alpha \cdot r_s(c) + \rho \cdot r_l(c) \tag{4.6}$$

where α is the minority faction's relative strength (i.e. the seat share of the minority faction divided by the majority faction's seat share) and takes values between $0 - 1$. A higher α means that the minority faction is relatively stronger, i.e. that the factions have more equal bargaining power. Recalling the assumption that the smaller party is strong enough to have veto power, one can see that a lower seat share will make them less interested in short-term rents. As a simplifying assumption, the bargaining outcome between the two groups is assumed to be relative to their strength and directly incorporated in the maximization problem of the majority group.

[46] A more detailed analysis of bargaining within the constitutional assembly would go beyond the aim of the model presented here. A general discussion of this bargaining is provided in section 4.3.

Setting the first order condition equal zero, and using some algebraic manipulations gives the following equation:

$$\frac{\rho}{\alpha} = -\frac{\frac{\partial r_s(c)}{\partial c}}{\frac{\partial r_l(c)}{\partial c}} \tag{4.7}$$

While the results with regard to the degree of uncertainty remain the same, the multiple veto players have an effect on the valuation of short-term benefits. Short-term benefits are valued less since the minority faction (by definition) expects to obtain them in less than 50% of the cases. As the inequality of the two factions increases, less weight is put on short-term rents. This assumption can be explained by the minority party recognizing their weakness in the given situation encouraging them to take a more long-term oriented view. The left-hand side shows the relationship between uncertainty and bargaining power. Uncertainty leads to a stronger emphasis on short-term rents in situations with relatively equal assemblies, while unbalanced assemblies which yet still have at least two groups with veto power are better able to focus on the long-term perspective even in times of uncertainty. As soon as a single party dominates the assembly and there are no other veto players, the analysis becomes the same as in an autocracy.

As discussed in the literature review, many democracies further constrain their drafters through a referendum for ratification. Whether the referendum is able to fulfill this task is discussed in the next section.

Constitution-Making with a Required Referendum

Another potential way of placing further constraints on drafters and achieve constitutions that actually bind the government are mandatory referendums for ratification of the constitution. Recall the finding that 44% of all constitutions required a referendum for ratification (Ginsburg, Elkins, and Blount, 2009). It is necessary to introduce the

maximization problem for the citizens in the referendum stage.[47] We begin by modeling the citizens' utility function as follows:

$$U_v(c) = -\frac{p}{n} \cdot r_s(c) + \rho \cdot b_l(c) \tag{4.8}$$

Again, the only variable of interest is the degree of government constraints in the constitution. This setup is used to focus on the conflict between citizens and drafters and show how popular participation can affect the choice of drafters in constitution-making. The citizens profit, similar to the drafters, from the prospects of long-term growth discounted by the risk of constitutional failure, $\rho \cdot b_l(c)$. We assume that the benefits for long-term growth for citizens increase in c like the long-term rents for politicians and that both groups expect the same risk of constitutional failure. However, even a constitution without any government constraints does provide some benefit to the citizens. Therefore, $b_l(o) \geq 0$, where $b_l(o)$ describes the benefit of having a constitution that provides the basic functions of society compared to the current *status quo*.

However, since the citizens will be the potential victims of future expropriations, they receive negative utility from a constitution that allows the government to abuse their power. The term $\frac{p}{n}$ gives the proportion of politicians to citizens. While this ratio affects the levels of the rents, it leaves the results otherwise unchanged. The expropriations are modeled as a zero-sum game between politicians and citizens for analytic simplicity, whereas the long-term benefits are modeled as a positive-sum game. The intuition behind the positive-sum game is that both sides can profit from enhanced long-term growth.

The timing of the constitution-making in this setting is as follows: The drafters first decide about the level of c, just as in the two settings discussed above. Afterwards, the citizens are asked in a referendum whether or not they want to ratify this constitution. In case they agree, the constitution enters into force. In case they reject the draft, the

[47] Citizens are assumed to fully know the constraints to the government that the draft is providing.

whole process has to start again and the citizens will have to be consulted again. Thus, a rejection leads to a second period of constitution-making, which can be considered time-consuming. In case of a failed referendum, we assume that the constitutional assembly will change its composition and current drafters expect to no longer be drafters in this new process.

The citizens will vote yes if the utility from accepting the draft now is larger or equal compared to the expected utility from waiting for another draft. It is assumed that the referendum requires a simple majority to succeed, thus the median voter decides. Given this setting, heterogeneity within the population does not matter for the referendum as long as one group has a majority. The citizens will vote yes if the following condition holds:

$$U_v(c) \geq \delta_v \cdot U_v(\bar{c}) \tag{4.9}$$

Here, $U_v(c)$ represents the citizens' utility from the proposed level of constraints in the draft. This function increases in c, since citizens prefer a constitution that binds the politicians. $\bar{c}$ stands for the expectations of the citizens with regard to the average proposal of a constitutional assembly, whereas δ_c is the discount factor of the citizens that occurs if they reject the draft and the process of constitution-making has to start anew. This discount factor catches the duration of redrafting the constitution in case of a failed referendum.

As in the case for politicians, higher uncertainty reduces the discount factor. The reason behind this assumption is that in times of crisis, citizens will be less willing to wait for a new constitution compared to regular times. One could argue that the discount factor implicitly incorporates the costs of maintaining the status quo. The two discount factors are allowed to differ, but it is assumed that they move in the same direction when uncertainty changes.

The introduction of this constraint changes the maximization problem of the drafters.

$$\max_{c} U = \alpha \cdot r_s(c) + \rho \cdot b_l(c) \quad s.t. \ \frac{U_v(c)}{U_v(\bar{c})} \geq \delta_v \tag{4.10}$$

It is assumed that a negative vote leads to a zero pay-off for the drafters, which can be thought of as a change in the constitutional assembly's composition after a failed constitutional referendum. Thus, the drafters dare not risk a failed referendum and are constrained by the citizens' vote.[48]

The referendum constraint is only meaningful if the citizens' voting decision is affected by the choice of c. One can derive the threshold point at which even a draft with no constraints on the government (i.e. $c = 0$) will be accepted. The utility for citizens in this case, $U_v(0)$, can be spelled out as $-\frac{p}{n} \cdot r_s(0) + \rho \cdot b_l(o)$. In this situation, citizens can only obtain benefits from the basic functions of government ($b_l(o)$) and face the maximum risk of the government using expropriation. If

$$\frac{U_v(0)}{U_v(\bar{c})} \geq \delta_v \tag{4.11}$$

holds, citizens will prefer to ratify the constitution even if it provides no constraints on the drafters.

On the one hand, this case becomes more likely when uncertainty about the future is high (i.e. a low δ_v), the value of having a constitution ($b_l(o)$) goes up, or citizens expect that the proposal in the next period will feature weak constraints (low $\bar{c}$).[49] The first two of these conditions can be typically found in times of crisis and especially during domestic conflict. When facing an ongoing conflict, the focus is on immediate concerns and uncertainty about the benefit of future developments is high. Looking at the value of having a constitution, it can be argued that constitutions are devices to mitigate or

[48] In this chapter, it is assumed that politicians can perfectly predict the outcome of a referendum conditional on their chosen level of c. Cases like the failed referendum on the EU constitution highlight that this assumption does not necessarily hold in practice. Releasing this assumption is an opportunity for future research, but not dealt with in this chapter.

[49] ρ does not play a role for the one period difference between ratifying now and ratifying next term, assuming that constitutional breakdown does not occur immediately.

end conflicts and as such they entail a larger benefit in times of crisis.[50]

On the other hand, the condition never holds if there is no uncertainty ($\delta_v = 1$) or if constraining the government is the only thing that matters for the citizens (i.e. $b_l(o) = 0$). Thus, a referendum works particularly well if citizens care about the constraints on the government and if uncertainty is low. Ironically, these are the same settings where drafters experience low levels uncertainty, are generally attracted to long-term benefits and more amenable to drafting a binding constitution.

To sum up, referendums provide the strongest effect in situations where citizens face a relatively stable setting and put a lot of emphasis on government constraints. Arguably, constitution-making often happens in more turbulent times and it appears likely that the constraint of a referendum loses power when constitution-making occurs after crisis or during transitions. The model presented in this section hinges critically on the effect of a crisis on property rights and the voting behavior of citizens. To test these links, the next section will present some regression models based on cross-country evidence.

4.5 Testing the Claims About Referendums

4.5.1 Towards an Empirical Test

The model in the previous section has shown that in times of conflict, citizens are theoretically less likely to reject a draft constitution. This argument highlights that referendums might be less effective in times when they are most needed. The aim of this section is to attempt an empirical test of the predictions of the model about the conditions under which referendums will constrain drafters. For this venture, we need a measure of conflict at the times of the referendum and a measure of the voting behavior of citizens. The simple idea behind the test is to check whether the yes-votes in the referendum are correlated with the level of conflict at the time of the referendum. A

[50] For a detailed discussion of the conditions for constitutions to act as conflict-resolution tools, see Grossman (2004).

positive relationship between yes-votes and the level of conflict would support the results of the theoretical model above.

4.5.2 Data Overview

The data on constitutional referendums includes the results of all constitutional referendums from 1945 until 2012 (Centre for Research on Direct Democracy (c2d), 2015). The dataset contains not only whether or not the referendum was successful, but also the exact date, the vote shares, whether the referendum was mandatory or not, and the topical areas of the referendums. This detailed coverage allows us to focus on new constitutions and exclude amendments. It would have been preferable to have individual-level data, but given the time span from 1945 to 2012, only aggregated data is available.

To measure domestic conflict, the aggregated domestic conflict variable from the Cross-National Times Series (CNTS) dataset is employed (Databanks International, 2011). It aggregates information on assassinations, general strikes, guerrilla warfare, government crises, purges, riots, revolutions and anti-government demonstrations into a weighted indicator. This indicator is created from reports published in The New York Times. As such, this indicator is not purely objective because it is dependent on what is reported. It is possible that articles published in The New York Times may have a bias against certain regions. However, the depth and breadth of the coverage in The New York Times alleviates potential issues that may arise from gathering data based on newspaper reports. This variable is used as a proxy for the level of uncertainty caused by domestic violence among the citizens.

To control for the political system, the democracy dummy variable from Cheibub et al. (2010) is used. Education is measured by average years of schooling in a country and is taken from Barro and Lee (2013). The GDP per capita data is taken from the Penn World Tables (Feenstra et al., 2015). The analysis incorporates the ethno-linguistic fractionalization data from Roeder (2001))[51] As an additional control, the transition

[51]This indicator offers a broader coverage compared to the more popular one constructed by East-

data from Cheibub et al. (2010) is used to see whether or not a transition prior to the new constitution has an effect on the outcome. The transition dummy takes a value of 1 if a transition has taken place in the same year or the 3 years prior to the referendum. Furthermore, to control for changes over time, a time trend is used. This variable is normalized to 0 for the year 1944.

According to the theoretical model, the results of the referendum should depend on the constraints offered by the constitution. Data on executive constraints is taken from the *xconst* variable of the Polity IV dataset created by Marshall and Jaggers (2002). However, one could argue that this variable measures the *de facto* constraints on the government and not the constraints in the constitution on which citizens cast a vote. To take care of this issue, an indicator of government constraints in the constitutional text is required. As a proxy for these constraints, a *de jure* property rights index from Voigt and Gutmann (2013) can be used. However, the indiciator of Voigt and Gutmann has much fewer observations than the Polity IV variable. To mitigate this problem, another property rights indicator has been constructed for this chapter from the dataset of Goderis and Versteeg (2014). Table 4.1 presents the summary statistics of the data used in the subsequent analysis. It is interesting to see that most referendums do succeed with a high average share of yes-votes. This result is not surprising, since drafters are expected to take the referendum into account when preparing the draft. Nevertheless, there is some variation which allows for an econometric analysis. In terms of domestic conflict, there is a lot of variation to draw from.

4.5.3 Estimation Approach

Following the reasoning of the theoretical model presented above, the empirical model aims to test whether domestic conflict has a positive effect on the percentage of yes-votes in constitutional referendums. In brief, the argument here is that domestic conflict fuels uncertainty and the need for a new constitution, thereby making voters agree to a larger

erly and Levine. The use of the indicator by Easterly and Levine would not change the results, but significantly reduce the number of observations.

Table 4.1: Summary Statistics

Variable	Mean	Std. Dev.	Min.	Max.	N
Yes-votes [%]	83.036	18.343	4.78	99.990	136
Mandatory	0.243	0.43	0	1	136
Domestic conflict indicator	914.245	1974.239	0	51625	8950
Democracy	0.437	0.496	0	1	9032
Fractionalization	0.443	0.279	0	0.984	9076
ln GDP per capita	8.353	1.182	5.219	11.806	8125
Education	5.436	1.512	3.669	8.152	13444
Democracy	0.437	0.496	0	1	9032
Transition	0.092	0.289	0	1	8197
Executive constraints	4.116	2.351	1	7	8544
De jure property rights (Voigt/Gutmann)	0.437	0.17	0.048	0.976	5798
De jure property rights (Goderis/Versteeg)	0.452	0.194	0	1	8513

set of constitutional drafts.

Hypothesis 1: *Domestic conflict has a positive effect on approval in constitutional referendums.*

To control for differences in the content of the draft, executive constraints are included. One would expect that voters are more likely to say yes to a draft that offers more constraints.

To this date, only a few articles have looked at the determinants of the outcomes of constitutional referendums. One contribution, analyzing the Kenyan constitutional referendum of 2005, argues that ethnic fractionalization is one of the key determinants (Kimenyi and Shughart II, 2010). Based on their findings, one would expect the share of yes-votes to decline with increased fractionalization.

It can also be argued that more democratic countries are less likely to hold sham elections and/or rig the results. Thus, a higher degree of democracy should also lead to fewer yes-votes compared to a less democratic system. Another reasons for this hypothesis is the argument that following a transition from an autocracy, citizens will be more willing to accept a new constitution as long as it breaks with the authoritarian past. Furthermore, it can be argued that education and per capita income can be used as proxies of the development of the given country. The level of development can be

seen as a standard control variable in this regression.

To test the hypothesis, we use an Ordinary Least Squares (OLS) estimation with robust standard errors. The dependent variable is the percentage of yes-votes in the constitutional referendum, whereas domestic conflict, fractionalization and the other control variables serves as independent variables. The baseline model includes only the referendum results, the domestic conflict index, ethnic fractionalization and democracy as well as a linear time trend. To take care of the effect of mandatory referendums and potential transition effects, dummies for a mandatory referendum and for a recent transition are added in the second specification. Finally, the content of the draft is incorporated through a measure of executive constraints in the final three specifications. The difference between these specifications are different proxies for executive constraints in the constitution.

We are aware that the OLS approach suffers from several problems. First, since the yes-percentage is bound between 0 and 100, an OLS estimation might be problematic. As a robustness check, a fractional logit model is estimated using the same specifications as the OLS.[52] Second, the result might be driven by outliers. A robust regression estimation automatically gives lower weighs to outliers and thereby mitigates this issue. Huber (1973) on the theoretical underpinnings and Li (1985) on the details of the method are the seminal articles for this method. As another robustness check, this estimation technique is employed by using the stata command *rreg*. Third, it is possible that the result of the referendum would also affect the level of domestic conflict in a given year, i.e. a problem of reversed causality. To mitigate this problem, the lagged domestic conflict variable is used as a robustness check.

In a perfect world, one could randomly assign constitutional referendums to countries with and without crisis which would otherwise be identical. This randomization would allow for a test of the causal relationship between crises and referendum results. However, especially when dealing with constitutions as dependent variables, the data often

[52]Only one of the three specifications for executive constraints is used for the robustness checks. The results would not have been different if another of the three measures had been used.

does not allow for stringent causal analysis. The reason for this claim is the stylized fact that constitutions have an average lifetime of 19 years. Thus, on average there will be nearly two decades of missing data between two observations. Another problem with the data used for the analysis here is that one would like to focus on mandatory referendums. However, due to the low number of mandatory referendums, all referendums used to ratify new constitutions are included in the analysis. Whether or not a referendum was mandatory is added as a control variable and the results for a regression with only mandatory referendums are reported for reasons of transparency.

4.5.4 Results

We are interested in whether conflicts affect the final outcome of a referendum, i.e. the percentage of yes-votes.[53] The results indicate that the degree of domestic crisis has a positive effect on the yes-votes, but this effect is not robust to different estimation techniques and models.

The coefficient of the conflict variable is positive across estimations, thus following the expected path. However, statistical significance can only be found in one of the OLS specifications. The statistical significance of domestic conflict vanishes particularly when government constraints in the draft are taken explicitly into account. This effect could be a first indication that failed referendums play a key role for the significant result in the first specifications, since they need to be excluded when property rights indicators are taken into account.[54]

Fractionalization is insignificant across all specifications, thereby putting some doubt on the general applicability of the results of Kimenyi and Shughart II (2010). Income per capita and education (indicators of the development of a country) are significantly negative across most specifications. While this result could be a sign that people in

[53] While it would be interesting to use a success dummy variable as the dependent variable, the extremely low number of failed referendums weakens the explanatory power of such an approach due to low variation.

[54] A failed referendum would not change government constraints in the future.

more developed countries are less likely to vote yes, it might simply be an artifact of rigged elections in less developed countries. The issue of rigged election results is a serious concern for this analysis and might explain why the coefficient on democracy is statistically insignificant across specifications, but a pure focus on countries that have been coded as democratic by Cheibub would leave the analysis with 18 observations making any meaningful regression impossible. The time trend coefficient is significant and positive across all specifications. Surprisingly, whether there was a transition prior to the referendum and whether a constitutional referendum was mandatory does not have any statistically significant effect.

Finally, the most surprising result is the negative and significant sign of government constraints. One would assume that citizens prefer their government to be constrained, thus the result is striking. One reason could lie in the nature of the proxy, namely that it measures de facto constraints. The additional control of de jure property rights hints at this explanation, since the coefficient is insignificant for both property rights measures.

With regards to our main variable of interest, namely domestic violence, the results have highlighted that outliers might be a main driver for the significant results in the OLS specifications. This finding and the small number of failed referendums make a closer look at these failed referendums in light of the theory proposed in the main part of this paper a viable option.

Table 4.2: Effect of Domestic Conflict on Referendum (OLS)

	(1)	(2)	(3)	(4)	(5)
	Yes-votes [%]	Yes-votes [%]	Yes-votes [%]	Yes-votes [%]	Yes-votes [%]
Domestic conflict indicator	0.000869	0.00105*	0.000985	0.000553	0.0000191
	(1.61)	(1.94)	(1.35)	(1.11)	(0.03)
Fractionalization	-0.952	1.374	-2.945	-1.955	2.433
	(-0.17)	(0.22)	(-0.53)	(-0.34)	(0.31)
ln GDP per capita	-5.616**	-5.829*	-4.523*	-3.713	-3.830
	(-2.03)	(-1.86)	(-1.84)	(-1.34)	(-1.28)
Education	-17.94***	-16.22**	-14.83**	-18.20***	-37.33
	(-2.78)	(-2.37)	(-2.21)	(-2.74)	(-1.36)
Democracy	-7.087	-8.475	0.896	-2.981	-1.269
	(-1.33)	(-1.46)	(0.18)	(-0.56)	(-0.22)
Time Dummy	1.532**	1.320**	1.345**	1.586**	3.771
	(2.54)	(2.13)	(2.14)	(2.59)	(1.25)
Mandatory		3.022	-0.838	-1.210	-3.479
		(0.72)	(-0.22)	(-0.28)	(-0.77)
Transition		-0.0320	1.108	-2.336	-1.557
		(-0.01)	(0.27)	(-0.58)	(-0.29)
Executive constraints in t+1			-2.762***		
			(-3.31)		
De jure property rights (Goderis/Versteeg) in t+1				-12.86	
				(-1.15)	
De jure property rights (Voigt/Gutmann) in t+1					-8.799
					(-0.62)
Constant	169.2***	167.4***	160.4***	162.9***	178.8***
	(6.38)	(5.34)	(6.60)	(6.08)	(4.12)
Observations	88	79	72	74	49
R^2	0.289	0.304	0.375	0.318	0.262

t statistics in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Table 4.3: Effect of Domestic Conflict on Referendum (Frac. Logit)

	(1) yes	(2) yes	(3) yes
Domestic conflict indicator	0.0000566	0.0000780	0.0000388
	(1.15)	(1.43)	(0.85)
Fractionalization	-0.0555	0.141	-0.0532
	(-0.12)	(0.30)	(-0.11)
ln GDP per capita	-0.372**	-0.385*	-0.248
	(-2.04)	(-1.92)	(-1.36)
Education	-1.273***	-1.145**	-1.409***
	(-2.72)	(-2.33)	(-2.95)
Democracy	-0.459	-0.516	-0.161
	(-1.44)	(-1.59)	(-0.51)
Time Dummy	0.105**	0.0899**	0.115***
	(2.57)	(2.21)	(2.97)
Mandatory		0.219	-0.0317
		(0.79)	(-0.10)
Transition		-0.121	-0.349
		(-0.45)	(-1.26)
De jure property rights (Goderis/Versteeg) in t+1			-1.411
			(-1.62)
Constant	7.773***	7.612***	8.103***
	(4.18)	(3.50)	(4.14)
Observations	88	79	74

t statistics in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Table 4.4: Effect of Domestic Conflict on Referendum (Robust Regression)

	(1)	(2)	(3)
	Yes-votes [%]	Yes-votes [%]	Yes-votes [%]
Domestic conflict indicator	0.000897	0.00110	0.000133
	(1.40)	(1.59)	(0.27)
Fractionalization	-1.369	-0.926	-0.691
	(-0.23)	(-0.14)	(-0.14)
ln GDP per capita	-6.918***	-7.454***	-0.590
	(-3.93)	(-3.87)	(-0.39)
Education	-19.02***	-18.97**	-16.16***
	(-2.77)	(-2.38)	(-2.91)
Democracy	-5.978	-6.505	-7.841**
	(-1.43)	(-1.29)	(-2.07)
Time Dummy	1.587**	1.560**	1.504***
	(2.44)	(2.02)	(2.81)
Mandatory		2.051	-7.272**
		(0.44)	(-2.13)
Transition		0.00279	0.291
		(0.00)	(0.09)
De jure property rights (Goderis/Versteeg) in t+1			-2.591
			(-0.30)
Constant	184.4***	187.4***	130.9***
	(9.19)	(8.32)	(8.28)
Observations	88	79	74
R^2	0.340	0.348	0.391

t statistics in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

4.5.5 Failed Referendums: Case Studies

Only four of the referendums covered by the data of our analysis failed. The four cases are Uruguay in 1980, Albania in 1994, Zimbabwe in 2000 and Kenya in 2005. It is useful to analyze the background against which the referendums took place to check whether some common factors leading to the failure of the referendums can be found.

After a military coup in 1973 and stabilizing their rule, the military leadership in Uruguay aimed to institutionalize their executive powers through a new constitution in 1980. Despite a heavy media campaign, linking a no-vote in the referendum to communism, the citizens voted against the constitutional draft (Gonzalez, 1983). While it remains uncertain why exactly citizens said no, it can be argued that they opposed the strong powers of the military. Those powers would have been formalized by the new constitution.

Albania is one of the typical cases where countries need a new constitution in the aftermath of a regime change. After the breakdown of communism in Eastern and Central Europe, Albania first introduced an interim constitution in 1991. This document was temporary in nature and the constitution-making process started directly. In 1994, the Constitutional Commission presented a draft which did provide broad powers to the president without establishing strong checks and balances (Center for the Study of Constitutionalism in Eastern Europe, 1995, p. 2). The president tried to circumvent parliament for ratification of the draft constitution since his ruling party did not have the required two-thirds majority there. For this reason, a public referendum was used as a method of ratification. The opposition attacked the draft vigorously, arguing that it was a president constitution (Center for the Study of Constitutionalism in Eastern Europe, 1995, p. 3). The citizens mirrored those concerns in the referendum and the draft was rejected by 59% of the voters.

The starting point for the constitutional debate in Zimbabwe was the foundation of the National Constitutional Assembly (NCA), a collaboration of opposition groups and

NGOs, in 1997. As a reaction to this movement, the government installed an own Constitutional Commission (CC) in 1999. While the CC also had inclusive elements and allowed citizens to be heard, its members were selected by the ruling government of President Mugabe. To gain further legitimacy, the government decided that the citizens would be allowed to vote on the new constitution in a referendum. One of the key issues of the official draft has been land reform. In a last-minute attempt to gain support amongst the veterans from the independence war, the president added provisions which would make land redistribution easier to accomplish (Dorman, 2003). Ultimately, the referendum was considered a vote on the land issue as much as a general vote on President Mugabe. Surprisingly, the draft was rejected with 54% of the voters saying no. Thereafter, the government lost interest in drafting a new constitution and decided to maintain the old constitution.

The movement towards a new constitution in Kenya started in 2002. A new government under President Kibaki was elected, ending a forty-year long rule of the Kenya African National Union. One of the first promises made by the new president was drafting a new constitution. Although one of the key issues for constitutional change was the high degree of executive power in the old constitution, the draft did not succeed in reducing this powers sufficiently, at least from the perspective of the voters. (Kimenyi and Shughart II, 2010, p. 5) highlight that executive powers were the key issue for voters who rejected the proposed constitution. Altogether, only 38% of the voters opted in favor of the draft. This clear result led to the failure of the constitutional draft and it took five more years until a new constitutional referendum, which was eventually successful, took place.

What is common across all four cases is that the referendums took place in "normal" times. None of the countries was in a deep crisis or internal conflict that made the old constitutional solution unacceptable for its citizens. This claim can also be supported drawing on the domestic conflict indicator. Prior to the referendums, all four cases displayed a low degree of domestic conflict. Albania, Zimbabwe and Uruguay saw no

domestic conflict prior to the referendum according to the Banks database.[55] The indicator for Kenya in the year of the referendum shows some conflict, but in the two years leading to the referendum value was very low or zero. Low levels of uncertainty, combined with drafts that grant significant powers to the executive, appear to be the most likely case for failed referendums from our theoretical perspective. The stylized fact that all four failed referendums fit this description reasonably well provides further support for the formal model presented in this chapter.

4.5.6 Robustness I: Does a Referendum Affect Domestic Conflict?

As discussed above, the very act of requiring a ratification referendum might result in increased domestic violence in the year the referendum is held. Thus, a lagged domestic conflict variable can be used as a robustness check. The drawback of this check is missing out on domestic conflict which intensifies in the same year as the referendum. The results of this test, which can be seen in table 4.5, are in line with the main section, thus strengthening the argument that reverse causality is not the key problem.

4.5.7 Robustness II: Mandatory Referendums

Finally, we would prefer to focus on the effect of mandatory referendums only. However, as can be seen below in table 4.6, the low number of observations available weaken the reliability of the results from the empirical analysis. For the purpose of transparency, it is useful to report these results. Given the sample size of less than 20 for all models, a meaningful analysis of these results is not possible. .

[55] Since the referendum in Zimbabwe was held early in 2000, the value for 1999 is base for this claim.

Table 4.5: Robustness: Effect of Lagged Domestic Conflict on Referendum (OLS)

	(1)	(2)	(3)
	Yes-votes [%]	Yes-votes [%]	Yes-votes [%]
Domestic conflict indicator in t-1	0.00131*	0.00131*	0.000691
	(1.75)	(1.83)	(1.06)
Fractionalization	3.141	3.914	1.224
	(0.52)	(0.62)	(0.21)
ln GDP per capita	-5.777*	-5.705*	-3.344
	(-1.98)	(-1.87)	(-1.24)
Democracy	-11.44**	-11.11*	-5.651
	(-2.21)	(-1.92)	(-1.04)
Time Dummy	-0.206	-0.196	-0.108
	(-1.65)	(-1.24)	(-0.71)
Mandatory		0.990	-3.821
		(0.21)	(-0.78)
Transition		-0.847	-2.462
		(-0.18)	(-0.56)
De jure property rights (Goderis/Versteeg) in t+1			-12.73
			(-1.02)
Constant	135.9***	134.1***	123.2***
	(5.93)	(5.43)	(6.20)
Observations	81	77	72
R^2	0.269	0.254	0.237

t statistics in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Table 4.6: Effect of Domestic Conflict on Mandatory Referendums (OLS)

	(1) Yes-votes [%]	(2) Yes-votes [%]	(3) Yes-votes [%]
Domestic conflict indicator	0.000200	-0.000173	-0.000174
	(0.26)	(-0.21)	(-0.20)
Fractionalization	-4.911	-9.056	-9.086
	(-0.41)	(-0.77)	(-0.71)
ln GDP per capita	-9.007**	-7.264	-7.237
	(-2.35)	(-1.71)	(-1.40)
Education	-22.90**	-26.33***	-26.39**
	(-2.80)	(-4.14)	(-3.32)
Democracy	2.279	3.876	3.922
	(0.31)	(0.48)	(0.45)
Time Dummy	1.949**	2.276***	2.280***
	(2.96)	(4.50)	(3.89)
Transition		2.851	2.779
		(0.49)	(0.42)
De jure property rights (Goderis/Versteeg) in t+1			-0.448
			(-0.02)
Constant	208.1***	202.9***	203.2***
	(7.82)	(5.61)	(5.13)
Observations	18	17	17
R^2	0.520	0.574	0.574

t statistics in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

4.6 Conclusion

The results of this chapter, as they stand, are able to explain which constraints influence the constitution-making process in different settings. We have argued that effective constraints on the drafters depend on potential intra-elite conflicts, uncertainty's influence on expected future benefits and whether or not the procedural rules require a referendum. These variables also interact with each other, where strong uncertainty mitigates the influence of referendums and intra-elite conflicts. Looking at the empirical results, the effect of uncertainty (as proxied by domestic conflict) on the referendum result takes the expected positive sign and gives further indication that referendums are least effective in situations when constraining drafters is of utmost importance. While the statistical significance is not robust to different specifications, a closer look at the few cases of failed referendums is supportive of the claims made in the model.

One interesting result arises when combining the results from the formal model with the arguments made about bargaining power within the constitutional assembly. Whenever one faction is clearly stronger than the other one along the dimensions discussed in section 4.3, the constraining effect of the minority's veto power in the assembly increases. This counter-intuitive result is related to the expectations for the near future of the two groups. The factors determining the bargaining power (e.g. the number of seats in the constitutional assembly) are also good proxies for prospects in the first election under the new constitution and the minority group will be less interested in short-term rents if they expect to be out of office. All in all, the internal constraints on the drafters are reduced when the bargaining power of the factions in the constitutional assembly is equal.

When rulers are uncertain about their long-term perspective, the model predicts that they are more likely to opt for expropriationary powers. This finding illustrates that the concept of roving and stationary bandits fits quite well in an analysis of constitution-making. Unfortunately, testing for this relationship through a large-n study suffers from

data problems. While a *de jure* indicator of expropriationary powers in a constitution has been constructed by Voigt and Gutmann (2013) and can be expanded with the data gathered by Goderis and Versteeg (2014), the relative preferences of drafters for short-term and long-term rents cannot be easily observed or proxied. To properly take these preferences into account, a set of detailed case studies would be necessary. While those are beyond the scope of this chapter, they offer an interesting opportunity for future research.

The key learning of this chapter has been that constitutional referendums constrain in situations that are not typically found when one thinks about constitution-making. This finding can be interpreted in two ways. First, constitutional referendums could be an ineffective tool to constrain drafter *per se*. Second, the underlying cause for this lack of constraining effect could be that almost all constitutional referendums only require a simple majority for ratification. To shed some further light on this second possible interpretation, the next chapter will have a closer look at the way public participation in form of constitutional referendums is set up and discuss the optimal majority requirements. While qualified majority rules are the most typical ratification rule within constitutional assemblies, they have to date hardly ever been used for constitutional referendums. Especially in the light of the results of this chapter, an analysis of the drawbacks and benefits of a qualified majority rule for constitutional referendums seems useful.

Chapter 5

Majority Rules in Constitutional Referendums

5.1 Introduction[56]

Making a new constitution is often seen as an essential step for a new-founded country or a regime change. While preferences and past experiences are important determinants of the new constitution, the process of drafting and ratifying it plays a key role. For this process, broad-based public involvement is considered beneficial. This idea has been discussed at length in the legal literature (see for example Samuels, 2006, p. 670; Banks, 2008, pp. 1048-1050; Carey, 2009, pp. 156-157) and can also be found in the concept of constitutional moments, in which citizens are particularly attentive and which differ from times of normal law-making (Ackerman, 1991, pp. 6-7). The typical means of public participation to ratify the document are referendums.

A number of studies argue that popular participation increases the legitimacy of a constitution (Elster, 1993, p. 179; Samuels and Wyeth, 2006, p. 3). Besides increasing legitimacy, participation also places constraints on the drafters (Ginsburg, Elkins, and

[56]This chapter is based on joint work with Ignacio N. Cofone, to whom I am very grateful for allowing me to use this work as part of my dissertation.

Blount, 2009, p. 206). Moreover, a participatory constitution-making process increases the stability of a newly carved document. Empirical evidence suggests that inclusive processes (such as referendums) have a positive impact on the lifespan of constitutions (Ginsburg, Melton, and Elkins, 2009, p. 139).

Stability is especially important for new constitutions drafted in turbulent times—which is by no means a rare occurrence.[57] When a country undergoes a political regime change, a new constitution is one of the typical demands. A recent example of this can be found in the process of constitution-making that followed the Arab Spring in Egypt, Tunisia and Libya. One challenge for constitution-making, particularly in those post-conflict settings, is the inclusion of all important societal groups, factions and ethnicities into the process.

To achieve a broad public involvement in the process of writing a new constitution or amending an existing one, two main methods of inclusive constitution-making can be identified: making the drafting process itself more participatory and using a public referendum to ratify the constitution.

Public referendums to ratify the constitution have grown more popular over the past decades. This method was used to ratify 44% of all constitutions in force by 2005 (Ginsburg, Elkins, and Blount, 2009) and the trend has become more pronounced in the last years.[58] This number is salient when compared to the negligible use of direct democracy in other areas of politics. While most constitutional procedural rules vary substantially across countries and depend on national characteristics, referendums for constitutional ratification are used across the world. This trend has led many to claim that public participation is emerging as virtually the only international norm in constitution-making (Hart, 2010, p. 42; Franck and Thiruvengadam, 2010, p. 14; Landau, 2013, p. 934).

Recent years have seen a wide range of papers focusing on the process of constitution-

[57] In the past 40 years, more than 200 constitutions have been drafted under the threat of civil conflict. For a detailed discussion, see Widner (2008).

[58] Ten out of the eighteen constitutions that entered in force between 2005 and 2010 required a referendum for ratification.

making (for example Banks, 2008; Tushnet, 2008; Barnett, 2009; Partlett, 2012; Landau, 2012, 2013). Given the growing popularity of referendums, the question of which majority rule procedures a specific country decides to implement is relevant for policy-making. However, scholarship has so far paid little attention to the specific decision-making rules of referendums.[59]

This chapter focuses on the question which majority rules should be chosen for the different stages of the constitution-making process, with a particular focus on the referendum stage. Although it is common to find qualified majority rules in place for the constitution-making body itself,[60] they are rarely used in referendums for ratification (Tierney, 2012, p. 274). This differential treatment of ratification within the constitutional assembly and ratification in the referendum can be found across the world.[61] A simple majority is in practice often considered sufficient for a constitutional draft to pass the referendum

It is doubtful that the considerations that demand the use of qualified majorities for ratification within the constitutional assembly are never applicable to the referendum stage of the ratification process.[62] We identify relevant reasons to use qualified majorities for all stages of constitutional ratification, including both the drafting at the constitutional assembly and the subsequent referendums. Thus, if diverging majority rules are

[59]Throughout this chapter we abstract from the issue of quorums in the referendum. The reason for this is that the problem we discuss is relevant with or without a quorum. As long as the relevant groups have similar access to the voting booth, turnout requirements will not solve the legitimacy issues discussed here. One should note, still, that under some circumstances one could approximate supermajority rules in a referendum by requiring an absolute majority of voters, rather than just a relative (qualified) majority. If there is a low turnout rate, an absolute majority would, in practice, work as a qualified majority rule. If the turnout is extremely low, this rule could even be harder to obtain than a true (relative) qualified majority

[60]Possible constitution-making bodies include the ordinary legislature, the executive, or a specifically elected constitutional assembly. A report on constitution-making after the Arab Spring has shown that the use of super-majorities in voting bodies (when they existed) has been the norm over the past few decades (Democracy Reporting International, 2011, p. 4). 19 out of the 20 cases in their analysis used a super-majority requirement.

[61]In this chapter, we take the use of the referendum itself and the reasons for using it as given. The focus is on the different majority requirements for the two stages and not on explaining why we see a referendum in the first place.

[62]One could also imagine a setting with simple majority at the assembly stage and a qualified majority at the referendum stage. While interesting in theory, this setting is not found in constitution-making and thus omitted from the analysis in this chapter.

chosen, they would require a justification on why the referendum stage is different and should not be the unreflective default mode of constitution-making.

This chapter is a theoretical contribution to the literature on direct democracy. While many contributions have looked at the (economic) effects of direct democracy in normal times (see for example Bohnet and Frey, 1994; Feld and Savioz, 1997; Matsusaka, 2005; Blume et al., 2009), the analysis of direct democracy at the constitution-making stage has not received similar attention. The contribution of this chapter is to address this gap in the literature.

The rest of the chapter is organized as follows. Section 2 provides an overview of the reasons for different majority rules in constitution-making in general. Section 3 lays out the criteria to choose between different majority rules for the case of constitutional referendums. Sections 4 and 5 draw on these criteria to present the reasons for choosing a simple majority rule or a qualified majority rule, respectively. Section 6 offers a discussion of these reasons, applying them to a set of case studies. A final section concludes.

5.2 Setting Majority Rules for Constitution-Making

5.2.1 Choosing Under a Veil of Uncertainty

Rousseau (1762) was first to address the question of what kind of voting rule would be required for important decisions, arguing that more important decisions require higher majorities. The question which rule should be used for the ratification of a constitution has been explicitly brought forward in the seminal contribution of Buchanan and Tullock (1962), who argued that unanimous consent to a constitution is necessary from a normative standpoint, even when the constitution spells out less-than-unanimous rules for subsequent policy decisions. Their argument is based on an analysis of the costs of the political process and the existence of a veil of uncertainty.

Political decisions concerning the placement of a certain activity in the public sector have two types of costs: external costs and decision-making costs (Buchanan and Tullock, 1962). External costs are the costs of being on the losing side of a policy decision, while decision-making costs relate to the cost of finding agreement. The trade-off that majority rules present is that an increase in the required amount of votes reduces the external costs while it increases the costs associated with decision-making.

A rational and welfare-maximizing individual would agree *ex-ante* (under a veil of uncertainty) to a decision-making rule that minimizes overall cost.[64] This operates at two levels. At the level of constitutional choice, individuals know that they will face collective decisions in the future and that they will sometimes be on the winning side and sometimes on the losing side. As long as they face uncertainty at the constitutional stage about their positions in these future decisions, they will agree to a lower requirement than the unanimity rule for future decisions in order to reduce the high decision-making costs that would result from this rule for each decision-making process.

For very fundamental choices (including the choice on the constitution itself), the external costs are so high that the requirement of unanimity at the constitutional stage can be justified (Buchanan and Tullock, 1962). However, implementing a unanimity rule is not without problems. A key problem with unanimity rule is that it generates an opportunity for strategic voting. Under this rule, a single voter can stop the whole process in order to obtain personal benefits in exchange for her agreement. This creates a holdout problem.[65]

This problem can explain the use of qualified majority rules in constitution-making. Qualified majority rules are more demanding than a simple majority without requiring unanimous consent. These rules allow for the retention of the main benefits from the

[64]The decision might not be optimal for her from an ex-post perspective, depending on whether she turns out to be on the winning or losing side of the policy decision.

[65]This problem arises when the consent of multiple right-holders is required for the completion of a project. In this situation, each individual holds veto power for the entire project and has strategic incentives to use this veto power to extract more benefits than are proportional. This may create a scenario in which it is impossible to complete the project. Typical examples for the holdout problem are urban development projects such as the building of a new road, where the consent of all landowners is required.

unanimity rule while avoiding the holdout problem, presenting a compromise between the appeal of unanimous consent and the necessities of a functioning voting procedure.

5.2.2 Utility Weights

The case for choosing a voting rule can also be made from an egalitarian or a utilitarian perspective (Laruelle and Valenciano, 2008, pp. 71-77). To satisfy egalitarianism, a necessary condition (although not a sufficient one) is that the votes of all citizens are equally valuable behind a veil of uncertainty. As long as each citizen has a single vote of equal weight, voting rules should satisfy this concern independently of which quota is chosen. For this reason, the decision between the different majority rules relies chiefly on utilitarian concerns (Laruelle and Valenciano, 2008, pp. 71-77).

To evaluate these utilitarian concerns, it is necessary to introduce a further element into the discussion (Laruelle and Valenciano, 2008). If one agrees that minorities should be given protection in a political community, then it is reasonable to consider that one should give them special consideration at the stage of constitutional choice. It is possible that citizens put different utility weights on being on the winning side depending on whether they are in favor or against a constitution. The constitution defines the basic rules of the society and it is likely that citizens will find it more important to prevent a constitutional draft when they oppose it than supporting it in the contrary case. The reason for this asymmetry lies in the *status-quo*. The costly process of drafting a new constitution is often initiated in cases where the old constitution is unable to provide the basic structure for society anymore, for example after a revolution or a civil war.[66] Given that all citizens benefit from the basic structure that a constitution provides for a society, preferring the (costly) *status-quo* over a new constitution indicates a strong preference against the document.[67]

[66] For minor changes, constitutions would rather be amended than completely redrafted so, in case of amendments, the argument that those opposing an amendment will have more to lose is less likely.

[67] One might argue that strategic bargaining could also lead to rejecting the draft, but it is unlikely that a sufficiently large group of a society will engage in this to make a draft fail in case of a qualified majority requirement.

Under this assumption, the voting rule for ratification should require a qualified majority under utilitarian calculations, since the negative utility *per capita* for those opposing a constitution would be larger in average than the gains for those favoring the constitution.[68] The level of the qualified majority depends on the degree to which the members of the opposition in the society value not living under the rules of the constitutional draft which they oppose. In an extreme case where the disutility of the minority is very high, these considerations could even justify unanimous consent.

5.2.3 Protecting Minorities

Even when the levels of disutility of opposition groups are low enough to support a simple majority rule, other concerns can support the use of qualified majority rules. One of these concerns is the protection of minorities from the so-called tyranny of the majority.[69]

Using a majority rule to achieve protection of minorities is counter-intuitive, since the protection of minorities is counter-majoritarian in nature. Minorities are typically protected through four tools: judicial review, constitutional entrenchment, separation of powers, and checks and balances (Elster, 1992). However, at the stage of constitution-making, these tools are not yet in place and need to be included in the constitutional draft in order to ensure protection.

When asked to vote in the referendum, citizens face uncertainty about their position in future policy decisions. For some future decisions, they are not fully aware whether they will be in the minority. Even with minority characteristics that are static, such as race or gender, the decisive element that determines which characteristic is relevant to

[68] Imagine a group of 10 people who have to decide whether to vote yes or no to a constitutional change. If the constitution passes, every one of them who is in favor of the change would win the utility equivalent of 5 dollars, while each of the ones against would lose the utility equivalent of 9 dollars. A benevolent dictator would specify a qualified majority rule here to make sure that no overall utility loss occurs. Concretely, for these numbers a majority of 70% would be required.

[69] John Adams was the first to use the term, while Alexis de Tocqueville popularized it. See Adams (1787) and de Tocqueville (1835).

categorize minorities and majorities is the issue on ballot.[70]

There are two reasons why a qualified majority rule is better suited to ensure the protection of minorities in this scenario. First, consider a society where the members are fully aware that future decisions in the areas of religion, race and sexual orientation could suffer from the tyranny of the majority. If there are 12% members of a minority race, 12% members of a minority religion and 12% members of a minority sexual orientation, they would together be able to block a constitution without minority protection, in the form of counter-majoritarian measures for constituted powers, or otherwise, under a qualified majority rule of two-thirds or more. Second, one can also relax the assumption that the relevant policy areas must be known *ex-ante*. If there are enough characteristics that could turn out to be an issue of future policy-making, many will be aware that they will occasionally be in the minority themselves. If they sufficiently care about being protected in these cases, they will block a constitution that does not include the tools of minority protection.[71]

Since citizens at the stage of referendum are unable to add further content to the draft, they can only rely on their blocking power to prevent drafters from excluding minority protection from the constitution. A qualified majority rule is equivalent to a lower blocking requirement and makes it more likely that this threat will force drafters to include basic rights, judicial review and other counter-majoritarian tools. In this way, qualified majorities can mitigate the tyranny of the majority problem at the level of constitution-making. Thus, a referendum requiring a qualified majority can be seen as an indirect counter-majoritarian device.

[70] For example, imagine a person of ethnicity A and religion B, and a person of ethnicity B and religion A, in a society which consists mostly of people of ethnicity A and religion A. Both individuals will have an interest in minority protection, even if part of a majority group, since they will be in the minority for one of the two issues.

[71] Minorities might also achieve their aim through logrolling in the constitutional assembly. Logrolling is more likely when a small group of people takes the decision Tullock (1959). Note that this kind of logrolling protection would require the minority group to be represented at the assembly and that their votes are needed on other areas of the draft.

5.2.4 Tyranny of the Minority

An objection to the protection of minorities argument could be raised based on the idea that the minority could obtain too much power under this regime. The use of a qualified majority requirement is equivalent to giving a minority a veto power approximating the holdout problem identified for unanimity rules. If the minority is large enough, for example more than one-third of the votes for the typical two-third qualified majority, they would be able to prevent the constitution from being ratified and thereby obtain further concessions from the majority. This situation is the mirror image of a tyranny of the majority, thus coined tyranny of the minority. The more demanding the qualified majority requirement is, the more relevant this consideration becomes.

Two arguments can, however, be raised against using the idea of the tyranny of the minority as a justification for demanding simple majorities at the referendum stage. First, a constitution-making process that includes both majority and minority groups in society is the prime example of inclusive constitution-making which, as was mentioned, increases the stability and legitimacy of the constitution (Ginsburg, Elkins, and Blount, 2009). Furthermore, individual citizens have no incentives for strategic voting at the moment of referendums as long as the qualified majority requirements are not excessively high, since only a substantial part of the population would be able to block the proposal. If a sizeable part of society objects to a constitutional draft, the possibility that the constitutional draft is unbalanced becomes more pronounced.

The second argument is based on a situation in which the constitutional assembly has ratified the draft with a qualified majority requirement. If the members of a minority are proportionally represented in the assembly, it is easier for them to coordinate a blockade of the draft within the assembly than in the subsequent referendum, where they would need to coordinate with the minority at large. If the minority is not represented in the assembly, the drafting process can generally be considered lopsided and a referendum with a qualified majority requirement represents an opportunity for the minority to

make itself heard.[72]

What is critical in determining the optimal majority threshold is the tradeoff between better protection of minorities (higher threshold) and a reduced blocking power of those minorities (lower threshold).[73] This issue has been extensively discussed in the literature (see for example Aghion and Bolton, 2003; Aghion et al., 2004; Harstad, 2005; Gersbach, 2011). A 64% rule, which has been brought forward by Caplin and Nalebuff (1988), is reasonably close to the typical qualified majority requirement of two-thirds (Democracy Reporting International, 2011, p. 4).[74] Another way to protect minorities would be establishing a round table model for the entire constitution-making process (for a detailed description, see Arato (2012)). TThe idea of the round table model is that a multi-party instance (the round table) that includes all major groups negotiates an interim constitution and is followed by the election of a new assembly, which then drafts the final constitution. This multi-stage process is also referred to as post-sovereign, since no single 'instance, institution or person can claim to fully embody the will of 'the people'.' (Arato, 2012, p. 174). One similarity between the round table approach and the use of a qualified majority (in referendums and constitutional assemblies) is worth noting. A higher majority threshold in qualified majorities leads to a smaller chance of one group dominating the process. This is, at the same time, a key strength of a round table approach.

To sum up, the general arguments in favor of using qualified majorities for constitution-making seem convincing. However, constitutional referendums are typically only a second step in the ratification process. In an effort to highlight this difference, the next section will discuss the special case of referendums for constitutional ratification.

[72] However, the risk of a tyranny of the minority is hardly driven by the referendum stage.

[73] Constitutional amendment difficulty increases with the size or scale of the polity, holding the amendment rule constant (Dixon and Holden, 2012). Larger polities have higher decision-making, but in case of constitution-making the external costs are significantly higher compared to an amendment, given that all constitutional rules are on the table at the same time. Therefore, while being a provoking and interesting argument for lower majority thresholds in larger polities, this case is less important for constitution-making than for constitutional amendments.

[74] The argument of Caplin and Nalebuff, however, does not build upon the tradeoff discussed above, but rather on the avoidance of Condorcet cycling.

5.3 Choosing a Majority Rule for Constitutional Referendums

Majority rules are one of the key channels through which a constitution can directly or indirectly achieve popular participation. A maximally participatory process not only requires that all relevant groups are included in the drafting process but also that the voting rules within the constitutional assembly allow these groups to exert some influence on the final outcome.[75] These considerations add to the explanation why most constitutional assemblies do not use simple majority rules, but rather require qualified majorities.

As we mentioned, while the use of qualified majority rules is widespread for constitutional assemblies, they are rarely used in referendums for ratification.[76] However, the general reasons for a qualified majority in constitution-making are applicable to both stages. This divergence among majority rules runs contrary to the intuition that procedural rules should specify the same decision rules, absent reasons to divert.

There are some ways in which the stages of constitution-making differ. The costs of failure are often higher in a referendum vote than in an assembly vote, and for voters in a referendum it is difficult to signal their support (or lack thereof) in advance, thus leading to a higher level of uncertainty about the outcome of the referendum. When these qualifications apply, a concrete comparison of arguments in favor of the different majority regimes is beneficial for choosing the most appropriate majority rule.[77]

For the purposes of this analysis, we consider that constitution-making processes have the objective of ensuring the legitimacy and the stability of the constitution being written. This idea has been extensively supported by the literature (Banks, 2008; Barnett,

[75] In this chapter, constitutional assembly and constitution-making body are used as synonyms. Thus, any political body that has the task of drafting and ratifying the draft of the constitution is covered by this definition.

[76] There are very few exceptions. For example, the 2009 referendum of Saint Vincent and the Grenadines required a two-thirds qualified majority and serves as a notable one.

[77] We discuss this in section 5.6.

2003, 2009; Carey, 2009; Hart, 2003; Jackson, 2008; Landau, 2012, 2013; Tierney, 2009).

Constitutional stability is defined as the longevity of the constitution.[78] Two of the main functions of a constitution are serving as the basis of the legal system and allowing citizens to build stable expectations about government actions and the limits of executive power. The constitution works as a focal point to detect government transgressions and to solve the citizens' coordination problem in these situations (Weingast, 1993, 1995). A focal point as a coordination device is only helpful if citizens are aware of it. A constitution that has been in force for a long period of time is better able to fulfill these functions.

While a referendum is unable by itself to make the process of constitution-making more (or less) lawful, a referendum is a good test for what has been called the sociological legitimacy of a constitutional draft, which is achieved when the public thinks of the constitution as agreeable and justified (Fallon Jr., 2012). The main concern with regard to public participation in constitution-making is not the question of legal legitimacy, but rather whether the people at large are sufficiently involved in the constitution-making process.

Legitimacy is also linked to the concepts of inclusive and participatory constitution-making. An inclusive process is one that ensures that a broad spectrum of society is represented in the process, whereas a participatory process involves the citizens directly.[79] Both of these aims are furthered by a constitutional referendum. When people are required to vote on the draft directly, the process is more participatory than one without direct democracy elements. Furthermore, a popular referendum can be a second layer of an inclusive process, which is especially relevant when the assembly is not

[78] For a detailed discussion of advantages and drawbacks of constitutional longevity, see Ginsburg, Melton, and Elkins (2009, ch. 2)

[79] Both of these aims could be achieved by other means than a constitutional referendum as well. Direct involvement of the citizens in the drafting is a typical way to make a process more participatory, as for example seen in the drafting of the Brazilian constitution in 1988. Electoral rules for and the majority rules in the constitution-making body are important for the inclusiveness. A proportional electoral rule leads in general to a more inclusive constitution-making body than a first-past.the-post rule, whereas a higher majority requirement leads to the necessity to include more representatives in a minimum winning coalition.

sufficiently inclusive. This effect is stronger with a higher majority requirement in the referendum.

The existence of a certain degree of political rule of law is necessary for the analysis of this chapter to be meaningful. By political rule of law we understand that the referendum will be fair and democratic and that campaigns in favor of the new draft as well as those opposing it should be allowed. If these conditions are not fulfilled, then the difference in majority rules will not be able to make a sufficient impact. An elite that is able to tamper with the results of a referendum will not be constrained by a higher threshold in that referendum. An autocrat aiming to increase the legitimacy of his regime might use a referendum to give his citizens a feeling of participation. One example of a regime potentially staging such a referendum is the 2003 constitutional referendum of Qatar, where official results gave nearly 97% agreement for the draft constitution supported by the Emir.

The next sections analyze the arguments for and against simple and qualified majority rules for the constitutional referendum.

5.4 When to Use a Simple Majority Rule

5.4.1 Swift Stability in Times of Crisis

Most referendums ask voters if they agree to the constitutional draft as a whole. While a positive vote leads to a direct implementation of the constitution, a negative vote leads to a continuation of the *status-quo* for a given amount of time while a new constitution is drafted. If this *status-quo* is costly for citizens, a majority might agree to the draft despite the fact that they actually prefer a different constitution. This problem is especially severe when citizens not only face a costly *status-quo*, but also discount future benefits more heavily because their private interest rate when making decisions is higher compared to a situation without crisis.

These two characteristics are typically found during the aftermath of a crisis or a violent conflict, which are, as mentioned before, by no means an exception for constitution-making. In the past 40 years, more than 200 constitutions have been written while facing the risk of an outbreak of internal violence (Widner, 2008, p. 1513).

Despite the high costs of delay, referendums have been one of the primary means of ratification for countries facing the risk of internal violence, where almost 45% of these cases used a referendum as the primary method of ratification (Widner, 2008, p. 1525). Referendums might be able to reduce the risk of ongoing violence independent of the majority rule chosen because the idea of participation can calm citizens. Thus, a referendum could be implemented not only to constrain drafters but also because it may support stability by reducing the risk of a violent outburst. The minimum (reasonable) requirement for any meaningful referendum, in turn, is a simple majority. This is the least constraining scenario for the drafters. For this reason, a simple majority referendum might be able to resolve the tension between the desire to create an inclusive process and a need for swift decision-making.

There are, nevertheless, alternatives to a hurried constitution-making process in times of crisis. One alternative is based on a two-step process: drafting an interim constitution as a first step and as a second step drafting a new constitution that aims to endure (Arato, 2009, pp. 71-72). The advantage of this procedure is that the first stage can be completed without public ratification, given that the issue of stability is not relevant for an interim document. The second stage will not face the same time pressure as that of a single-step process rendering the main argument against a more inclusive majority requirement inapplicable. The constitution-making process implemented in Poland after the breakdown of the communist block used an interim constitution and provides a good example of this alternative approach. To sum up, a simple majority requirement has advantages when swift decisions are necessary and a double-step process is inviable in the given case.

5.4.2 High Decision-Making Costs

A standard argument in favor of lower majority requirements in general is the presence of high decision-making costs (Buchanan and Tullock, 1962, ch. 8). This argument relies on the intuition that the external costs of those who are on the losing side of a vote can be justified if a higher majority requirement would make the decision much more costly for the entire population.

It can be argued that the costs of renegotiating and redrafting are higher for a referendum than for an assembly, not only because setting up a referendum is costly and time-intensive but also (and mainly) because a negative vote requires the whole drafting process to start anew. In light of our evaluation criteria, this can be seen as instability. In situations where the costs of constitution-making are very high, the risk of a negative vote could justify the use of a simple majority requirement.[80]

However, three qualifications to this argument apply. First, it is unclear whether the majority requirement has a strong effect on the risk of a failed referendum. In the period from 1925 until 2012, 84.4% of all constitutional referendums that passed the simple majority requirement would have also passed a qualified majority of two-thirds (Centre for Research on Direct Democracy (c2d), 2015). These numbers include all constitutional referendums for the specified period. One could limit the dataset to mandatory referendums, but the general picture would hardly change. For the case of mandatory referendums in the same time period, 79.4% of all referendums that passed simple majority would also have passed a qualified majority of two-thirds. Given these findings, the majority requirement would have affected the result of the referendum in a very limited number of cases.

Second, in cases where the decision-making costs are high because a failed referendum is costly due to the *status-quo*, citizens will also take these costs into consideration when

[80] These costs include some or all of the following elements: the prolonged continuation of a status-quo without a constitution, the increased risk of a violent solution if no return to a stable political situation is achieved, the monetary costs of running a constitutional assembly, and the constitution-making process in general as well as the loss in investment due to the unstable situation.

casting their vote. A negative vote by a substantial part of the voters in situations with a costly *status-quo* is a clear signal that the assembly is not representative of the society as a whole. In this case, an additional qualified majority requirement in the referendum would reduce external costs. Therefore, even with high decision-making costs, the result of the interdependence calculus is by no means clear.

Third, if the drafters of a constitution know there will be a referendum after completing the draft, they will be more likely to propose a draft that they expect to pass the referendum, hence (partly) internalizing the higher costs of redrafting in case of a negative vote. A constitutional bargain that fails to be ratified is worthless to the drafters. Thus, to the extent that constitutional drafters are able to predict the outcome of their draft in the referendum, the majority requirement will affect the content, while the risk of failure will remain stable. The next section deals with cases where the drafters are uncertain about their citizens' policy preferences.

5.4.3 Uncertainty of Drafters about Citizens' Vote

The argument that drafters will attempt to write a constitutional draft that will pass the referendum relies critically on the ability of politicians to correctly predict the voting behavior of citizens. A higher majority requirement makes it more difficult for drafters to anticipate the political atmosphere correctly, since a lower veto threshold increases the possibilities for failure and can also be viewed as instability of the process itself. This risk is prevalent in scenarios both with normal and with high decision-making costs, since the loss in time caused by the additional round of referendum is generally problematic. It is, therefore, necessary to look at the factors that decrease the politicians' ability to properly predict electoral outcomes.

A high level of heterogeneity is one of the main factors that make an accurate prediction of voters' behavior problematic. If the electorate is divided in many different groups, the risk of a wrong expectation from the drafters increases. Jottier et al. (2012) have tested this argument in a survey with Belgian politicians and found that more

heterogeneity increases prediction error. The case of the European Constitution, where different nation states (and thereby also societies that differ substantially) had to agree on a shared basic set of rules, is a good example of these difficulties. The drafters, as well as the local governments, were unable to predict voters' behavior. They did not foresee the risk of failed ratification and expected a vote in favor that did not materialize.

Hence, a society with multiple blocking minorities faces a greater risk of incorrectly predicting the outcome of a referendum. Since by definition a simple majority requirement prevents the existence of a blocking minority, drafters could choose this tool to reduce the risk of mistaken predictions.

5.5 When to Use a Qualified Majority Rule

5.5.1 Sociological Legitimacy

It has been argued that, unlike ordinary referendums, constitutional referendums are more than a decision-making mechanism; they allow citizens of both democratic and non-democratic societies to feel identified with the constitution, and as a consequence to feel identified with the state (Tierney, 2009, p. 366). The constitutional referendum makes individual citizens feel part of the *demos* as defined by the constitution to be approved (Tierney, 2009). It can easily be seen that a higher majority threshold increases the minimum level of sociological legitimacy at the moment of the referendum. This higher threshold, similarly, can be used to increase cohesion. When there is a conflict looming between different groups within society, simple majority referendums can lead the minority groups to boycott the referendum entirely and resort to more violent measures because they know that they will not have a blocking minority in the referendum. In the terms of Buchanan and Tullock, the external costs for these groups are likely to be extremely high. The cases of Northern Ireland and Bosnia where conflicts were exacerbated by referendums, despite being about the different issue of independence, are good examples of this. Although it remains unclear whether a higher requirement

would have stopped the ensuing conflicts, putting a brake on the tyranny of majority risk increases the legitimacy of a successful referendum.

Legitimacy can also arise through an influence of the citizens' choice in the referendum on the content of the draft. It has been claimed that qualified majorities are useless at the stage of referendums because the decision of the voters is binary (to accept or to reject), without the actual possibility of shaping the content of the constitution or of encouraging compromise. This claim only holds for the direct effect of the referendum but it ignores its indirect effect. Since the drafters are aware (*ex-ante*) that they need (*ex-post*) a given level of public agreement for their draft to pass, they will adapt their draft to this expectation. A higher majority requirement of the referendum will change the content of the draft due to the anticipation of the drafters. The analysis of the economic effects of direct democracy institutions provides further evidence of the effects of mandatory referendums.[81] Thus, the claim that qualified majorities at the referendum stage are unable to shape the content of the constitution does not seem to hold. A higher majority requirement thus increases the power of the citizens rather than the power of the drafters and leads to a more legitimate outcome.

5.5.2 Abuse of Power During Times of Crisis

The possible abuse of times of crisis or their aftermath by constitutional drafters is another relevant argument in favor of qualified majorities. As discussed above, citizens will place a high value on a quick return to constitutional stability if a crisis is still threatening and the costs of delay are high. High costs of remaining in the *status-quo* will motivate citizens to pay less attention than normal to the constraints placed on the government by the new constitution. If the drafters are able to formulate a constitution that grants the future government discretionary power, citizens will be more inclined than usually to accept a draft with such feature.

[81] Blume et al. show that the existence of (mandatory) referendums has a significant effect on fiscal variables. Their study analyses the economic effects of referendums on a global scale and this evidence highlights that politicians will take referendums into account at the stage when content is shaped (Blume et al., 2009).

This venture is easier when a single party dominates the constitutional assembly, which is another characteristic often found in post-conflict settings. This dominance might take place through a democratic election with a clear winner or in a non-democratic way. One could think, for example, about the winning side of a civil war, the successful leaders of a revolution, or an autocratic government that wants to rewrite the constitution. In this case, the assembly and the ratification rules within the assembly lose their constraining power due to the fact that one party is strong enough to withstand these rules. These types of scenarios increase the risk of establishing a constitution with low levels of legitimacy and stability (Landau, 2013).

In these cases, the use of a referendum with a simple majority requirement might be insufficient to deliver the level of legitimacy and stability that the new constitution would need in order to survive future shocks. A qualified majority requirement can mitigate this problem, since the higher threshold increases the minimum level of sociological legitimacy and would also increase the expected longevity. Especially in cases of non-democratically created assemblies, the use of qualified majority referendums could provide the necessary boost in legitimacy to make the constitution more stable. This layer of additional control of the drafters through the referendum is the topic of the following subsection.

5.5.3 Additional Control of Politicians in the Assembly

The additional control of politicians is of paramount importance in instances where the drafting body is not representative of the population. In cases of constitution-making in times of crisis, every fourth constitution-making body can be considered unrepresentative (Widner, 2008, p. 1524). Referendums serve as additional controls in these cases and a qualified majority rule can further strengthen legitimacy by ensuring that the interests of minority groups are incorporated into the considerations of the draft as well.

The usefulness of the control function of referendums does not end there. Even if

the assembly has been elected in a democratic process and is representative of society, it is naïve to assume that the drafters will act in a selfless way purely in the interest of their constituents. As long as they expect to hold some political office once the constitution comes into force, drafters might aim to increase their own future benefits by adopting constitutional measures that are beneficial to the political elite. Therefore, even a democratic setting does not make the control function obsolete, and a stricter majority requirement tightens the control over politicians.

A final word of caution is required. In a non-democratic setting, while drafters would face additional controls by a stricter majority requirement, it is unclear when the referendums in these cases are merely shams. One can easily imagine a referendum where the results are rigged by the ruling autocrat. Furthermore, any analysis which takes the procedural rules of constitution-making as exogenous ignores the problem that, since drafters are often the same people designated to create the procedural rules, they may be motivated to create procedural rules that promote their own self-interests rather than constitutional stability and legitimacy.

Having discussed the main reasons why simple majority or qualified majority requirements may be appropriate, we can turn to a more general evaluation of these arguments.

5.6 Case Studies

5.6.1 Evaluation Criterion

We have argued that it is relevant to ask which majority requirement should be chosen for constitutional referendums instead of simply assuming that the same rule is always optimal. An evaluation based on the arguments we presented above can answer this question. As discussed above (section 5.2), a qualified majority requirement can be justified for constitutional ratification in general. Starting from this base, the evaluation for referendums assesses whether one or more of the arguments in favor of a simple

majority referendum are applicable (section 5.4). If this is the case, the advantages of a simple majority requirement for the referendum must be compared with the advantages of a qualified majority (section 5.5). We show the way in which this evaluation can be applied by looking at three examples of diverging majority rules in the different stages of ratification and checking whether the decision to use simple majority requirements can be justified from the perspective of the criteria discussed in the previous sections. More specifically, we use the cases of Poland, Bolivia and Egypt as examples of this diverging majority rules. For different reasons, all three countries used qualified majorities in the constitutional assembly, but chose to use a simple majority in their constitutional referendums. The following subsections will analyze these cases with the proposed criteria.

5.6.2 Poland

Poland was the first country of the three that we analyze to give itself a new constitution.[82] Following the unrest and looming threat of a revolution in 1989, the communist government and the opposition groups engaged in round table talks to prevent a violent conflict (Gross, 1997, p. 65). President Walesa (previously chairman of the trade union Solidarity, elected in 1990) and the newly elected parliament aimed to quickly install a new constitution and replace the Soviet document of 1952. The fragmentation of the parliament as well as a disagreement about the degree of power that the president should wield prevented, however, a quick and complete drafting of the new constitution. Thus, the decision-makers opted for a 'small' constitution in 1992 which defined basic government functions leaving the process of completing a "large" constitution for the future.

The constitutional committee that was tasked with preparing the large constitution consisted of 10% of the members of the two Polish houses—the Sejm and the Senate. This setting has been criticized since the daily interests of the members of the commit-

[82] Garlicki and Garlicka (2010) provide an in-depth analysis of the constitution-making process in Poland.

tee, who were simultaneously serving in Sejm or Senate, interfered with the drafting of the constitution (Osiatynski, 1997, p. 66). To make sure that the interests of the different political factions (including the post-communist parties) were reflected in the new constitution, the ratification procedures required a two-third majority in the national assembly, which is a combined assembly of all members of the Sejm and the Senate. This qualified-majority requirement was easily fulfilled in the assembly vote.

A public referendum was also required. The drafters intended to use the referendum to increase the sociological legitimacy of the constitution, not merely as window-dressing. Since the Polish constitution was the first one to be drafted after the collapse of the Iron Curtain, a high degree of legitimacy was especially important given the many rigged elections and sham constitutions that were typical for the communist regime. The Solidarity movement (which had proposed its own draft in the course of the constitution-making process) was campaigning heavily against the new constitution. However, the simple majority requirement of the referendum was met when 53.5% of the participating voters opted in favor of the draft presented by the national assembly.[83] A qualified majority requirement for the referendum would have required some sort of compromise, since the referendum would have otherwise failed.

When considering the criterion of high decision-making costs, it should be noted that the small constitution already defined the most basic government functions and maintaining the *status-quo* was thus not extremely costly to the society. Nevertheless, the process of constitution-making itself required a long time before the final draft was put to ratification and another delay through a failed referendum could have further increased this cost. However, given this long time frame, it should have been possible to reach a solution acceptable for a qualified majority of society also including the op-

[83]Another legitimacy issue with the Polish referendum was the turnout requirement. The initially proposed threshold of 50% was not achieved as only 42.9% of the eligible voters casted their votes. The low level of legitimacy that derives from this turnout has been acknowledged in the literature (cf. Spiewack, 1997, p. 96). Nevertheless, the Supreme Court subsequently ruled that the constitution could be introduced despite failing to achieve the threshold requirement. While voter turnout is not the focus of this chapter, this stylized fact strengthens the case for doubting the legitimizing function of a simple majority referendum.

posing Solidarity movement. Such a development would have increased support for the constitution, heightening its degree of legitimacy. It is unlikely that the drafters labored under a high level of uncertainty, but the close result is rather due to the conflict with Solidarity. Altogether, the justification for a simple majority purely based on decision-making costs does not appear strong enough and a qualified majority requirement could have helped to increase the legitimacy of the constitution.

5.6.3 Bolivia

A breakdown of the political order, although in a different context, also led to the demand for a new constitution in Bolivia when the leftist movement *Movimiento al Socialismo* (MAS) won the elections in 2005 and ended the enduring reign of a coalition of the long-established parties in Bolivia.[84] It has been argued that many left-wing groups in Latin America used constitutional reforms to manifest their powers once they have been elected (Cameron, 2009, p. 339). Despite losing the elections, the opposition parties were still strong enough to have some bargaining power in the constitution-making process. Both sides agreed on the need for a new constitution, although for different reasons. President Morales from MAS wanted a constitution that offered more social inclusion due to the fact that the indigenous groups were one of his major bases of support, while the opposition parties aimed for more regional autonomies due to their stronghold in the (richer) eastern regions of Bolivia (Landau, 2013, p. 952).

The electoral rule for the constitutional assembly used a district magnitude of three giving the first two seats to the party or movement that received the most votes and the third seat to the party or movement with the second-most votes.[85] This deviation from a first-past-the-post system (in which there is one winning candidate per district defined as the person receiving the most votes) allows for a better representation of minorities at the assembly. Furthermore, the voting rules within the assembly required

[84] For a more detailed discussion of the constitution-making process in Bolivia, see Landau (2013)

[85] This election rule has some precedent in the region. For example, Argentina chose it as the way to elect its senators in its constitutional reform of 1994.

a two-third majority for the ratification of the draft and a subsequent public referendum to complete the ratification process. Nevertheless, the referendum only required a simple majority of votes. The conflict between established parties and a new movement as well as the spatial dispersion of voter-support led to the choice of procedures (electoral rules for electing the assembly) and voting rules (2/3 majority requirement in the assembly) that protected minorities at every stage, except for the referendum stage.[86] When the referendum was finally held in 2009, 61.4 % of the participating voters accepted the draft.

Bolivia is special in the sense that opposition and government parties both agreed to a constitutional change. There is no proper justification for the use of a simple majority, as the absence of an immediate crisis mitigated the potential of high costs during the process. The increased risk of a failed qualified majority referendum is by itself insufficient in this setting. Furthermore, since both factions needed to agree on procedural rules, the referendum could have served to add further veto players as a backup for the weaker group. Additionally, the conflict between rich and poor probably could have made it easier for the drafters to be certain whether a proposed draft would be ratified in the referendum, given that the relatively clear structure of Bolivian society made failure easier to predict, compared to a more complex setting with more factions and groups. Given this clear division in the society, a successful constitution-making process should require a high degree of legitimacy so that the constitution remains stable also in case of a regime change. This aim could have been achieved in a better way by using a qualified majority in the referendum. Finally, the mobilized nature of the citizens' protests highlights that the protesters held some de-facto power. A qualified majority requirement would have ensured that both groups of protesters agreed to the new constitution—not only their leaders representing the groups in the assembly. To sum up, the case of Bolivia presents strong arguments that justify the use of a qualified majority.

[86]It is important to note that the procedural protections did not stop the MAS government from violating them when Parliament accepted the draft brought forward by the MAS in February 2008. See (Lehoucq, 2008, pp. 110-111) for a more detailed discussion.

5.6.4 Egypt

The most recent of the cases is constitution-making in Egypt. After the Arab Spring revolution resulting in the reign of the Muslim Brotherhood, a military take-over ensued in July 2013 because of protests against the government of President Mursi. One of the first steps of the military government was to put the 2012 constitution out of force and set up a new constitutional committee, which was formed in September. The procedural rules of the assembly, whose members were selected by the interim government, specified that a 75% majority was required in case of any disagreements on substantive matters.[87] Despite the fact that the assembly was not democratically elected, many minority groups were, for the first time, represented in the constitution-making process (the representatives of Nubia and of the Disability Challengers serve as examples). In the light of the previous conflict and the instability of the previous constitution, it makes sense that the government made an effort to include different groups. These efforts may, however, have been hampered by the improper influence of the military government. It has been argued that the constitutional committee was selected to strengthen the role of the military (Cross and Sorens, 2015, p. 11) Furthermore, the Muslim Brotherhood (and thereby a large and important part of Egyptian society) was basically excluded from the process.

Similar to Poland and Bolivia, the final ratification of the new constitution lay in the hands of the general public through a referendum. Yet again, only a simple majority threshold was chosen for such referendum.

The case of Egypt is the most difficult of the three to judge. As the constitution-making took place after a military coup, a failed referendum could have caused further distress and violence in the country. Furthermore, whether the military leaders really wanted to include all parts of society through the referendum is unclear, given their exclusion of the Muslim Brotherhood from the drafting process. Finally, the very heterogeneous makeup of Egyptian society made it extremely difficult for the drafters to

[87] See Article 16 of the procedural rules of the constitutional committee.

predict the voters' behavior.

On the other hand, it is doubtful how successful a constitution that excludes a major part of society really can be. The referendum was boycotted by the Muslim Brotherhood and only 38.6% of the citizens turned out to vote. The increase in legitimacy through a stricter requirement could have mitigated this effect by making a campaign against the new constitution a viable option for the Muslim Brotherhood. Furthermore, since the assembly was selected by the military leaders, additional control through the constituents is an important argument in favor of a qualified majority. Finally, the process clearly took place during a time of crisis. Given that all arguments for both sides apply, it is unclear from a theoretical point of view why the qualified majority that was used in the assembly was discarded in favor of a simple majority regime for the referendum.

5.7 Concluding Remarks

The prevalence of the divergence in majority rules in constitutional referendums remains puzzling. In many if not most cases, the same considerations that lead to the use of qualified majorities for constitutional assemblies also apply for constitutional referendums. This finding is striking when one takes into account that nearly every constitutional referendum is held under a simple majority rule. As a tentative hypothesis, the reason behind this puzzling outcome could be found in historical path dependency, as well as in the self-interest of those politicians that create the procedural rules of constitution-making.

Despite this prevalence of diverging majority rules, there have been no theoretical justifications for the differential treatment. Some justification seems necessary to use different majority rules for two voting mechanisms with similar characteristics and the same aim: ensuring constitutional stability and legitimacy. This chapter highlights the circumstances under which each majority requirement for the referendum (simple or qualified) is most adequate to the ends of constitution-making. This disentanglement

of the advantages and drawbacks of different majority requirements has so far not been explicitly performed in the literature or in practical constitution-making. We show that using simple majority referendums as a default rule without proper scrutiny based on societal characteristics can lead to losses in constitutional stability and legitimacy. Therefore, a procedure that delineates the advantages and drawbacks of the different options like the one we present is helpful for the ends of constitution-making.

The case made for the ratification of a constitution in this chapter also holds for constitutional amendments that require a referendum.[88] Constitutional amendments typically require a qualified majority of the legislative and thus resemble the drafting of a constitution in an assembly with respect to the majority rules.

One key limitation of the tools presented in this chapter relates to the actors who make the procedural rules. If the same politicians who will later on draft the constitution also make the rules of constitution-making, it is unlikely that they will take steps to establish checks and balances on the drafters. In terms of policy advice, it is therefore an important task to ensure that the procedural rules are legitimate and politicians are not able to make them fit to their own interest. International norms and best practices, by setting up these rules, could possibly help to overcome the risk of self-serving politicians. The analysis of the making of procedural rules by these self-interested actors offers an interesting opportunity for further research.

These arguments have shown that the existence of some popular participation by itself does not necessarily achieve constitutional stability and legitimacy. Under the circumstances we identified, requiring a qualified majority rule in referendums would perform better in terms of constraining the constitution makers as well as in producing a more stable constitution.

While the last chapters have focused on the constitution-making process itself, the following chapter will focus on an outcome of the constitution-making process that substan-

[88] In 2010, 98 countries around the world used referendums for constitutional amendments. See See Anckar (2014)

tially constrains politicians in the future, namely unamendable constitutional provisions. This additional perspective is useful to complement an analysis of the constitution-making process and its effects on the written constitution. Whereas this chapter and the preceding ones focused on the direct effect of procedural rules, unamendable provisions are rather an indirect way through which drafters can take influence. The next chapter aims to gain a better understanding why those provisions are used and whether they should be seen as commitment devices.

Chapter 6

Commitment or Paternalism? The Case of Unamendability

6.1 Introduction [89]

During the Age of Enlightenment, the political and philosophical idea of democracy gained credibility becoming the preferred political system of nation states. The rise of constitutionalism, which has been one of the defining features of modern political systems, enjoys a similar level of acceptance. At a first glance, constitutionalism and democracy appear to reinforce one another, but there is one area where they stand at a cross: unamendable provisions. By unamendable provisions, or unamendability, we refer to explicit, formal bans of the amendment of constitutional provisions through the normal amendment procedure as established in the constitution. Under the regime of unamendability, the limitless supremacy of the people's collective action (pure democracy) and majoritarianism's limits through countermajoritarian devices (constitutionalism) stand at odds (Albert, 2010, p. 664). One could also see this conflict as affecting the

[89] This chapter is based on joint work with Ignacio N. Cofone, to whom I am very grateful for allowing me to use this work as part of my dissertation. Furthermore, this chapter is forthcoming in the edited volume "An Unconstitutional Constitution? Unamendability in Constitutional Democracies", which is part of the "Ius Gentium: Comparative Perspectives on Law and Justice" series published by Springer.

balance between constitutional rigidity, as championed by constitutionalism, and constitutional flexibility, which is a concept more in line with majoritarianism's supremacy. The importance of taking into account this balance between rigidity and flexibility when assessing a constitution has been highlighted in the literature (Roznai, 2015a). Furthermore, the amendment procedure's flexibility has served as a key design variable in studies on constitutional longevity (Ginsburg, Melton, and Elkins, 2009). Unamendable provisions tilt this balance towards constitutionalism, which is noteworthy given the finding that unamendable provisions are increasingly used in constitution-making.[90]

From a doctrinal point of view, unamendable clauses are puzzling. According to the general principle of *lex posterior derogat priori*, for all contradicting rules on the same hierarchical level, newer rules trump older rules, and yet unamendable provisions are constitutional clauses that can prevent the enactment of newer provisions. How can one justify that a prior decision prevails over a new one under the same hierarchical level? (Roznai, 2015a, p. 4)

Moreover, the power to amend a constitution does not fully fit either in the category of a constitutional power, which creates the constitutional order, or in the category of a constituted power, which derives from such constitutional order; the constitutional amendment power presents characteristics of both. From this perspective, amendment power can be seen as a derived constitutional power, as opposed to an original constitutional power: it holds the power to create constitutional norms, but it is still bound (mainly regarding procedure) by those very norms (Roznai, 2015a, pp. 13-15). For this reason, although it has been argued that "unconstitutional" constitutional amendments seem inconceivable from the logic of legal hierarchy (Preuss, 2011, p. 431), an "unconstitutional" amendment could possibly occur if the amendment breaches the rules of the original constitutional power that allows for the existence of the derived constitutional power.[91]

[90] More than half of all constitutions that came into force between 1989 and 2013 included provisions which are unamendable, compared to 27% of all constitutions between 1945 and 1988. See (Roznai, 2015b, p. 8).

[91] An interesting application of this theory can be found when discussing the case of the German

Unamendable provisions have been analyzed using two main perspectives. The functional perspective deals with the direct effects of unamendable provisions, while the expressive perspective focuses on the effects unamendable provision have through the mere expression of this heightened attention. Recognizing that expressive functions play a key role in explaining the use of unamendable provisions, we will focus on a functional perspective.[92]

The functional perspective focuses on the drafters' ability to use their power to amend through the means of a written constitution and to credibly commit themselves *and* future generations to the clauses. This statement is inspired by analyzing various discussions of unamendable provisions that have been presented in the literature. Unamendable provisions are a barrier to change the constitution (Roznai, 2015b, p. 4). As discussed in chapter 2, constitutions are often defined as being self-enforcing, since no external party can enforce these rules. Given that constitutions are indeed self-enforcing, any barrier to constitutional change could be seen as a credible commitment in order to be functional.

Elster (2000b) discusses four potential reasons to use constitutional pre-commitment: overcoming passions and self-interests, overcoming hyperbolic discounting, overcoming strategic time-inconsistencies and ensuring efficiency gains . These four reasons serve as the basis for this analysis. We introduce a new functional theory of unamendable provisions, moving from the idea of credible commitment to the concept of (selfish) paternalism. Analyzing unamendability clauses from the functional perspective described above, in particular with regard to their feasibility and desirability to serve as commitment devices, can enrich doctrinal scholarship. From the analysis that follows, it will

constitution. The addition of a right to resist by amendment into an article that is protected by unamendability does not make the added clause unamendable as well. For a more detailed discussion of this problem, see Köybasi (2017).

[92]For a detailed discussion of expressive functions of unamendable provisions, see Albert (2013). The idea of the expressive function also relates to the concept of a constitution as a focal point. If certain provisions are highlighted by their unamendability, it will be harder for the future government to transgress them. Given that modern constitutions can be long and include several provisions, this highlighting can be seen as a key condition for the ability of the citizens to coordinate their behavior based on the provision.

be conjectured that under the framework of Elster there are no justifiable reasons that make the use of unamendability clauses desirable. However, even if they are not seen as desirable from this perspective, they are by no means without effect.

A functional approach to these clauses that relies on interpreting paternalistic or hegemonic policies, rather than simply focusing on pre-commitment, provides a better perspective when dealing with their direct effect. Drafters cannot predict the preferences of future generations. This fact highlights the reality that unamendability clauses are a means for drafters to impose their own preferences on future generations. The defining feature and underlying difference between paternalistic and hegemonic policies solely depends on whether the imposition of these preferences is inherently benevolent or selfish.

The rest of this chapter is organized as follows. The next section will discuss the reasons for pre-commitment in general and constitutional pre-commitment specifically, while the subsequent section links constitutional pre-commitment to unamendable provisions. Thereafter, the question whether unamendability is a good tool for commitment will be analyzed in detail. Section 6.5 provides alternative functional justifications for unamendable provisions and a final section concludes.

6.2 Reasons for Constitutional Pre-Commitment

Unamendable clauses raise the costs of future options by disallowing the amendment channel. Modifying a constitution will always come at a lower cost than re-drafting the document as a whole. This leads to the question of how pre-commitment is motivated in social sciences, and whether these motivations are transferable to unamendable clauses.

At the individual level, pre-commitment is a relevant part of the everyday life of people, and it has been the subject of legal discussions in various fields (see for example Thaler and Sunstein, 2003; Sunstein and Thaler, 2003; Camerer et al., 2003; O'Donoghue and Rabin, 2003). Contracts are a typical device to credibly commit in the area of business,

and marriages represent commitment devices in the area of love. The concept of pre-commitment, as one can see, is nothing new to the evaluation of legal debates.

The perspective of pre-commitment can also be used to evaluate collective decisions that require a society as a whole to bind itself to for future choices. When considering the concept of a contract as a commitment device, we might distinguish between contracts made between different collective groups and contracts made within a single collective group. International treaties are an example of the first type of contract. A constitution is often likened to a social contract that commits the members of a society to follow a specified set of rules, and in this way is an example of the second. The notion of a constitution as a social contract goes back to the English political philosopher Thomas Hobbes (1651). This idea of a social contract has significantly fueled the field of constitutional economics following the seminal contribution of Buchanan and Tullock (1962). The key difference between individual pre-commitment and collective pre-commitment through constitutions is that constitutions, unlike most means of pre-commitment, may bind others, or they may not bind at all (Elster, 2000b, pp. 92-96). This argument relates back to the paternalism argument mentioned in the introduction.

Collective pre-commitment has the ability, at the same time, to do more and less than individual pre-commitment. The prime examples are preventing a preference change in the future (where collective pre-commitment can achieve less), and aims different than binding "oneself" (where collective pre-commitment can achieve more). First, since a society is in constant change (births, deaths, migration of its members and any number of other modes of change), it undergoes constant preference changes.[94] While an individual might want to maintain a specific set of preferences regardless of changes in experience, it seems unjust to force younger generations to maintain the preferences of older generations.[95] Second, collective pre-commitment (for example, in the form of a

[94]It is important to notice that this argument does not release the assumption of stable individual preferences. Overall preferences change because the composition of individuals in society changes.

[95]This argument does not consider cases of "hypothetical consent" of the younger generation: pre-commitment devices that make them better off. The focus of this argument is on pre-commitment that is in line with the preferences of the older ones, but not with the younger ones.

constitution) can also be abused to bind others instead of binding oneself (Elster, 2000b, pp. 92-94). One example would be constitutional drafters who anticipate that they will not be in the majority once an election under the new constitution takes place. They might put excessive limits on the future government, not in order to bind themselves, but to bind the other groups that will have the majority in the future.

The analysis of constitutions and their provisions from the viewpoint of constraint theory, and in particular as pre-commitment devices, has been pioneered by Elster (1984, 2000b). His reasons for collective pre-commitment have been discussed in the introduction. Before linking these reasons to unamendable provisions, it is important to delineate the aims of unamendability in general.

6.3 Constitutional Pre-Commitment and Unamendability

The purposes of unamendable constitutional provisions have been discussed extensively elsewhere (Breslin, 2009; Albert, 2010; Roznai, 2015b). Albert (2010, pp. 666-667) examines these purposes distinguishing between preservative entrenchment, transformational entrenchment and reconciliatory entrenchment. Preservative entrenchment focuses on the past and aims to prevent the change of a historical situation, irrespective of social or cultural changes. Transformational entrenchment, on the other hand, looks towards the future and is aimed at provisions that facilitate change. The goal of reconciliatory entrenchment is to overcome past conflicts and limit the risk of another round of violence.

Roznai (2015b, pp. 13-25) builds on Albert's terminology, by creating a taxonomy with five categories. The five categories are preservative, transformative, aspirational, conflictual, and Bricolage.

Preservative provisions aim to enshrine a certain part of the constitution that has already been established in a society. One example of this could be protecting an existing form of government, or protecting democracy. This situation is among the most typical

for pre-commitment and also a justification of constitutions from the perspective of commitment in general. Constitutions can be seen as devices to formalize certain rules of the society to make them more stable. This argument relates to constitutions as focal points for coordination (Weingast, 1993) and constitutions as conventions (Hardin, 1989; Ordeshook, 1992).

Transformative provisions aim to install a new institution or a new value set. A bill of rights in a society with a record of human rights violations would be an example of this kind of provision (Albert, 2010, p. 685).

Roznai's third category is aspirational provisions. Aspirational provisions are similar to transformative provisions, but have a more demanding purpose. These provisions look at past deficiencies in a society and imagine a better society to which the drafters aspire. Both categories aim to establish new conventional norms in a society. The goal of aspirational provisions, however, is to change existing (formal or informal) institutions through the means of a written constitution, while the goal of transformative provisions is to create entirely new institutions. It has been argued that the goal of aspirational provisions it too difficult since it is less likely that these provisions will be adopted given that the very elements of the political system they want to change work against them (Elster, 2000b).

The fourth category, conflictual provisions, deals with provisions that aim to manage conflicts. It has been proposed elsewhere that constitutions are devices for conflict resolution (Grossman, 2004). Typical provisions for this category would include gag rules and amnesties to prevent the resurfacing of previous conflicts.[96] In Albert's discussion of the similar category of reconciliatory entrenchment, he argues that amnesties resemble credible commitments towards the loser of a constitutional struggle (Albert, 2010, p. 693).

The final category, Bricolage, captures the increasing phenomenon of constitutional transplants. Time is the drafters' scarcest resource, and on occasion they reduce their

[96] For a discussion of unamendability as gag rules, see Roznai (2015b, p. 20).

own drafting costs and use what is at hands. Thus, unamendable provisions are able to spread via this mechanism from jurisdiction to jurisdiction and be included for no deeper reason other than expediency. What is common among all of these categories (except for this last category, Bricolage) is that they require the unamendable provision to be a credible commitment to be able to fulfill the declared function.

Interestingly, Roznai's first four categories map neatly onto the four reasons for constitutional pre-commitment described by Elster. Preservative provisions are mainly employed to thwart self-interest and prevent passionate moments from destroying the fundamental framework of the constitution. Transformative and aspirational provisions are put in place to ensure efficiency gains through the new clause as well as overcoming hyperbolic discounting problems of implementation and strategic time-inconsistencies. Finally, conflict management through amnesties is a typical example of preventing strategic time-inconsistencies. If, for example, continued conflict is still a serious threat, an autocratic elite might be afraid that the majority promise of amnesty could be rescinded once they step down from power. In this sense, conflict management can work through unamendable provisions.

Since Roznai's categories harmonize well with Elster's reasons, it might be useful to go through the four categories again with a specific focus on how one might use this harmony to justify the use of unamendable provisions. The desire to overcome passions and interests rests on the assumption that a society might make rushed decisions during a time of chaos when passions tend to be exacerbated. In a democracy, it would be difficult to prevent a majority from making decisions in these passionate moments. Constitutional devices can be useful here by offering the means to eliminate options or create delays in the decision-making process allowing for a cooler, more rational decision after the moment of crisis has passed (Elster, 2000b, pp. 124-125). Furthermore, a qualified majority requirement and a separation of powers are instruments to prevent rushed decisions as well as to limit interest groups' ability to monopolize the decision-making process. Unamendable provisions can be seen as devices to (1) generate delays in

the sense that drafting a new constitution takes a longer time than simply amending an existing one, and to (2) eliminate options from a possible set of actions that politicians might take. One example would be protecting basic rights against the passions and interests of a majority through an unamendable provision that guarantees those rights. This device is, for example, used in the German Basic Law, where Article 1, guaranteeing basic rights, is made unamendable by Article 79 paragraph (3).

The second reason Elster discusses is hyperbolic discounting.[97] A typical illustration of hyperbolic discounting might be the introduction of a costly educational reform, which is delayed to a later point in time due to short-term considerations even though the government knows it will be advantageous in the long-run. Once the later point arrives, new short-term considerations might again hinder implementation. A constitution can be used to commit to these long-term aims by including positive rights. Elster (2000b, p. 142) goes as far as proposing "... perhaps even to entrench them as unamendable rights." However, to our knowledge, no country has explicitly entrenched healthcare or education through an unamendable provision.

The issue of strategic time-inconsistency deals with the credibility of promises made by the future government. Whenever the state has a monopoly of violence, the question arises of how governments can be prevented from abusing this monopoly in the future without losing the ability to act as impartial enforcers. This argument goes back to Hobbes (1651). More recently, this point was brought into focus in a contribution analyzing the Glorious Revolution (North and Weingast, 1989). The situation has been coined the "Dilemma of the Strong State" by Dreher and Voigt (2011). A typical solution for this dilemma is establishing a separation of powers to generate checks and balances. Choosing a form of government and a political setup to ensure a separation of powers is a key area in which a constitution can serve as a commitment device against the future abuse of governmental powers. Establishing an appropriate form of government and delineating a political system's structure are typical cases where unamendable provisions

[97] Hyperbolic discounting is an increasing rate of time preference over time so that the distant future is more heavily discounted than the near future.

are used (Roznai, 2015b, pp. 10-11).

Finally, another reason for constitutional pre-commitment is to ensure the political process can be carried out more efficiently. A more stable political regime enables a longer time horizon and improves the ability of citizens to engage in long-term activities, such as growth-generating investments. One example for this would be the requirement of qualified majorities to change constitutional provisions. As long as no coalition obtains a large majority, citizens can build expectations based on rules that are protected by a supermajority requirement. It is typically the case that some form of qualified majority requirement governs the amendment process, either through the percentage of votes in a single chamber or through a form of bicameralism. In Germany, both chambers need to approve a constitutional change with a two-thirds majority according to Article 79 of the Basic Law.[98] An unamendable provision would be an example of preventing cyclic changes with the hope of increasing stability.

Following the discussion of how unamendable provisions can be linked to the reasons for collective pre-commitment, the next section goes through the four reasons again and analyzes whether unamendable provisions are useful as devices to achieve these aims of constitutional pre-commitment or whether they have major drawbacks of their own. Furthermore, the question whether unamendable provisions should be used to commit to a core set of values (in other words, the spirit of a constitution) is discussed.

6.4 Desirability of Unamendable Provisions

Recall that the first potential reason to make provisions unamendable is to protect them from the personal interest of subsequent legislatures, as well as from passionate decisions that would be regretted later on. Constitutional pre-commitment can be justified to overcome passions and interests that arise in times of normal politics. Following this

[98]There is a difference, however, since the article demands an absolute two-third majority of the Bundestag and a simple two-third majority of the Bundesrat. Of course, the amendment rule does not include the parts of the Basic Law which are included in the eternity clause.

reasoning, a majority should not be able to pursue their interest against the minority with regard to some especially important provisions. The protection of basic rights and democracy are typical examples for this case. This argument is key to understanding the choice of several countries to make certain provisions unamendable in their post-World War II constitutions.

However, the use of unamendable clauses for this purpose is problematic. First, if we consider the use of unamendable provisions to provide protection from self-interest, one would need impartial drafters to achieve impartial provisions in the first place. While many authors argue that drafters are less self-interested then politicians in normal times (see for example Ackerman, 1991; Elster, 1995), this by no means implies that constitutional drafters do not pursue their personal aims while drafting a constitution. It can be assumed that drafters of constitutions are also, at least partially, motivated by their private interests and thus cannot be expected to impose selfless clauses. While it is easy to see that this problem is more likely in non-democratic settings with an unelected constitutional assembly, the case for selfish drafters does not disappear in a representative, elected assembly. Constitution-making is a rare event, which reduces the possibility for citizens to hold drafters accountable, since there is no option to vote them out of office.[99] More generally, the notion that politicians are rational and self-interested is not novel, it is the main foundation for the research field of public choice and political economy. From our perspective, there is no good reason to think that drafters are different.

Historical evidence tends to support the view that drafters are selfish. Personal motives have played a key role, for example, in the drafting of the US constitution.[100] Furthermore, few countries have a political elite that is large enough to prevent drafters

[99] Referendums as part of the constitution-making process can be seen as one mitigation for this problem. However, the use of simple majority referendums might not be sufficient to constrain drafters, especially in times of crisis. This issue has been extensively discussed in chapter 5.

[100] A detailed discussion of the focus on economic motives of drafters goes back to Beard (1913), which spawned a series of econometric tests of his claims that personal, economic motives of drafters are the key to understanding the US constitution. Several contributions have found robust evidence for the key role of personal motives of delegates (McGuire and Ohsfeldt, 1984, 1986, 1989; Heckelman and Dougherty, 2013).

from subsequently entering the political arena. Selfish drafters might attempt to improve their future status by using unamendable provisions to raise the future cost of changing provisions. This is particularly problematic if an elite in power abuses an unamendable provision in order to protect itself against the opposition in conflicts with high stakes (Preuss, 2011, p. 447). It has been argued that an unamendable provision is a tool that allows selfish constitution-makers to install a preferred power asymmetry for the majority (Roznai, 2015b, p. 5).[101] In this light, it is doubtful whether the availability of unamendable provisions will make self-interested decisions of politicians more or less likely, taking the drafters' own interests into account.

With regard to passions, times of constitution-making are rarely times of calm and rational reasoning. Moments of constitution-making, in fact, are at an increased risk of being times of heightened passions. In the past 40 years, more than 200 constitutions have been made in times of crisis (Widner, 2008, p. 1513). This implies that drafters are unlikely to be particularly cool-headed in their decision-making during the drafting process. Therefore, since the process itself is likely to be passionate, it seems incongruous that the moment of drafting is the optimal time to install a device against passions. In the words of Elster (2000b, p. 173), "[i]t is mainly if the framers are impartial *and* know that impartiality may be lacking on future occasions that they will have an incentive to pre-commit themselves. Although this case cannot be excluded, I have argued that there is no reason to think that it is typical or frequent". Combining the two arguments presented, one can conclude that drafters are unlikely to act without self-interest and, even if they do so, their passion would be another obstacle to create unamendable provisions that protect from these same passions and interests. It seems doubtful, for these reasons, that drafters can use unamendability as a rational means to control either passion or self-interest.

The second reason to motivate the use of unamendable provisions for pre-commitment

[101] In a similar vein, it has been argued that the informal unamendability of the Jewish character of Israel and its dominance over other constitutional clauses is used to establish a hierarchy of citizens (Masri, 2017).

is non-strategic time-inconsistency. Discounting payoffs over time means that individuals often obtain less utility or disutility from distant consequences than from consequences in present times. One relevant reason for this is that waiting is costly, and another relevant reason is that, over time, payoffs present the risk of either disappearing or depreciating. When either of these two effects is strong, they can lead to non-strategic time-inconsistency, which produces a switch in choice among varying delays while maintaining stable preferences.

Regarding the first reason to discount, a large number of studies have shown that people often display self-control problems which lead them to choices favoring immediate gratification over welfare-enhancing alternatives (O'Donoghue and Rabin, 2001). This is the classic problem of the dieter. While a person trying to lose weight is perfectly aware that the long-term effects of a salad are welfare-enhancing, the direct gratification of eating the French fries is too tempting to resist. For these cases, pre-commitment is welfare-enhancing, since it eliminates temptation problems hence allowing the agent to choose the welfare-enhancing option, by disallowing him or her to choose the tempting but welfare-decreasing option.

Regarding the second reason to discount, it has been shown that agents who do not face behavioral biases will reverse their choice when the probability of the payoff disappearing is uncertain (see for example Sozou, 1998). For these agents, the welfare-enhancing mechanism, as opposed to pre-commitment, is an increase in flexibility that allows them to update their choice upon the availability of new information (Casari, 2009).

From this perspective, a pre-commitment device would be useful to solve non-strategic time inconsistencies in constitutional choice if and only if these inconsistencies are driven by behavioral biases and not by the uncertainty of the future. If changes in social choices are driven by societal preferences that change over time, a pre-commitment device will be welfare-decreasing. This is especially so in the framework of constitutional choice, where commitments are not really self-binding but rather other-binding, given that a constitution's aim is also to commit future generations; the phenomenon of

pre-commitment does not easily translate from individual choice to social choice when considering inter-generational concerns.[102] Moreover, future-generation binding seems especially problematic for strong substantive provisions (Elster, 2000b, p. 170). In contrast to abstract provisions, the preferences for substantive provisions are those that are more likely to change over time.

From a practical perspective, it has been argued that the risk of binding future generations is only of limited importance given the fact that a constitution's average lifespan is 19 years, which is roughly one generation (Roznai, 2015a, p. 45). Following this line of reasoning, unamendable clause is a more fitting name than eternity clause, since the average lifespan of a constitution is nowhere near eternal. The problem with this argumentation stems from the effect unamendable clauses have on a constitution's lifespan. If we turn the argument around, the question becomes whether unamendable provisions have an effect on a constitution's lifespan? Looking at the empirical evidence at hand, the closest proxy for a direct effect of unamendability is the effect of the ease of amendment. Empirically, ease of amendment has an inverse U-shaped effect on the constitutional lifespan (Ginsburg, Melton, and Elkins, 2009, p. 140). Since unamendable provisions tend to take the ease of amendment to one extreme end of this variable, the evidence at least hints at a negative effect of unamendable provisions on constitutional longevity.

The third reason to use unamendability is to overcome the problem of strategic time-inconsistencies, which could potentially be mitigated through the existence of pre-commitment devices. Two main issues to motivate this use can be identified, namely mitigating the dilemma of the strong state and providing credible commitment for regime changes in conflict situations. The dilemma of the strong state, was mentioned in the previous section. By binding its own hands through the deliberate creation of a separation of powers, the government can credibly commit not to abuse its own powers.

[102] Even if societal preferences remained stable, which is unlikely, pre-commitment would still be welfare-decreasing as a device to tackle time-inconsistencies if they were driven not by temptation but by uncertainty.

Separation of powers can be instituted in two classical ways; either horizontally (between the executive, legislative and judicial branches), or vertically (through a federal system). Making either an independent judiciary, a presidential or parliamentarian form of government, or a federal system, unamendable, can strengthen the separation of powers and increase the credibility of the commitment. Thus, unamendable provisions would have an indirect commitment function. Separation of power is a first-level device to design the machinery of government, while making them unamendable is a higher level constraint to the machinery of amending, which reinforces the first-level device (Elster, 2000b, pp. 117-118).

In other words, unamendable provisions can be seen as a separation of powers done over time. When a certain clause is made unamendable, parts of the political power, namely the power to amend, remains with the original drafters and prevents future governments from using it. This separation of powers over time has the advantage that the commitment is credible, assuming the constitution is enforced and no new constitution comes into action.[103] Using the case of the Weimar Republic in Germany as a negative example (which had very low requirements for amendment),[104] it becomes clear how this commitment can add to constitutional stability. However, this separation over time has a problem: its effect in times of crisis or in case of substantial changes. While an "orthodox" separation of powers still allows for all powers to act in unison if circumstances require it, a separation of powers over time such as the one generated by unamendable clauses is unable to allow for unified action in times of crisis. It has been argued that unamendability acts like a lock on the door, which is effective in normal times but cannot withstand extraordinary force (Roznai, 2015a, p. 47). While vertical and horizontal separation of powers resembles locking a door with more than one key and dividing them among people with different interests, making certain provisions unamendable can be seen as locking the door and throwing the key away.

[103] Although to a certain extent, the first assumption could be considered sufficient given that if the constitution is enforced then it is substantially more difficult to deviate from the indicated path.

[104] In the Weimar Republic, constitutional amendments could be done by ordinary law-making, which might have motivated the German use of eternity clauses (Preuss, 2011, p. 436).

The second issue is using unamendable provisions to make constitutional agreements intended to end conflicts more credibly. Typical examples of this issue are amnesty clauses protecting the former government from prosecution after a regime change and gag rules to prevent existing disputes from worsening. Amnesties are a case where a strategic time-inconsistency arises because the opposition to the old government has incentives to agree to an amnesty clause when the threat of conflict still exists, and then renegotiate on their promise once they are in power (Sutter, 1995).[105] Being aware of this risk, the incumbent government might prefer a violent conflict as opposed to stepping down and facing prosecution despite the promise of an amnesty. In this situation, making the promise as an unamendable constitutional provision can increase the promise's credibility and thereby tip the scales to prevent violent conflict. However, this argument only deals with the case of amnesties which are in the interest of all parties. The flipside of making amnesties unamendable is the risk that an autocratic government will use amnesties to absolve themselves from crimes committed during their reign.[106] In this way, they protect themselves in case of a transition by having raised the costs of removing the amnesty, since rewriting a whole constitution is always more costly than amending a single provision.

Even in the abovementioned case where the opposition agrees to provide amnesty, the victims of the crimes may not be represented by either of the two groups. One can imagine a scenario where two elite groups struggle for power and use an unamendable amnesty despite the fact that victims in the general population are strongly opposed. Recognition of these types of risks is one of the reasons why international law tends to disallow amnesties. As an example, the Office of the United Nations High Com-

[105]This renegotiation threat was the case in the aftermath of the democratization of several countries in Latin America after military dictatorships, such as Argentina, Brazil, Chile and Uruguay. The amnesties lead later on to public unrest and repeated requests from the Interamerican Court of Human Rights and the Interamerican Commission of Human Rights to declare them void retroactively. In Brazil, Chile and Uruguay the provisions are still valid and the renegotiation threat did not materialize, while in Argentina they were declared void by a Supreme Court ruling in 2005. See Legarre (2006) for more details.

[106]These self-amendments were once again seen in most dictatorships during the second half of the twentieth century in Latin America. Had these controversial amnesties been made unamendable, the polemic and social unrest that they caused might have been more severe.

misioner for Human Rights (2009) has stated: "Under various sources of international law and under United Nations policy, amnesties are impermissible if they: (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations; (b) Interfere with victims' right to an effective remedy, including reparation; or (c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law. Moreover, amnesties that seek to restore human rights must be designed with a view to ensuring that they do not restrict the rights restored or in some respects perpetuate the original violations."

The rationale for gag rules is to turn compromises between conflicting groups more credible by protecting them with unamendability and thereby also silencing future motions to re-negotiate them. An interesting example of a gag rule in a different context can be found in the *status quo* rule from 1852 of the Church of the Holy Sepulchre in Jerusalem. The different Christian groups sharing the church would resort to violence in an attempt to obtain more exclusive rights for the use of specific areas of the church. The Ottoman ruler at the time fixed the status quo and decided that the rule would never be changed in the future, thereby making it effectively unamendable.

The problem with the use of gag rules is twofold. First, both necessary compromises as well as issues where one can find clear winners and losers can be gagged. Using the gag rule in this way might fix a temporary power difference between groups in society and prevent renegotiation, but it might also lead to dangerous differences between *de jure* and *de facto* power in the future. Second, silencing an issue does not necessarily help to solve its underlying problems and may even exacerbate it. In the example of the Holy Sepulchre, violent outbreaks due to the underlying conflict have not completely stopped this day despite more than 150 years of having the gag rule in place. Altogether, both examples of conflict-solving mechanisms show that they are problematic as commitment devices to overcome strategic time-inconsistency.

Finally, unamendable provisions could be used to ensure efficiency gains. This would

be done by expanding the time horizon and by preventing the cyclic amending of constitutional provisions following changes in political power. Cyclic amendment would only be a problem if the shifts in the majorities were large enough to fulfill the amendment requirement in the first place, which is typically a two-third majority requirement. Even if a society has big swings in its majorities, making provisions unamendable in the constitutional drafting process would either require selfless drafters, which seems to be an unlikely assumption as discussed above, or simply establish a "first-mover advantage" to the faction which is enjoying the majority during the constitution's drafting, which is not necessarily a more desirable alternative.

It has been shown that the effect of the flexibility of the amendment process on a constitution's longevity follows an inverted U-shape (Ginsburg, Melton, and Elkins, 2009, p. 140). In other words, constitutions that are very easy or very difficult to amend are more likely to have a shorter lifespan. This empirical observation fits with the prediction that qualified majorities provide a middle ground for the amendment process between simple majority rules and unamendability, giving greater stability to a constitution. Therefore, choosing the most extreme version of a difficult amendment procedure, namely unamendability, seems to be a suboptimal measure to increase the time horizon, all other things being equal.[107]

Beyond these potential reasons for commitment outlined by Elster, protection of the constitution's core is yet another motive discussed in the literature about unamendable constitutions. In other words, unamendable provisions might be considered a credible commitment to a particular set of values. While amendment powers are argued to be implicitly unable to dismantle a democracy (Roznai, 2015a, p. 27), it is unclear how this implicit ban would be enforced and how to distinguish which amendments would constitute a destruction of democracy and which would not. Unamendable provisions might be used to protect the spirit of a constitution and thus democracy in an explicit

[107] One can argue that constitutions that otherwise have a lax amendment procedure could profit from the additional stability through unamendability. Which effect prevails is an empirical question and outside the scope of this contribution.

way.

The core or spirit of the document is not necessarily at risk from any of the four reasons discussed previously, but might nevertheless be a value that drafters want to commit to. It has even been argued that the main reason to use unamendability is to protect the founding myth of the constitution from change. In other words, unamendability is the guardian of the constitution's identity (Roznai, 2015b, p. 26). Once this protection fails and the relevant provisions are changed, the society might veer into chaos and possibly civil war (Preuss, 2011, p. 445)

The upside of protecting a set of core values is that the risk of abusing the amendment process to destroy constitutionalism or democracy is mitigated, assuming that the constitution is set in a way that these values are included *and* protected by unamendable provisions. From the perspective of normative individualism, this approach leads to problems. The constitution in itself has no inherent value besides the effect it has on the individuals who are living under its rules. It is important that a society is not seen as just a larger individual, but as an aggregation of the individuals living in it (Elster, 2000b, p. 92). Therefore, protecting the constitution's spirit or integrity is only valuable if it has a positive overall impact on aggregated welfare in the society and is not a good or bad thing, *per se*.

There are, however, two potential downsides when considering the overall impact on the aggregate welfare of a society. The first downside becomes immediately clear, namely that the tool of unamendability can also be used to protect autocratic values. As an example, a dictatorship oppressing a minority can enshrine constitutional provisions that will perpetually limit the minority's power. This not only justifies the dictatorship oppression the minority group, but also makes it harder for the minority group to find legal channels to challenge the oppression. Constitutions are a part of many different forms of government. It is unclear how to determine which constitutions incorporate a "good" founding spirit and which ones are more on the side of "evil". Autocracies might create constitutions that protect their core values and the sources of their power simply

to increase the cost of transitions in case of an uprising against them. It is difficult to see how a government formed by selfish actors can be stopped from using unamendability simply for their own benefit.

Another dangerous downside of using unamendability to protect the core or spirit of a constitution relates to the fact that constitutional bargaining is costly. It is argued that protecting the core set of values is not a big problem as long as the citizens still have the constitutive power to replace the old constitution with a new one (Roznai, 2017, 5). Now, assume a scenario where most provisions of the old constitution are acceptable to the society, but a change in preferences has made one or more of the "core" provisions unpopular. All citizens would like to change this provision, but to do so they must draft a new constitution. Even if everyone is satisfied with the other parts of the constitution as they are, placing them back on the negotiation table by redrafting the whole constitution opens the door for strategic bargaining.[108] This cost arises because choosing among constitutions can be likened to a game called Battle of the Sexes in game theory (McAdams, 2009, pp. 239-241). Even when all members of society are better off with any possible constitution, each member still ranks the different options in different ways. For example, assume that the old constitution did not include a positive right to work. While left-wing as well as right-wing groups would prefer to have a constitution, the left-wing group would like to include such a provisions and the right-wing would prefer to keep the old setting. In this way, costly negotiations due to strategic options would arise. If these negotiating costs are high enough, a society will refrain from drafting a new constitution even if all of its members dislike certain unamendable core values of the current constitution. This argument presents additional support for the classical critique of “dead-hand” constitutionalism and casts some doubts on whether the protection of the constitution’s spirit is something beneficial for the society. An example for the problems of dead-hand constitutionalism can be found in the case of

[108] A good example of the high costs of bargaining in constitution-making is presented by the failed attempt to draft a new constitution in Turkey. For a more detailed examination of the process, see Yegen (2017).

Bangladesh.[109]

6.5 An Expressive Device with a Functional Effect

The previous section offers arguments that give reasonable doubt that it is desirable to use unamendable provisions simply for what the functional perspective would call credible pre-commitment. It would seem then that the expressive function of unamendability is the main driver of its increased use. However, the lack of desirability as a commitment device should not be given to mean that an unamendable provision has no effect other than its expressive use In this respect, the first relevant issue to evaluate is whether unamendable clauses have an effect besides pre-commitment, and the second is why they are put into use.

We have already pointed out that the entrenchment unamendable provisions offer is not absolute, since citizens can always decide to draft a new constitution (Albert, 2010, p. 684). One might argue that whenever a substantial majority agrees to dispose an unamendable provision, they will do so by writing a new constitution; this argument seems to reduce the potency of unamendable provisions. However, this reasoning ignores the costs of renegotiation as discussed in the previous section. In this scenario unamendable provisions have a strong functional effect. This finding leads to the question of why drafters would put them in the constitution in the first place, given that they are not desirable as commitment devices.

We assume that drafters not only care about the expressive effects of unamendable provisions, but have a functional aim in mind. Even if one argues that they are mainly in place for their expressive use, looking at the functional effects of these expressive clauses can help gain a better understanding of potential underlying reasons for the visible increase in the use of unamendable provisions. To evaluate this functional purpose, one has two options: to consider that the drafters are benevolent when writing the clauses,

[109] For details on this case, see Hoque (2017).

and to consider that they are not.

If the drafters are benevolent we can infer that they will use unamendable provisions paternalistically to improve the welfare of future generations. Using constitutional constraints can be seen as a self-binding act only if the drafters anticipate that future political agents will prefer to be restricted for the same reasons that motivate the drafters to install the unamendable provision in the first place. This argument is particularly relevant for provisions that fall under preservative entrenchment. It has been argued that preservative entrenchment can be compared to an originalist interpretation of the constitution, at least in spirit (Albert, 2010, p. 687). Originalism can be argued to incorporate certain paternalistic traits, which also establishes a link between paternalistic policies and preservative entrenchment. In both cases, the will of the drafters dominates the subsequent generations, supposedly for their own good.

Transformative entrenchment is another area in which this paternalistic behavior fits well. In this area, drafters may aim to improve the lot for future generations, for example after bad experiences, and move society into a better direction. Germany and Italy with their post-World War II constitutions are good examples for this argument. Looking back at the failure of their respective authoritarian central states, and in order to transform their respective societies, Germany drafted a constitution that entrenched federalism (among other provisions), while Italy entrenched republicanism.

However, this behavior might be seen as myopic or at least naïve, since it shows a lack of concern for the changing preferences of future generations. If preferences are changing, the use of unamendability could generate problems.[110] Even in the cases of Germany and Italy, it is possible that future generations would find different structures of government to be more suitable, even though they would like to maintain other parts of the existing constitution. Failure to change unamendable clauses, resulting from the

[110]The idea that social norms and preferences change over time, even substantially so, is hardly contestable. A salient example of this would be slavery, which was considered normal less than two centuries ago, and now is unthinkable in most of the world. Abortion could be considered another example in many countries, and so could marriage between people from different religions, different ethnicities, or the same sex.

prohibitive bargaining costs of redrafting the whole constitution as argued above, could exacerbate tensions within the society. The finding that an amendment procedure that is too rigid reduces the expected lifespans of constitutions is further support for this tentative claim (Ginsburg, Melton, and Elkins, 2009, p. 140).

A different explanation does not require the assumption that drafters are myopic, but rather questions their motives for using unamendable provisions. Assuming that drafters are rational and act strategically, the explanation provided in an earlier paragraph supporting the notion that the drafters are paternalistic falls apart. Under this assumption of rational behavior, drafters will only make provisions unamendable if they expect to benefit from it.

We have argued that the standard credible commitment explanations do not sufficiently explain the functional use of unamendable provisions, and therefore another strategic motive must be used to explain drafters' behavior. Using the analogy of hegemonic preservation with regard to the judiciary's increasing power through judicial review in constitutional issues may shed some light on the issue (Hirschl, 2004, p. 90). Following this argument, the political elites give power to the judiciary to fortify their current political power and limit the power of standard democratic policy mechanisms to overturn the current political hegemony. In the case of unamendable provisions, the drafters, who can be seen as the current political elite threatened by subsequent changes in political power, aim to secure their preferences by making certain provisions unamendable. Similar to the hegemonic preferences argument, the key explanatory factor is protection from the threat of losing political power. Pursuing this argument a bit further, and assuming that drafters want to maintain their preferred provisions for as long as possible, one can also explain the seemingly myopic ignorance of a new generation's preference shift. Instead of assuming the drafters are myopic about the shift, this preference shift can be seen as the motivation for them to use unamendable provisions.

The discussion of constitutional theories versus constitutional interests (Vanberg and Buchanan, 1989) might shed some light on the two arguments offered above. In one case,

the drafters are seen as using a device which, in their own understanding, will be beneficial for posterity. The problem is not constitutional interest, but rather constitutional theories which are not aligned with the real workings of the device that they are using. The second case is an example of constitutional interests at work. The drafters in this case are fully aware of the way in which the unamendable provision will affect future generations, but their own interests and the benefit they gain from either its expressive or its functional value, supersedes their concern for future generations.

We have argued that unamendable provisions are not useful as pre-commitment devices but they might be desirable as paternalistic devices for the drafters. In order to analyze specific unamendable provisions, it appears to be more fruitful to analyze the motives for using unamendable provisions from this paternalistic perspective rather than through the perspective of credible commitment. When analyzing from the paternalistic perspective, pessimistic assumptions about the motives of the drafters appear to be more consistent with reality. While the self-interest of drafters seems to be a natural part of the drafting process, their naivety and myopia appear to be rather constructed to fit a preferred story about impartiality and selflessness which is otherwise rare in politics. The empirical result of Ginsburg, Elkins, and Blount (2009, p. 205) indicates that executive power was involved in the constitution-making process in more than 50% of all constitutions promulgated between 1789 and 2005. This finding seems to support the idea that drafters use unamendable provisions to extend their influence and power to the time after the end of their drafting duties, and goes against the idea that drafters are benevolently paternalistic and selfless.

6.6 Conclusion

Using a functional perspective, this chapter has shown than unamendable provisions are more easily understood when thought of as paternalistic devices rather than as pre-commitment devices. An analysis from this perspective highlights the problems un-

amendable provisions face. Specifically, changes in societal preferences over time, constitutional drafters with hegemonic preferences, and abuse by actors who seek impunity for their crimes. From the paternalistic perspective, the drafters' intentions are the key to assess the effects of unamendable provisions. The analysis suggests the more realistic view is focusing on the dangerous case of selfish drafters rather than the often-employed view of the selfless drafter.

These results imply that the key problems that lessen the desirability of unamendable provisions from a functional perspective relate to the change of preferences over time and the risk of abuse by selfish drafters. These problems can be more generally seen as the risks of strong entrenchment and would also apply, to a limited degree, to alternatives such as the entrenchment simulator proposed by Albert (2010, pp. 706-711). However, limiting the potentially damaging impact of unamendability should not be considered a negligible feature. Sunset clauses with a duration of less than a generation, as proposed in the entrenchment simulator, and limits on the ability of drafters to hold political office after the drafting, offer further mitigation.

Given that unamendable provisions are still strong in our constitutional reality, the question of how to mitigate the potential damage from the problematic aspects mentioned arises. It has been argued that constitutional courts play a crucial role in this setting. On the one hand, they need to protect the constitution and prevent extra-constitutional actions by the citizens, but at the same time they should arguably protect the right of self-determination (Preuss, 2011, p. 443). To protect this right, courts could stop enforcing problematic unamendable provisions thereby bringing them into desuetude.[111] However, this behavior would give enormous power to an unelected body. In addition, there are no clearly established criteria to determine if an unamendable provision is problematic enough for the courts to interfere. A final determination concerning the degree to which courts might limit the risks we have discussed, and if that benefit is worth the cost of giving (informal) amendment powers to an unelected group of individ-

[111] For a more detailed discussion about the theory and implications of constitutional desuetude, see Albert (2014)

uals, goes beyond the scope of this discussion. It can be said, however, that the courts are one of the key actors when it comes to the (non-) enforcement of unamendability.

This analysis is the final step of the analysis of the constitution-making process as laid out in the discussion of the scope of this dissertation. We argue that the process of constitution-making has important effects on the outcome. A closer look at referendums as one example of procedural rules highlights the transmission channels of procedural rules as well as the limits to their functionality. A normative discussion of the majority rules for referendums built upon this argument and shows that qualified majority requirements can strengthen the efficacy of referendums with regards to legitimacy and stability of constitutions. This chapter has finished the analysis by taking a different perspective, namely how drafters can use unamendable provisions to prolong their influence on the written constitution and the reasons for them doing so. The next chapter will put this findings in context and highlight relevance as well as limitations of the approach taken here.

Chapter 7

Concluding Remarks

7.1 Summary

Besides the introductory chapter and the overview of the key literature, this dissertation is comprised of four content chapters. Chapter 3 focuses on the factors driving the choice of the form of government. So far, it had been argued that higher income inequality makes a parliamentarian system less likely. Using a rational-choice model and focusing on a set of assumptions that fits well with unstable democracies, this chapter finds that the composition of the constitutional assembly does play a key role for the choice of form of government. Especially when the policy conflict within the society (measured by income inequality in the model presented here) is high, a change in the majorities in the constitutional assembly has a strong effect on the choice of form of government.

Chapter 4 looks closer at the effect of procedural rules on government constraints. One of the main conflicts in constitution-making is between the drafters and the citizens with regard to the level of future government constraints. The use of referendums for ratification has been proposed as a tool to constrain drafters and increase the inclusiveness of constitution-making. The model presented here highlights that referendums for ratification can successfully constrain drafters, but do fail in exactly those situations

characterized by uncertainty when they are most needed. To support this theoretical result, a domestic conflict indicator as a proxy for uncertainty is regressed on constitutional referendum results. While most regression results are statistically insignificant, a closer look at the few cases of failed referendums supports the predictions of the model. In the four cases of Uruguay, Albania, Kenya and Zimbabwe, the citizens voted against a constitution with few government constraints during times of low uncertainty. These cases highlight the effectiveness of referendums in normal situations.

Chapter 5 addresses the divergence in majority rules at the moment of creating or reforming constitutions. While constitutions require, in most cases, qualified majorities in order to be approved at the constitutional assembly, they normally require only simple majorities to be ratified at the referendum. We analyze the set of conditions under which each majority rule is preferable for constitutional referendums. We argue that the simple majority requirement for referendums in constitution-making, which is nearly universally used, lacks a clear theoretical justification. Qualified majority rules increase legitimacy and provide additional checks on the drafters. We further highlight when simple majority rules have advantages: when decision-making costs in the referendum are high. Thereafter, we present an evaluation mechanism to identify the cases in which each majority rule should be used to increase stability and legitimacy. We then apply this evaluation mechanism to the constitution-making processes in Poland, Bolivia and Egypt, which are three examples of diverging majority rules..

Chapter 6 looks at the functional value of unamendable provisions as commitment devices and presents a new functional theory based on drafters' paternalism. Unamendable provisions are found to be problematic as commitment devices. The key problems that limit the unamendable provisions' desirability relate to changing preferences over time and the risk of abuse by selfish drafters. A better functional perspective of unamendable provisions can be given by reference to paternalistic policies. In this sense, an incentive-based perspective of the drafters is taken, which stands in stark contrast to the assumption of drafters losing their self-interest during constitutional moments.

7.2 Relevance of Findings

Given these findings, it is useful to return to the arguments made in the introduction why economists, legal scholar and policymakers should consider reading this dissertation and evaluate the relevance of the findings.

Chapter 3 uses an abstract model of choice of form of government and modifies the way in which the institutional framework of constitutional choice has been modeled previously in the literature. The results highlight that the effect of income inequality on the choice of form of government depends on the institutional setting. In this case, the composition of the constitutional assembly forms a transmission channel through which the effect of income inequality operates. More generally, this finding supports the claim that institutions matter.

Not only the institutional details matter, but also the circumstances under which institutions operate. Chapter 4 shows that the effect of a required referendum depends on the level of uncertainty faced by politicians and citizens. Referendums are needed the most when uncertainty is high to constrain drafters, yet ironically they are least efficient in situations of high uncertainty. This finding highlights that institutional rules such as the referendum requirement should not be judged outside the environment in which they operate. This argument supports the case made for the importance of informal institutions (see Williamson, 2009, for an overview article).

Finally, property rights are among the most important legal rules from an economic perspective. The model in chapter 4 highlights that drafters with a short-term perspective will place less emphasis on property rights protection. In cases where uncertainty is low or where citizens put very high emphasis on government constraints, including a required referendum as part of the procedural rules of constitution-making strengthens *de jure* property rights as one part of executive constraints.

This dissertation repeatedly focused on self-interested drafters to analyze constitution-making. Instead of focusing on constitutional moments and selfless drafters (Ackerman,

1991), we highlighted that constitution-making is often as riddled by personal interests of the drafters as are ordinary politics. While the constitutional rules are more general than ordinary legislation, the drafters are aware that they are likely to belong to the political elite under the new constitution. Thus, they have an interest in tailoring the rules in their own favor. This finding should be taken into account when discussing procedural rules of constitution-making.

Chapter 6 highlights that the idea of unamendable provisions as a credible commitment towards future generations is flawed. A better functional theory of their use is provided through the lens of paternalistic drafters. Especially when dealing with the legal interpretation of unamendable provisions, legal scholars should take the potential self-interest of drafters into account.

The rules of this process do not fall from heaven and policymakers can use some of the findings from this dissertation. Chapter 4 highlights that simply requiring a referendum is no panacea to constrain the drafters. A democratically elected assembly, which typically has more than one party with veto powers, in combination with a referendum offers a better chance to constrain drafters in times of crisis.

Chapter 5 delves deeper into one specific procedural rule, namely the majority requirement in constitutional referendums. The key recommendation from this chapter is to use the same majority requirement for all steps of ratification, namely a qualified majority requirement. We also discuss the reasons to deviate from this rule of thumb, namely the need for a swift decision or high decision-making costs in case of a failed referendum.

Finally, chapter 6 highlights why unamendable provisions are not desirable as commitment devices when drafters aim to increase stability or legitimacy of the constitution. Other tools should be used to strengthen certain constitutional provisions, such as unamendability for a fixed time or higher amendment requirements.

While this dissertation has looked at the process of constitution-making from the

perspective of different academic disciplines, some limitations to the approaches taken need to be discussed.

7.3 Limitations

Chapter 3 looks at the choice of form of government and not at other constitutional features. In constitution-making, the whole bundle of features is normally chosen at the same moment in time. This bundling opens the door for logrolling solutions, where the different groups involved in the constitution-making compromise on one feature to get their preferred solution in another area. This limitation is the cost of maintaining analytic tractability in the model. The conflict about the choice of one feature is a simplification of the more fine-grained bargaining process, but is useful to highlight the tensions involved.

This constitutional bargaining process links to a limitation of chapter 4. Since the focus of this chapter lies on the citizen-politician conflict, the intra-group conflict of politicians is not explicitly modeled. Instead, a more simple minority group power coefficient is used. The chapter gives a non-formal introduction into constitutional bargaining to mitigate this limitation. The empirical analysis deals only with parts of the transmission channels proposed in the theoretical model. This limitation can be explained by the problem to identify the short-term and long-term preferences of drafters. Without a good proxy for these preferences, it is difficult to test the effect of uncertainty on the content of the draft.

Throughout the dissertation, we have assumed that there is no conflict within the respective groups. However, the groups in the real world are more heterogeneous than this assumption. This simplified view of the world allows for a sharper analysis of the intra-group conflicts, but is another limitation of this dissertation.

The normative focus of chapter 5 leads to a limitation of the approach. The key question is whether the aims of legitimacy and stability are congruent with the aims

of the drafters. Throughout the thesis, we argue that self-interest of drafters plays a key role to understand the process of constitution-making. In this case, the normative results of this chapter would be more relevant for third parties who can set standards or put pressure on the elites who choose the rules.

One general problem when dealing with the effects of procedural rules is the question who makes those rules for constitution-making. While chapter 4 touches on the issue when discussing referendum majority rules, more general issues such as whether or not a referendum is required for ratification are assumed exogenous throughout this dissertation. This dissertation has been limited to understanding the effects of procedural rules, but explaining why they are chosen is a logical next step.

7.4 Opportunities for Future Research

The first step to understand why procedural rules are chosen is to clearly identify who makes the procedural rules for constitution-making. This issue has received no scholarly attention and can form a first step to understand the choice of procedural rules. Once the actors have been identified, one needs to highlight the constraints faced by the "agenda-setters" for a clear understanding of the making of procedural rules. To gain a full picture of the process of constitution-making, taking these step would be an important area for future research.

Behavioral economics is another avenue for future research on the process of constitution-making. Especially when analyzing bargaining situations in constitutional assemblies, loosening the rationality assumptions can lead to a more realistic picture. The research in behavioral political economy is one example in a closely related area where behavioral models are used to deepen the understanding of political processes (see Schnellenbach and Schubert, 2015, for an overview of the emerging literature).

In the context of chapter 4, whether a constitutional assembly is dominated by a single group or not is very important. To test the theoretical claims in the chapter, we would

need better information on the assemblies in the constitution-making processes around the world. Creating an indicator whether an assembly had one or more groups with veto power is a starting point. However, especially in one-party systems, intra-group conflict might play a key role to understand the dynamics within the assembly. To detect the inter-group conflicts, detailed case studies are necessary for the respective assemblies. A deeper look into the potential effect of inter-group conflict presents a fruitful opportunity for future research.

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Executive Summary

This dissertation analyzes the overarching question of how the process of constitution-making affects the written constitution. To shed more light on this issue from a broad perspective, positive and normative research questions are dealt with. Besides an introductory chapter, which sets the stage for the dissertation and an overview of the key literature in chapter 2, this dissertation consists of four content chapters and a short concluding chapter.

Chapter 3 deals with the question whether the process of constitution-making affects the choice of constitutional features. A rational-choice model shows how the introduction of a stage of constitution-making influences the constitutional choice of form of government. The set of assumptions used for this model fits particularly well for new and unstable democracies, which are at the same time the kind of countries that often change their constitution. So far, income inequality has been argued to be a key determinant for the choice of form of government (Robinson and Torvik, 2016). This chapter arrives at a different conclusion and shows that the effect of income inequality is determined by the composition of the constitutional assembly.

Chapter 4 looks further into the details of the constitution-making process and discusses which procedural rules can effectively constrain the drafters. To analyze this question, we use a theoretical model as well as a regression analysis. The model highlights that drafters are willing to constrain themselves even without external rules when long-term rents are important to them. In situations with high uncertainty, these rents

become less important and procedural rules are needed to constrain drafters. Ironically, the model shows that referendums work best as a tool to constrain drafters when uncertainty is low and worst when uncertainty is high. Thus, referendums alone are insufficient to properly constrain drafters.

Following this positive analysis, chapter 5 and chapter 6 deal with more normative issues. Chapter 5 follows up on the issue referendums for the ratification of constitutions and discusses the advantages and disadvantages of simple and qualified majority requirements. We argue that the nearly universal use of simple majority requirements cannot be normatively justified, especially given that most ratification procedures in constitutional assemblies require a qualified majority. We argue that path dependency and self-interest of drafters are the likely reasons for this double-standard of ratification.

Chapter 6 focuses on one specific channel through which drafters can influence the constitutional development in the future, namely unamendable provisions. The function of these provisions is often described as a commitment device. We argue that a better way to understand their use is the view of paternalism, while their desirability for commitment purposes is questionable.

A final chapter summarizes the findings in light of the limitations of this dissertation and discusses paths for future research.

Samenvating

Dit proefschrift bevat een analyse van de overkoepelende vraag hoe het grondwetgevende proces van invloed is op de geschreven grondwet. Om vanuit een breed perspectief meer licht op deze kwestie te werpen worden positieve en normatieve onderzoeksvragen behandeld. Naast een inleidend hoofdstuk, waarin de opzet van het proefschrift wordt geschetst, en een overzicht van de belangrijkste literatuur in hoofdstuk 2 bestaat dit proefschrift uit vier inhoudelijke hoofdstukken en een kort hoofdstuk met de conclusie.

In hoofdstuk 3 wordt stilgestaan bij de vraag of het grondwetgevende proces van invloed is op de keuze van grondwettelijke kenmerken. Aan de hand van een rationelekeuzemodel wordt getoond hoe de invoering van een bepaald stadium van grondwetsvorming van invloed is op de grondwettelijke keuze van de staatsvorm. De reeks aannames die in dit model wordt gehanteerd, is met name van toepassing op nieuwe en instabiele democratieën; dit betreft tegelijkertijd het soort landen waar vaak grondwetswijzigingen plaatsvinden. Tot op heden wordt vaak aangevoerd dat inkomensongelijkheid een bepalende factor is voor de keuze van de staatsvorm (Robinson en Torvik, 2016). In dit hoofdstuk wordt een andere conclusie getrokken en wordt aangetoond dat het effect van inkomensongelijkheid wordt bepaald door de samenstelling van de grondwetgevende vergadering.

In hoofdstuk 4 wordt dieper ingegaan op de bijzonderheden van het grondwetgevende proces en wordt besproken door middel van welke procedurele voorschriften de opstellers effectief kunnen worden bedwongen. Om deze vraag te kunnen analyseren maken we

gebruik van een theoretisch model en van een regressieanalyse. Uit het model komt naar voren dat opstellers zelfs zonder externe regels bereid zijn zichzelf te bedwingen wanneer zij belang hechten aan de opbrengsten op lange termijn. In situaties waarbij sprake is van grote onzekerheid worden deze opbrengsten minder belangrijk en zijn procedurele regels nodig om opstellers te bedwingen. Ironisch genoeg komt uit het model naar voren dat referenda als instrument om opstellers te bedwingen het effectiefst zijn bij weinig onzekerheid en het minst effectief wanneer er sprake is van grote onzekerheid. Referenda alleen zijn niet voldoende om opstellers te bedwingen.

Na deze positieve analyse komen in hoofdstuk 5 en 6 meer normatieve kwesties aan de orde. In hoofdstuk 5 wordt ingegaan op de kwestie referenda voor de ratificatie van grondwetten en worden de voor- en nadelen van vereisten inzake gewone meerderheid en gekwalificeerde meerderheid behandeld. We stellen dat het nagenoeg universele gebruik van vereisten inzake gewone meerderheid normatief gezien niet kan worden gerechtvaardigd, vooral gezien het feit dat de meeste ratificatieprocedures in grondwetgevende vergaderingen een gekwalificeerde meerderheid voorschrijven. Er wordt gesteld dat padafhankelijkheid en eigenbelang van opstellers de vermoedelijke oorzaken zijn van deze dubbele moraal ten aanzien van ratificatie.

Hoofdstuk 6 handelt over één specifiek kanaal waarmee opstellers de grondwettelijke ontwikkeling in de toekomst kunnen beïnvloeden, namelijk bepalingen die niet kunnen worden gewijzigd. Er wordt vaak gezegd dat deze bepalingen de functie van een verplichtingsmiddel hebben. Wij stellen dat het gebruik van dergelijke bepalingen beter kan worden verklaard vanuit het oogpunt van paternalisme en dat de wenselijkheid van deze bepalingen als verplichtingsmiddel discutabel is.

In het slothoofdstuk worden de bevindingen samengevat in het licht van de beperkingen van dit proefschrift en worden wegen voor verder onderzoek besproken.

European Doctorate in Law & Economics

Curriculum vitae

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Short bio	
I have been born on May 26th 1985 in Gießen (Germany). Following my A-Levels in Gießen, I started to study Economics first in Marburg and later on in Canterbury and Edinburgh. Throughout this time, I enjoyed staying abroad and working on topics in the field between law, economics and political science. These factors led to my choice to start the EDLE programme, which was a great experience and is finalized by the thesis adjunct to this CV.	
Education	
PhD student in Law and Economics (University of Bologna, University of Hamburg and Erasmus University Rotterdam)	2012 - 2016
MSc in Economics awarded by University of Edinburgh (Scottish Graduate Programme in Economics)	2010 - 2011
Diplom in Economics awarded by the Philipps-University Marburg	2005 - 2010
Work experience	
Research Associate at the Institute of Law and Economics (University of Hamburg)	Since 2015
Prizes and awards	
Scholarship from German National Academic Foundation	2008-2010
Publications	
"Credible commitment or Paternalism – The Case of Unamendability" (forthcoming in *An Unconstitutional Constitution? - Unamendability in Constitutional Democracies* published by Springer as part of the *Ius Gentium* series)	2017 (forthcoming)

EDLE PhD Portfolio

Name PhD student	:	Stephan Michel
PhD-period	:	2012 - 2016
Promoters	:	Prof. Stefan Voigt Prof. Klaus Heine

PhD training

Bologna courses	***year***
Introduction to the Italian Legal System	2012
Game Theory and the Law	2012
Economic Analysis of Law	2012
Behavioral L&E I - Game Theory	2012
Behavioral L&E II – Enforcement Mechanism	2013
Experimental L&E	2013
European Securities and Company Law	2013
European Competition Law and Intellectual Property Rights	2013
Specific courses	***year***
Seminar 'How to write a PhD'	2013
Academic Writing Skills for PhD students (Rotterdam)	2013
Comparative Law and Economics (Summer School Hamburg)	2013
Econometrics (Summer School Hamburg)	2013
WTO Law and Food Safety (Summer School Hamburg)	2013
Seminar Series 'Empirical Legal Studies'	2014
Seminars and workshops	***year***
BACT seminar series (attendance)	2013/2014
EGSL lunch seminars (attendance)	2013/2014
Joint Seminar 'The Future of Law and Economics' (attendance)	2014
Rotterdam Fall seminar series (peer feedback)	2013
Rotterdam Winter seminar series (peer feedback)	2014
Institute of Law and Economics Hamburg Jour Fixes Seminars (peer feedback)	2014-2016

Presentations	***year***
Bologna March seminar	2013
Hamburg June seminar	2013
Rotterdam Fall seminar series	2013
Rotterdam Winter seminar series	2014
Bologna November seminar	2014
Joint Seminar 'The Future of Law and Economics'	2015
German Association of Law and Economics Annual Meeting (Bolzano)	2013
German Association of Law and Economics Annual Meeting (Gent)	2014
European Public Choice Society Annual Meeting (Cambridge)	2014
International Society for New Institutional Economics (Durham, NC)	2014
European Public Choice Society Annual Meeting (Groningen)	2015
European Association of Law and Economics (Vienna)	2015
EMLE Law and Economics Workshop (Bologna)	2014
EMLE Law and Economics Workshop (Rotterdam)	2015
Italian Society of Law and Economics (Lugano)	2013
Italian Society of Law and Economics (Rome)	2014
Silvaplana Workshop on Political Economy (Pontresina)	2014
Political Economy Workshop (Milan)	2014
Attendance (international) conferences	***year***
ACLE Spring Meeting (Amsterdam)	2013
Teaching	***year***
Tutorial Introduction to Law and Economics (Cairo University)	2016
Tutorial Microeconomics	2016
Tutorial Introduction to Economics for Lawyers	2016
Tutorial Public Choice	2016