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# THE DANGERS OF POPULAR CONSTITUTION-MAKING

William Partlett\*

## INTRODUCTION

Across the Middle East and North Africa, corrupt dictatorships are currently being swept away with astonishing speed. To fulfill the democratic promise of this wave of authoritarian collapse, these nations must build political systems committed to pluralism, the rule of law, and representative government.<sup>1</sup> The adherence to written constitutional rules that structure and limit the exercise of political power is central to this mission.<sup>2</sup> But how can these countries transform written constitutional rules into a “respect-worthy” form of higher law that can actually limit the power of government?<sup>3</sup>

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1. Kenneth M. Pollack, *The Arab Militaries: The Double-Edged Swords*, in *THE ARAB AWAKENING: AMERICA AND THE TRANSFORMATION OF THE MIDDLE EAST* 64 (2011) (discussing need for America to stress rule of law, civil rights, and representative government to key Middle Eastern constituencies).

2. CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 6–8 (2002); STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 6 (1995) (“A constitution is an instrument of government. It establishes rules that help put democracy into effect. It creates an institutional framework that, if it functions properly, makes decision making more thoughtful and mistakes easier to learn from and correct.”); Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction*, 14 *CARDOZO L. REV.* 497, 497, 508–9 (1993) (arguing that “the realization of the spirit of constitutionalism generally goes hand in hand with the implementation of a written constitution.”). See also Vicki Jackson, *What’s In A Name? Reflections on Timing, Naming, and Constitution-Making*, 49 *WM. & MARY L. REV.* 1249, 1254 (2008).

3. Frank Michelman devised the concept of a “respect-worthy” constitution. See Frank Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 *REV. CONST. STUD.* 101, 125–28 (2003). Jack Balkin describes Michelman’s concept of respect-worthy as

something more than merely legal validity in a positivist sense, and something less than complete justice. Rather, legitimacy is a feature of legal systems that makes them worthy of respect, so that people living in legitimate legal systems have reasons to accept the use of

Or, in other words, how can these countries make new democratic constitutions “matter”?

The scholarly answer focuses on the *process* of constitution-making.<sup>4</sup> It argues that written constitutional rules “matter” when they are drafted and ratified during a period of extraordinary popular mobilization. In this process of “popular constitution-making,” constitutional drafting and ratification necessarily involves irregular mechanisms of extraordinary popular mobilization, such as extra-parliamentary constitutional conventions and referendums.<sup>5</sup> By operating outside the rules and institutions of ordinary politics, the people will be able to act in their sovereign capacity as the “constituent power.”<sup>6</sup> In this constituent position, the people themselves become the author of constitutional rules, maximizing the democratic “legitimacy”

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state coercion to enforce laws that they do not necessarily agree with and may even think quite unjust.

Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485, 486 (2004).

4. Tom Ginsburg, Zachary Elkins, & Justin Blount, *Does the Process of Constitution-Making Matter?* 5 ANNU. REV. L. SOC. SCI. 201, 210 (2009) (surveying literature on process of constitution-making). Scholars first began to consider the best process of constitution-making in response to the wave of constitution-making after the fall of communism. *See infra* note 9.

5. BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 47–51 (1991) [hereinafter ACKERMAN, *LIBERAL REVOLUTION*]. Ackerman draws his belief in the importance of a higher and more popular “track” for constitution-making from his reading of American constitutional history. *See*, 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6 (1991). A link between popular mobilization and constitution-making is widely held. *See also* Angela M. Banks, *Expanding Participation in Constitution-making: Challenges and Opportunities*, 49 WM & MARY L. REV. 1043 (2008); Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 670 (2006) (“The use of more participatory and inclusive processes to broaden the constitutional agenda and prevent the process from degenerating into a mere division of spoils between powerful players.”). A belief in the importance of direct popular participation in constitution-making is also currently widespread amongst democracy-promoting, non-governmental organizations. *See, e.g.*, Jason Gluck, *Egypt, Tunisia, and the Constitutional Movement*, U.S. INST. OF PEACE (Feb. 28, 2011), <http://www.usip.org/publications/egypt-tunisia-and-the-constitutional-movement>. Gluck suggests that “[a]ll components of society should be included in the constitutional discussion.” *Id.*

6. EMMANUEL JOSEPH SIEYES, *WHAT IS THE THIRD ESTATE?* 121–22 (S.E. Finer ed., M. Blondel trans., Pall Mall Press 1963) (1789).

of these rules and transforming them into a form of higher law.<sup>7</sup>

Popular constitution-making is grounded on the belief that a successful process of constitution-making must be separated from ordinary politics. This view is so deeply ingrained that a recent article found that “[n]early all the normative and positive work on constitutions proceeds from the assumption that constitutional politics are fundamentally different in character from ordinary politics.”<sup>8</sup> In constructing a normative agenda for post-authoritarian constitution-making, scholars and commentators have drawn on this belief to encourage new democracies to deploy extraordinary popular mechanisms such as constitutional conventions and referendums in their constitution-making process.<sup>9</sup>

The experience of constitution-making in post-Communist Europe and Asia, however, challenges this scholarly consensus. First, many Central and Eastern European post-Communist countries have established strong systems of constitutional review without using popular mechanisms to draft and ratify their constitutions. Instead, they used inherited, Communist-era institutions and related rules to draft their new constitutions, a process that Andrew Arato calls “parliamentary constitution-making.”<sup>10</sup> In these countries, “[c]onstitutional change was so closely associated with political change that it implied a constitutional politics not readily distinguishable from ordinary politics.”<sup>11</sup> The relative success of this form of parliamentary

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7. This is an author-based theory of “legitimacy,” where a constitution is “respect-worthy” because of who drafted it. And, arguably, the most democratically “legitimate” author of a democratic constitution is the people themselves. For more, see Michelman, *supra* note 3, at 125–28.

8. Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. SOC. SCI. 201, 210 (2009).

9. ACKERMAN, LIBERAL REVOLUTION, *supra* note 5, at 47–51; Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 395 (1995) [hereinafter Elster, *Forces and Mechanisms*]; Laurel E. Miller, *Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION-MAKING 601, 612 (Laurel E. Miller ed., 2010); see also *supra* note 5.

10. See, e.g., Andrew Arato, *Parliamentary Constitution Making in Hungary*, 4 E. EUR. CONST. REV. 45, 45–47 (1995).

11. Ruti Teitel, *Transnational Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2069 (1997).

constitution-making in building constitutional orders that limited political power and protected individual rights has led some scholars to formulate a new "legal" model for democratic constitutional adoption.<sup>12</sup>

Second, and more disturbingly, the mechanisms and rhetoric of popular constitution-making have not produced constitutions that limit the concentration of power and protect individual liberty in the post-Communist world. Instead, irregular popular mechanisms like referendums and constitutional conventions have helped charismatic presidents unilaterally impose authoritarian constitutions on society.<sup>13</sup> As Stephen Holmes and Cass Sunstein describe it, "the greater role granted to popular referenda and extra-parliamentary authorities, the less constitutionalism matters as a political force."<sup>14</sup>

This Article will explore why popular constitution-making has led to constitutional dictatorship. Part I will detail the theoretical underpinnings of popular constitution-making.<sup>15</sup> Part II will describe how many Eastern European countries rejected popular constitution-making and instead drafted new constitutions through ordinary political processes and within the pre-existing legal system.<sup>16</sup> Part III will demonstrate how popular constitution-making has helped undermine constitutionalism by providing opportunities for charismatic politicians with little desire for constitutionally-limited government to appeal to the people. Claiming to be the agent of the people, these charismatic figures were then able to justify their decisions to side-step parliamentary opposition and push through "authoritarian constitutions" that concentrated vast power in their own hands.<sup>17</sup> Part IV will conclude by stressing the importance of stable rules and institutions in constraining the constitution-making process.

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12. Luis Lopez Guerra, *Application of the Spanish Model in the Constitutional Transitions in Central and Eastern Europe*, 19 CARDOZO L. REV. 1937, 1939-40 (1998).

13. See *infra* Part III.

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

15. See *infra* Part I.

16. See *infra* Part II.

17. See *infra* Part III.

# I. POPULAR CONSTITUTION-MAKING AND THE PEOPLE'S CONSTITUENT POWER

Anarchy is a frightening but necessary transitional stage; the only moment in which a new order of things can be created. It is not in calm times that one can take uniform measures.<sup>18</sup>

As post-Communist countries began to draft new democratic constitutions in the late 1980s and early 1990s, political scientists and constitutional theorists focused on a largely neglected question at the intersection of constitutional and democratic theory: How can new democracies increase the likelihood that new written constitutional rules will—in contrast to their authoritarian-era predecessors—create binding constitutional law that can limit governmental power?<sup>19</sup> This field of inquiry was entirely new in the early 1990s. Writing in 1992, Bruce Ackerman deplored the lack of a “powerful literature” that described how “[a] piece of paper calling itself a constitution can be . . . a profound act of political self-definition.”<sup>20</sup>

To address this question, theorists began by considering strategies for boosting the “democratic legitimacy” or “respect-worthiness” of a new democratic constitution.<sup>21</sup> Hesitant to recommend specific constitutional content, theorists focused purely on an ideal *process* of constitutional foundation that would ensure that the new constitution was generated by the true sovereign power in a democracy, the people. This “author-based” version of constitutional legitimacy would ensure that the constitution would be respect-worthy by connecting “the revolutionary will of the people” to “the making of a constitution.”<sup>22</sup>

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18. Jon Elster, *Constitutional Bootstrapping in Philadelphia and Paris*, 14 CARDOZO L. REV. 549, 557–58 (1993) (quoting CLERMONT-TONNERRE, 9 ARCHIVES PARLEMENTAIRES SÉRIE I: 1789–1799 461 (1875–88)).

19. Rett R. Ludwikowski, *The Beginning of the Constitutional Era: A Bicentennial Comparative Study of the American and French Constitutions*, 11 MICH. J. INT'L L. 167, 168 (1989) (discussing concept of “constitutional engineering” as method for determining ways to develop constitutionalism in countries with little history of constitutional discourse).

20. ACKERMAN, LIBERAL REVOLUTION, *supra* note 5, at 47.

21. See, e.g., Michelman, *supra* note 3, at 125–28.

22. ÜRLICH KLAUSS PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 2–3 (Deborah Lucas Schneider trans., 1995). See also Joel Colon-Rios, *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Dilemmas of Constitutional Reform*, 48

This author-based approach drew heavily on the concept of “constituent power” developed by the French theorist Emmanuel Joseph Sieyes.<sup>23</sup> Sieyes’s theory held that the people—or as he termed it, “the Nation”—act in two capacities in a democracy. The Nation most often acts through ordinary institutions and elected representatives within pre-established rules. In exceptional situations, however, the Nation exercises its sovereign “constituent power” (*pouvoir constituant*) to repudiate existing legality and establish a new government of “constituted powers” (*pouvoir constitué*), such as a parliament, an executive, or courts.<sup>24</sup> A *truly* democratic constitution, unlike legislation, is therefore the product of an exceptional moment of popular mobilization in which the monolithic mass of the Nation directly creates a new constitutional order.<sup>25</sup>

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OSGOODE HALL L. J. 199, 215 (2010) (“[T]he basic condition for democratic legitimacy is the realization of democracy at the level of the fundamental laws—that ordinary citizens have the real possibility of participating in the re-constitution of the norms that govern the state through highly participatory procedures. In other words, the democratic legitimacy of a constitutional regime depends on the way in which it approaches the question of constituent power.”). For more on the link between revolutionary thought and this theory of popular constitution-making, see William Partlett, *Liberal Revolution, Legality, and the Russian Founding Period*, REV. CEN. & E. EUR. L. (forthcoming 2013).

23. See SIEYES, *supra* note 6, at 136–39. The American revolutionaries also drew on the concept of popular sovereignty as the basis for new constitutional law. They were, however, more cautious in exercising that power. James Madison wrote that the people’s exercise of constituent power is of “too ticklish a nature to be unnecessarily multiplied.” THE FEDERALIST NO. 49, at 341 (James Madison) (Jacob E. Cooke ed., 1961). John Adams commented that “[i]t is certain, in theory, that the only moral foundation of government is, the consent of the people. But to what extent shall we carry this principle?” Letter from John Adams to James Sullivan (May 26, 1776), in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES, AND ILLUSTRATIONS 375 (Charles Francis Adams ed., 1854).

24. SIEYES, *supra* note 6, at 136–39. Sieyes therefore had a unitary vision of popular sovereignty. Sieyes saw natural law as a limit on the constituent power of the Nation. See Colon-Rios, *supra* note 22, at 205–206.

25. SIEYES, *supra* note 6, at 136–37. This theory of constitutional legitimacy is grounded on social contract theory and sees constitutions as a special kind of contract between the people and their government. “Social contract theory imagines political societies as resting on a fundamental agreement, adopted at a discrete moment in hypothetical time, that both bound individual persons together into a single polity and set fundamental rules regarding that polity’s structure and powers.” Jacob T. Levy, *Not So Novus an Ordo: Constitutions Without Social Contracts*, 37 POL. THEORY 191, 192 (2009)

Popular constitution-making theory draws its inspiration from Sieyes's belief that popular sovereignty is synonymous with the *unitary concept of the nation*.<sup>26</sup> It stands for the principle that for the people to truly act, they must do so outside of the ordinary, pre-existing rules or institutional subdivisions inherited from the old regime.<sup>27</sup> Instead, they must act as a national whole. This disregard for pre-existing legality and institutions is not a problem; it instead creates the basis or "political bottom"<sup>28</sup> for a new democratic constitution.<sup>29</sup> Illegal revolu-

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(providing further background on social contract theory). This theory therefore draws on enlightenment thinking that sees constitution-making as the product of the people's rational will.

26. Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1182 (1988) (discussing national referendum process as best way for capturing vision for constitutional change "handed down to us by the Founders."). American legal scholars have argued that the American founders shared a unitary vision of popular sovereignty. Akhil Amar argues that the concept that "sovereignty was absolute and indivisible" was "almost universally held in the 1780s." *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 507 (1994). Richard Kay described how the American founders invoked "a well-developed theory of constituent authority according to which the people's will was both anterior and superior to every instance of positive law, not excluding any constitutional text." *Constituent Authority*, 59 AM. J. COMP. L. 715, 718 (2011).

27. This sentiment was best summed up in Thomas Paine's proclamation that "[t]he constitution of a country is not the act of its government, but of the people constituting a government." THOMAS PAINE, *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution*, in *RIGHTS OF MAN, COMMON SENSE AND OTHER POLITICAL WRITINGS* 83, 122 (1791).

28. Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENT. 57, 58 (1987).

29. *Id.* (stating "it is exactly its break with prior legality that invested the Constitution with the power it still exercises over [Americans] and with its, at least formal, primacy in our legal system."). See also James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 296, 303–04 (1990); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 14–15 (1998). It is important to note that popular constitution-making was a contested idea during the American founding period. Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 922–23 (1993) (stating that in the immediate aftermath of the Revolutionary War, "many Americans . . . continued to believe that their legislatures were the best instruments for interpreting and changing these constitutions. The state legislatures represented the people, and the people, it seemed, could scarcely tyrannize themselves." Wood then shows how this view shifted radically in the 1780s.).



tionary constitutional foundation is therefore a virtue: To enjoy the status as legally binding higher law, constitutional foundation must be separated from the ordinary laws and conventions of ordinary politics.

*A. A Revolutionary Agenda for Capturing the People's Constituent Power*

As Communism collapsed, commentators drew on popular constitution-making to formulate a normative agenda for post-Communist constitutional adoption.<sup>30</sup> Popular constitution-making lent itself well to post-Communist constitutional creation because it linked the revolutionary street protests in city squares across the former Communist countries to the creation of binding constitutional law.<sup>31</sup> Seen as products of the masses of newly liberated post-Communist people, new constitutional rules would be protected "against erosion by political elites who had failed to gain broad and deep popular support for their innovations."<sup>32</sup>

To build binding new constitutional law, commentators therefore stridently opposed parliamentary constitution-making or adherence to pre-existing constitutional rules. These commentators instead argued that new democracies should turn to irregular institutions such as constituent assemblies and popular referendums, which could capture the collective voice of the Nation.<sup>33</sup> This extraordinary process would help foster the le-

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30. See *supra* note 9 and accompanying text. This interest was also widespread amongst non-legal commentators. See, e.g., RALF DAHRENDORF, REFLECTIONS ON THE REVOLUTION IN EUROPE 91 (1991) (commenting that "[a]fter the constitution, normal politics takes over.>").

31. See *supra* note 9. Other potential theories of constitutional legitimacy were not as appealing. For instance, foundationalism—the concept that post-Communist constitutional legitimacy would be drawn from constitutions with certain democratic provisions—was rejected for being too elitist. Furthermore, the Burkean historicism belief in gradual constitutional change placed too much emphasis on these countries' illiberal history. Finally, monism—the idea that elected legislatures should generate constitutional law—was seen as too easily overturned by temporary majorities. For more, see ACKERMAN, *supra* note 5, at 3–33 (analyzing competing theories of constitutional legitimacy).

32. ACKERMAN, *supra* note 5, at 10.

33. See *supra* note 30. Donald Lutz explained that "[the] doctrine of popular sovereignty required that constitutions be written by a popularly selected convention, rather than the legislature, and then ratified through a process

gitimacy of the new written constitution, placing it above ordinary politics. As two leading political scientists put it, “[t]he optimal formula [is] one in . . . which the work of the constituent assembly gains further legitimacy by being approved in a popular referendum . . . .”<sup>34</sup>

Bruce Ackerman, “America’s greatest theorist of transition,” has described this popular constitution-making agenda in detail.<sup>35</sup> Ackerman strongly urged post-Communist drafters to avoid “a series of ad hoc modifications of the older Communist texts” through parliamentary amendment.<sup>36</sup> Instead, he argued, constitutional drafters should aspire “to attempt a comprehensive statement of their revolutionary principles.”<sup>37</sup> Calling this the “triumphalist scenario,” Ackerman argued that appealing to the people would lead to the constitutionalization of post-Communist revolutionary fervor.<sup>38</sup>

To draft a new constitution, Ackerman suggested that post-Communist constitutional drafters should convene a constitutional convention to capture the people’s true constituent power.<sup>39</sup> Although newly elected post-Communist legislatures were unlikely to legally authorize these irregular institutions, Ackerman was not worried.<sup>40</sup> Instead, he argued that the extra-legal nature of these bodies accorded them important symbolic value, as had been in the case in the United States:

To them, the legally anomalous character of the “convention” was not a sign of defective legal status but of revolutionary possibility—that a group of patriots might speak for the People with *greater* political legitimacy than any assembly whose

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that elicited popular consent—ideally, in a referendum.” Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 355 (1994).

34. JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 82–83 (1996).

35. Sanford Levinson, *Transition*, 108 YALE L.J. 2215, 2215 (1999). Ackerman’s concept of “dualist democracy” recreates Sieyes’s two-track approach. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 461–462 (1989).

36. ACKERMAN, LIBERAL REVOLUTION, *supra* note 5, at 61.

37. *Id.*

38. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 780–87 (1997).

39. ACKERMAN, LIBERAL REVOLUTION, *supra* note 5, at 51–54.

40. *Id.* at 53.

authority arose only from its legal form. . . . As the revolutionary years moved on, Americans insisted that the People could deliberate on constitutional matters only in special bodies whose very name—“convention”—denied that legal forms could ultimately substitute for the engaged participation of citizens.<sup>41</sup>

Ackerman also argued that popular referendums should be an important part of the constitution-making process. He believed that referendums echoed the spirit of the American Revolution where the drafters “appealed for support from the People over the heads of existing governments.”<sup>42</sup> In particular, a referendum would be critical in ensuring that the constitution would serve as “a popular symbol of the revolutionary generation’s achievement”<sup>43</sup> and would capture a “mandate from the people.”<sup>44</sup>

To mobilize popular opinion around these irregular institutions, Ackerman called for strong charismatic presidential leadership.<sup>45</sup> In particular, Ackerman pushed for the constitutionalization of presidential charisma to avoid a constitution with “soft constitutional norms” that would be “too easy for a parliamentary majority” to ignore.<sup>46</sup> Consequently, he encouraged Russian President Boris Yeltsin to refuse to “strike a deal” with the members of the elected Russian Parliament and instead encouraged him to “use the impasse [with parliament]” to catalyze popular opinion behind a new democratic constitution.<sup>47</sup>

Jon Elster, the leading political scientist to address this field of constitution-making, drew on the insights of political science in support of popular constitution-making. Using eighteenth-century French and American history as examples, he rea-

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41. ACKERMAN, *supra* note 5, at 175 (emphasis in original).

42. ACKERMAN, LIBERAL REVOLUTION, *supra* note 5, at 53.

43. *Id.*

44. *Id.* at 54 (citation omitted).

45. See BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 143–47 (2005). (Ackerman’s full exposition on advantages of plebiscitary presidentialism). Ackerman’s calls for the constitutionalization of presidential charisma also echo Max Weber’s earlier calls for charismatic leadership. See ANDREAS KALYVAS, DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY: MAX WEBER, CARL SCHMITT, AND HANNAH ARENDT 65, 207 (2008).

46. ACKERMAN, LIBERAL REVOLUTION, *supra* note 5, at 63.

47. *Id.* at 58–59.

soned, “constitutions ought to be written by specially convened assemblies and not by bodies that also serve as ordinary legislatures. Nor should the legislatures be given a central place in the process of ratification.”<sup>48</sup>

Elster argued that an irregular constitutional convention, in contrast to an ordinary legislature, was far more likely to be an impartial body of deep deliberation necessary for constitution-making. For Elster, the irregular nature of these institutions would help insulate the process of constitution-making from the taint of short-term political bargaining.<sup>49</sup> He reasoned that conventions “promote the predominance of *reason* over *interest*”<sup>50</sup> because “the pressure on speakers to produce impartial arguments may be especially strong in the constitutional setting, compared to ordinary legislatures.”<sup>51</sup> This production of a more principled decision would help ensure a more apolitical and legitimate constitution. Without taking such an irregular path, “a constitution will lack legitimacy to the extent that it is perceived to be a mere bargain among interest groups rather than the outcome of rational argument about the common good.”<sup>52</sup>

## II. CONSTITUTIONAL FOUNDATION BY MIXING ORDINARY AND EXTRAORDINARY POLITICS

This new trend towards peaceful transition is puzzling because it raises serious questions about the accepted wisdom that genuine transitions to constitutional democracy require a violent tear in the political fabric and a radical shift in the polity’s conception of its own identity.<sup>53</sup>

A large number of Central and East European countries have been successful in constructing constitutional democracy with-

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48. Elster, *Forces and Mechanisms*, *supra* note 9, at 370–71, 395.

49. Jon Elster, *Legislatures as Constituent Assemblies*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 181, 185 (Richard W. Bauman and Tsvi Kahana eds., 2006).

50. *Id.* (emphasis in original).

51. Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 419–20 (2000).

52. Jon Elster, *Constitution Making in Eastern Europe: Rebuilding the Boat in the Open Sea*, 71 PUB. ADMIN. 169, 179 (1993).

53. Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 CARDOZO L. REV. 1891, 1893–94 (1998).

out employing the mechanisms and rhetoric of popular constitution-making.<sup>54</sup> These countries consciously rejected revolutionary mechanisms in favor of negotiated paths to constitutional foundation. For instance, a "high-ranking Hungarian jurist . . . remarked that even enthusiastic supporters," of political change in Hungary "avoid[ed] the term 'revolution,' preferring to speak of 'peaceful transition' instead."<sup>55</sup> As Andrew Arato observed, Central and Eastern European constitutional drafters sought to avoid a "state of nature, outside of all law by postulating constitutional continuity with old regimes."<sup>56</sup>

As a result, Central and East European countries actively avoided revolutionary attempts at popular constitution-making. In Hungary, a pro-presidential group "presented a petition with 200,000 signatures calling on parliament to hold a referendum which would decide," whether to introduce direct presidential elections and also whether to shift "some powers from the government to the president."<sup>57</sup> The Hungarian Parliament rejected this option after the Constitutional Court ruled that the "constitution cannot be amended by referenda."<sup>58</sup> Similarly, when Albanian President Sali Berisha's constitutional draft, which faced criticism for its authoritarian tendencies, failed to gain the necessary support in the parliament, President Berisha attempted to circumvent the Albanian Parliament and put his draft to a referendum.<sup>59</sup> The Constitutional Court in Albania ruled "that submitting the constitution to a popular vote without first asking parliament to vote violated the Law on Major Constitutional Provisions."<sup>60</sup> Finally, in Poland, a center-right party "drummed up half-a-million signatures and demanded a parallel referendum on their version of

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54. The success of constitutional democracy in these countries does not necessarily spring from the process of constitution-making; there are of course additional factors at play outside of the scope of this Article.

55. PREUSS, *supra* note 22, at 91. Hungary's exclusive use of ordinary institutions to amend the constitution might also have allowed it.

56. ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION, AND LEGITIMACY 142 (2000).

57. RETT R. LUDWIKOWSKI, CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE 186 (1996).

58. *Id.*

59. LEVENT GÖNENÇ, PROSPECTS FOR CONSTITUTIONALISM IN POST-COMMUNIST COUNTRIES 150-52 (2002).

60. *Id.* at 146.

the civic constitution.”<sup>61</sup> The Polish parliament successfully blocked this attempt to appeal to the people through irregular processes.<sup>62</sup>

Instead, the Central and East European countries amended and established new constitutional orders by combining ordinary and extraordinary institutional mechanisms.<sup>63</sup> Ordinary parliaments became the locus for both ordinary legislation and constitutional lawmaking, linking an emerging culture of civil engagement through parliamentary-based politics to the creation of constitutions.<sup>64</sup> These newly empowered parliaments created commissions, consisting of both legal experts and members of parliament, to draft the post-Communist constitutions under the standing rules set forth in their parliamentary tradition. These drafts were only given to the people in a referendum after parliamentary ratification in accordance with procedures inherited from amended Communist-era constitutions.<sup>65</sup> This use of parliamentarian rules to fundamentally reshape the constitutional order meant that “[w]holly new political arrangements [were] institutionalized throughout the region on the basis of a string of constitutional amendments passed by weakly legitimate parliaments, assemblies that are, in turn, fragmented into a chaos of small parties.”<sup>66</sup>

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61. See GEORGE SANFORD, DEMOCRATIC GOVERNMENT IN POLAND: CONSTITUTIONAL POLITICS SINCE 1985, at 90 (2002).

62. *Id.*

63. Holmes & Sunstein, *supra* note 14, at 285.

64. See ARATO, *supra* note 56, at 144. Most Communist countries, including China today, have Soviet-style written constitutions, which create a system of legislative supremacy. For more on the constitutional structure of the 1977 Soviet Constitution, see Christopher Osakwe, *The Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution*, 127 U. PA. L. REV. 1350, 1411–32 (1979).

65. Holmes & Sunstein, *supra* note 14, at 280.

66. *Id.* at 286.

	<b>Drafter(s)</b>	<b>Ratifier(s)</b>
Poland <sup>67</sup>	Parliamentary commission (drafted both the interim constitution and the final constitution)	Parliament AND referendum (1996)
Hungary <sup>68</sup>	Parliament (amended more than 70% of the Communist-era constitution)	New constitution went into effect January 1, 2012
Czech Republic <sup>69</sup>	Parliamentary commission	Parliament (Dec. 16, 1992)
Slovakia <sup>70</sup>	Parliamentary Commission	Parliament (Sept. 1, 1992)
Romania <sup>71</sup>	Parliamentary commission	Parliament (Nov. 21, 1991) AND Referendum (Dec. 8, 1991)
Bulgaria <sup>72</sup>	Parliamentary commission	Parliament (July, 1991)
Germany (reunification) <sup>73</sup>	N/A	Parliament (Sept. 20, 1990)

Influenced by the popular constitution-making literature, scholars and commentators argued that the Central and Eastern European rejection of popular constitution-making jeopardized the super-legality of constitutional law. In particular, they

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67. See SANFORD, *supra* note 61, at 89–90.

68. See LUDWIKOWSKI, *supra* note 57, at 180–83. See also Kim Lane Scheppele, *Hungary's Constitutional Revolution*, N.Y. TIMES (Dec. 19, 2011), <http://krugman.blogs.nytimes.com/2011/12/19/hungarys-constitutional-revolution/>.

69. LUDWIKOWSKI, *supra* note 57, at 167–68.

70. *Id.*

71. *Id.* at 127. In Romania, “Communists, attempting to establish their reputation as reformers, declared that the primary task of the new parliament would be to draft a new constitution.” *Id.*

72. *Id.* at 115.

73. Peter Quint, *Constitution-Making by Treaty in German Unification: A Comment on Arato, Elster, Preuss, and Richards*, 14 CARDOZO L. REV. 691, 691–95 (1993). German authorities ratified the Unification Treaty on September 20, 1990. David Patton, COLD WAR POLITICS IN POSTWAR GERMANY 139 (2001).

“condemn[ed] easy paths to constitutional modification in Eastern Europe . . . and [] denounce[d] more generally the ‘confusion’ between constitutional politics and ordinary politics characteristic of every post-Communist society.”<sup>74</sup> Andrew Arato questioned whether the “democratic legitimacy of a constitutional construction created through continuity with a rejected old regime can be significantly reconstructed mid-stream without damage to constitutionalism.”<sup>75</sup> Lloyd Cutler argued that ordinary legislatures should not ratify constitutions because, “if the legislature is the final word, the legislature can always change the constitution” and the process will not lead to “a true legitimization of the constitution.”<sup>76</sup> He criticized the German Constitution for being “simply an act, a so-called basic law of the legislature,” which is, “something that also plagues how [a country] go[es] about building a constitution in that part of the world.”<sup>77</sup> Peter Quint also argued that there would be “a price to be paid” for Germany’s decision to incorporate East Germany, the German Democratic Republic, without a constituent assembly, stating:

The drafters thereby relinquished the powerful democratic process of education and deliberation that such a procedure would have afforded—even if the Basic Law had not been significantly altered—as well as an attendant increase in democratic legitimacy. . . . [i]f there had been a constituent assembly under Article 146 leading to a new constitution, there might have been a greater sense of a common political enterprise than there now is.<sup>78</sup>

A. E. Dick Howard also criticized Central and Eastern European drafters for failing to draw on the people’s constituent power in the creation of a new constitution. He found it to be a “paradox” that “[t]he device of the constitutional convention or constituent assembly is not used” while “referenda are quite rare.”<sup>79</sup> Additionally, Jon Elster lamented Central and Europe-

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74. Holmes & Sunstein, *supra* note 14, at 284.

75. Andrew Arato, *Constitution and Continuity in the East European Transitions, Part One: Continuity and its Crisis*, 3 TILBURG FOREIGN L. REV. 345, 370 (1994).

76. Symposium, *Constitutional “Refolution” in the Ex-Communist World: The Rule of Law*, 12 AM. U. J. INT’L L. & POL’Y 45, 45, 75 (1997).

77. *Id.* at 73.

78. Quint, *supra* note 73, at 702 (emphasis in original).

79. Symposium, *supra* note 76, at 57.



an drafters' failure to raise the constitution above the whims of everyday ordinary politics, warning that "[t]he constitution will lose many of its desirable properties—notably that of inspiring confidence and creating a climate in which investors are willing to make long-term investments—if everyone expects that it will be continually revised."<sup>80</sup>

These worries, however, have proven to be overstated. With the exception of Hungary, which recently ratified a constitution criticized for rolling back democratic freedoms, other Central and Eastern European countries have built stable constitutional orders by mixing ordinary and irregular political mechanisms in the constitution-making process.<sup>81</sup> The relative success of these countries' transitions to their new constitutions might suggest that a constitutional order does not draw its "respect-worthiness" solely from the process of constitution-making.<sup>82</sup>

Scholars have begun to acknowledge that mixing ordinary and extraordinary mechanisms in constitution-making presents an alternate route to constitutionalism.<sup>83</sup> Cass Sunstein and Stephen Holmes argued that although "a sharp split" between constitution-making and ordinary politics is "preferable", the "peculiar conditions of Eastern Europe do not make this a sensible solution."<sup>84</sup> They conclude that "the very creation of a constitutional culture in post-Communist societies depend[ed] upon a willingness to mix constitutional politics and ordinary

80. Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 471 (1991).

81. See ARATO, *supra* note 56, at 142–44. For more on the Hungarian example, see Kim Lane Scheppelle, *Hungary's Constitutional Revolution*, N.Y. TIMES (Dec. 19, 2011), <http://krugman.blogs.nytimes.com/2011/12/19/hungarys-constitutional-revolution/>.

81. ARATO, *supra* note 56, at 167–68.

82. This is a contention that lies outside the scope of this Article. Dick Howard has speculated that ongoing implementation of human rights norms by assertive courts might further legitimize these constitutions. He comments that "[s]ince you don't find in post-communist Europe constitutional conventions and referenda and other notions of how one puts the constitution on a legitimate basis, I raise the question of whether the work of the constitutional courts might begin to supply some of that sense of legitimacy." Symposium, *supra* note 76, at 58.

83. Some have seen this gradual legal constitution-making as following a model first set by Spain in the 1970s. See Guerra, *supra* note 12, at 1939–40.

84. Holmes & Sunstein, *supra* note 14, at 275.

politics.”<sup>85</sup> Similarly, Vicki Jackson noted “that democratic legitimacy can emerge through a range of processes, including those formally controlled by less than fully legitimate governments or by occupying military authorities from liberal democracies.”<sup>86</sup> Ruti Teitel, seeking to explain what she described as a “puzzling conflation of ordinary politics and constitution-making,” hypothesized that transitions have their own unique characteristics, requiring the creation of a “transitional jurisprudence.”<sup>87</sup> Teitel, however, admitted that the understanding of this special kind of jurisprudence remains incomplete, conceding that the “constitutional component of [her] project points to a research agenda, which should be challenging of some of the meta-theoretical predicates of the prevailing constitutional canon.”<sup>88</sup>

### III. POPULAR CONSTITUTION-MAKING AND AUTHORITARIAN CONSTITUTIONS

	<b>Drafter(s)</b>	<b>Ratifier(s)</b>
<b>Russia</b> <sup>89</sup>	Presidentially appointed Constitutional Convention	Referendum
<b>Belarus</b> <sup>90</sup>	Presidential administration	Referendum
<b>Kazakhstan</b> <sup>91</sup>	Presidential administration	Referendum

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85. *Id.* at 285.

86. Jackson, *supra* note 2, at 1271–72. (writing that “some political scientists and lawyers argue for particular kinds of processes—for example, separate ‘conventions’ [rather than standing general legislative bodies] to draft constitutions—both to avoid the institutional and personal self-interest of existing members of legislative bodies and to better embody the interests of the people in a specifically constitutional process. Yet enough examples exist of successful parliamentary adoptions to make one skeptical of insisting on this one form.”). *Id.* at 1292–93.

87. Teitel, *supra* note 11, at 2080.

88. Ruti Teitel, *The Constitutional Canon: The Challenge Posed by a Transitional Constitutionalism*, 17 CONST. COMMENT. 237, 239–40 (2000).

89. RICHARD SAKWA, RUSSIAN POLITICS AND SOCIETY 49 (2008).

90. Lukashuk, *infra* note 177, at 314–317.

91. MARTHA BRILL OLCOTT, KAZAKHSTAN: UNFULFILLED PROMISE (2002).

The legally anomalous and extra-parliamentary mechanisms and rhetoric of popular constitution-making, however, did play an important role in post-Communist constitution-making further east. In the former Soviet Union, these irregular and popular mechanisms emerged as a useful tool for power-hungry politicians bent on reasserting personal leadership but unable to risk the domestic and international costs of openly autocratic rule amidst a post-Cold War global democratic "zeitgeist." Consequently, these post-Communist figures manipulated referendums and produced highly choreographed constitutional conventions to delegitimize ordinary constitutional rules and institutions such as parliaments, and to constitutionalize presidential dictatorship.<sup>92</sup> In other words, the mechanisms of constituent power helped cloak the creation of plebiscitary dictatorship in the garb of liberal constitutionalism. Russia's process of post-Soviet constitutional foundation is the paradigmatic example.

#### *A. Russia*

Russia initially followed the "parliamentary" model of constitution-making. By 1992, the Russian parliament had amended the Communist-era constitution numerous times and created a constitutional document that bore little resemblance to its Soviet-era counterpart.<sup>93</sup> Most importantly, the constitution no longer contained any reference to the Communist Party's monopoly on power and instead established a constitutional system of parliamentary supremacy with an elected president and a constitutional court.<sup>94</sup>

The two-tiered Russian parliament emerged at the center of this new constitutional system. At the base of this two-tiered system was the Congress of People's Deputies ("Congress"), a body that was elected in March 1990 and comprised of 1,098

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92. Larry Diamond, *The Globalization of Democracy*, in GLOBAL TRANSFORMATION AND THE THIRD WORLD 31, 53 (Robert O. Slater et al. eds., 1993). See also, STEVEN LEVITSKY AND LUCAN WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR (2010) (describing how post-Cold War global democratic zeitgeist raised costs of openly autocratic rule and led to creation of competitive authoritarian regimes that use democratic mechanisms but in ways that seriously handicap any real opposition).

93. JOHN MCCORMICK, COMPARATIVE POLITICS IN TRANSITION 217 (2012).

94. ANDREW FELKAY, YELTSIN'S RUSSIA AND THE WEST 43 (2002).

members.<sup>95</sup> The Congress had the power to amend the constitution, pass laws, elect a chairman, and approve the head of government as well as other state officials.<sup>96</sup> The Congress, therefore, was “like a constituent assembly, which assumes control of the state temporarily in a time of crisis in order to lay the constitutional foundations of a new political order.”<sup>97</sup> To govern between its meetings, the Congress elected a permanent standing body, the Supreme Soviet.<sup>98</sup>

Both the Supreme Soviet and the Congress became important arenas for political debate and criticism. In fact, as Yeltsin’s rapid economic reforms grew increasingly unpopular, these representative bodies became a key point of opposition.<sup>99</sup> The Supreme Soviet also emerged as a focal point for constitution-making, creating a Constitutional Commission under the leadership of Oleg Rumiantsev. Rumiantsev was a leading Russian westernizer; he had convened a discussion group, Democratic Perestroika, which was one of Moscow’s many such small, informal political discussion groups.<sup>100</sup> Mr. Rumiantsev’s draft constitution ultimately sought to draw on this advice to create a western-style semi-presidential system in Russia.<sup>101</sup>

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95. THOMAS F. REMINGTON, RUSSIAN PARLIAMENT: INSTITUTIONAL EVOLUTION IN A TRANSITIONAL REGIME 85 (2001).

96. *Id.*

97. EUGENE HUSKEY, PRESIDENTIAL POWER IN RUSSIA 17 (1999).

98. REMINGTON, *supra* note 95, at 85.

99. *Id.* at 104–11.

100. Peter Pavilionis, The Eurasia Center, *A New Constitution for Russia*, J. DEMOCRACY 1 (Dec. 23, 2005), available at <http://www.rumiantsev.ru/englishtexts/18/> (noting, “Rumiantsev and his similarly youthful advisers and associates on the commission were ardently committed to the importance of legal culture and constitutionalism. They were (and still may be) the most eloquent and committed adherents of the rule of law to be found in Russia.”); ROBERT B. AHDIEH, RUSSIA’S CONSTITUTIONAL REVOLUTION: LEGAL CONSCIOUSNESS AND THE TRANSITION TO DEMOCRACY 1985–1996 52 (1997).

101. William Partlett, *Separation of Power Without Checks and Balances: The Failure of Semi-Presidentialism and the Making of the Russian Constitutional System, 1991–1993*, in THE LEGAL DIMENSION IN COLD WAR INTERACTIONS: SOME NOTES FROM THE FIELD 129–134 (William Simons & Tatiana Borisova eds., 2012) (describing goal of Yeltsin’s advisors to raise president above the system of separated powers).

### 1. The Russian Constitutional Court

The newly created Russian Constitutional Court emerged as a surprisingly powerful body in enforcing the amended Communist-era Russian Constitution. Under the energetic leadership of Chairman Valerii Zorkin, the Court attempted to ensure that the new amendments, which proclaimed separation of powers and law-based limitations on government, were adequately enforced.<sup>102</sup> In its first case, the Court struck down a presidential decree seeking to merge the Internal Police and the Foreign Intelligence Service. The Court opened this decision with a broad statement that “[o]ne of the fundamental principles of a constitutional system is that each government institution may only make decisions and carry out actions that are within its competency, determined in the Constitution.”<sup>103</sup> The Court went on to state that “[t]he President is not able to contradict the Constitution and the laws of the Russian Federation or the elements of a system of checks and balances, underpinned by the principle of separation of powers based in Article 3 of the Russian Declaration of Sovereignty.”<sup>104</sup> The Zorkin Court did not just limit presidential power, later decisions also struck down unconstitutional extensions of power by the Russian Parliament.<sup>105</sup>

Zorkin’s attempts to enforce Russia’s amended constitutional system were complicated because much of the Russian political elite were unaccustomed to constitutional limitations on the practice of political power. As Zorkin explained in a speech to the Congress in the spring of 1992, many officials in both the presidential and parliamentary branches of power were unwill-

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102. Kim Lane Scheppelle, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757, 1795–1800 (2006).

103. Postanovlenie Plenuma Konstitutsionnyi Sud Rossiskoi Federatsii (Konst. Sud. RF) ot 19 dekabria 1991 [Russian Federation Supreme Court Ruling on the constitutionality of the Decree of the President of the Russian Federation of December 19, 1991 No. 289], VESTNIKI KONSTITUTIONNOGO SUDA RF [VKS] Jan. 14, 1992.

104. *Id.*

105. Postanovlenie Konstitutsionnogo Suda Rossiiskogo Federatsii, May 19, 1993. In VKS No. 2–3, pp. 64–72. (decision striking down parliamentary action to exert control over Russian newspaper).

ing to respect the limitations placed on their behavior by the existing constitution.<sup>106</sup>

## 2. Yeltsin's Visions of Presidentially-Dominated Form of Government

The first elected president, Boris Yeltsin, and his supporters were hostile to constitutional limits on presidential power. They saw a truly democratic constitutional order as one with an elected president as the supreme institution.<sup>107</sup> In a speech to the parliament, Yeltsin described the underlying centrality of presidential dominance in Russian democracy, asserting, "I am a strong proponent of presidential power. But not because I am president, but because without the presidency Russia would not survive . . . because the president is elected by the entire people, he *embodies* the integrity and unity of Russia."<sup>108</sup> One of Yeltsin's aides outlined the presidential administration's vision of presidential power. He explained that the Russian president differs from the presidency:

imagined in textbooks or in its classical form. The fundamental concept of the presidency is as the superior power. The presidency ensures the idea of an independent and responsible Government, formed in order to decide questions of governmental operation. And the presidency ensures that the Government works with the regional legislatures in the creation of a single governmental vertical.<sup>109</sup>

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106. Scheppelle, *supra* note 102, at 1795.

107. See *infra* note 123.

108. Boris Yeltsin, *If you destroy the presidency – you destroy Russia*, FINANSOVYE IZVESTIYA [FIN. IZV.] (Russ.) Mar. 12, 1993, at 1 (emphasis in original).

109. Boris N. Yeltsin, S. S. Alekseev & I. A. Spiridonov, *Soveshchanie rukovoditelei respublik v sostave Rossiiskoi Federatsii, glav administratsii kraev, oblastei avtonomnykh obrazovaniy, gorodov Moskvy i Sankt-Peterburga* [Meeting of the leaders of the republic consisting of the Russian Federation, heads of krai administrations, autonomous oblasts, the cities of Moscow and Saint Petersburg], reprinted in 1 [29 April – 4 June 1993 g.] KONSTITUTIONNOE SOVESHCHANIE. STENOGRAMMY. MATERIALY. DOKUMENTY. 29 APRELIA – 10 NOYABRIA 1993 G. [CONSTITUTIONAL CONFERENCE, REPORTS, MATERIALS, DOCUMENTS, APR. 29–NOV. 10, 1993.] 3, 7 (S. A. Filatova et al., eds., 1995) (Russ.) [hereinafter Yeltsin, et al., *Meeting of the Leaders*].

This aide insisted that this system was democratic because of its basis in popular sovereignty, or *narodovlastie*.<sup>110</sup> In other words, the Russian Presidency's power flowed directly from its embodiment of the people's constituent power.

### 3. Yeltsin's De-Legitimization of Existing Political Institutions

This view of superior presidential power conflicted with Russia's amended Communist-era constitution. Thus, it was only a matter of time before the president would come into conflict with constitutional legality and its two chief institutions, the Constitutional Court and the parliament. In this struggle, Yeltsin repeatedly attempted to argue that both the Constitutional Court and the parliament were Communist-era relics that did not represent the people's newfound constituent power.<sup>111</sup>

This feud began in earnest at the end of 1992 when President Yeltsin demanded that Congress renew his expansive decree powers so that he could continue his macroeconomic reforms.<sup>112</sup> Without these powers, the Presidency could no longer fulfill the presidential administration's expansive view of "proper" presidential power. As Congress debated whether to renew the delegation of these powers to Yeltsin, rumors circulated of a presidential coup d'état.<sup>113</sup> In a December 10, 1992 speech to the Congress, President Yeltsin attacked the existing constitution for affording too much power to the legislature, protesting, "[t]he constitution, or what has become of it, is turning the Supreme Soviet, its leadership and its Chairman into the absolute rulers of Russia . . . [they are] accustomed to giving orders without being accountable."<sup>114</sup> Drawing on the language of

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110. *Id.* This aide proclaimed that the "stable, strong, and capable organization of power" is rooted in a "democratic basis: popular sovereignty (*narodovlastie*). . . . The people decide the matter." *Id.*

111. *The President of Russia Sees Holding a Nationwide Referendum as the Way Out of the Crisis*, 44 CURRENT DIG. OF THE POST-SOVIET PRESS 1, Jan. 13, 1993 (translating *Investia*, Dec. 10, 1992, at 1) [hereinafter *Way Out of the Crisis*].

112. *Congress Opens: Yeltsin Asks for a "Stabilization Period"*, in 44 CURRENT DIG. OF THE POST-SOVIET PRESS, Dec. 30, 1992, at 1-6.

113. *Talk of Presidential Rule Stirs Political Furor*, 44 CURRENT DIG. OF THE POST-SOVIET PRESS (Dec. 9, 1992), at 1-5.

114. *Way Out of the Crisis*, *supra* note 111, at 1-2.

popular constitution-making, he called for the people to decide the nature of this constitutional system directly,

In this situation, I consider it necessary to appeal directly to the citizens of Russia, to all the voters. To those who voted for me in the election and thanks to whom I became President of Russia. . . . The Congress and the President have but one judge—the people. . . . My proposal is based on the constitutional principle of people's rule, on the President's constitutional right to appeal to the people, and on the President's constitutional right of legislative initiative.<sup>115</sup>

As Yeltsin stepped up these attacks and it seemed that Russia was on the brink of civil war, Chairman Zorkin stepped in to broker a compromise. He was ultimately successful. President Yeltsin and the leader of parliament, Ruslan Khasbulatov, reached a compromise—Khasbulatov agreed to a referendum in April 1993 in return for Yeltsin's agreement to choose a Prime Minister from the three candidates having the broadest support in the Congress.<sup>116</sup>

In January 1993, the leader of the Russian parliament, realizing the dangerous ramifications of allowing Yeltsin a popular mandate in a popular referendum, attempted to back away from this promise. He argued that a referendum was simply an appeal to mob rule and a way to “distract public opinion from the truth, to separate people into the ‘just’ (supporters of the strengthening of presidential power) and the ‘unjust’ (‘the anti-reformers’ and ‘all those reactionary Deputies’), and to establish some type of dictatorial regime (a regime of mob rule).”<sup>117</sup>

As the constitutional debate raged on, the Congress met again in March 1993.<sup>118</sup> The leader of parliament warned that Yeltsin's appeals to the people's constituent power “devalue the existing Constitution, destabilize the political situation . . . [and] have a certain logic, which consists, apparently, in implying that the potential for carrying out ultraradical reforms by

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115. *Id.* at 2–3.

116. *Compromise Forged, Rammed Through Congress*, in 44 CURRENT DIG. OF THE POST-SOVIET PRESS, Jan. 13, 1993.

117. Ruslan Khasbulatov, *The Congress of People's Deputies and the Referendum*, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, Feb. 10, 1993, at 2, 7–8 (translating *Rossiiskaya Gazeta*, Jan. 10, 1993, at 2).

118. *Ninth Congress Opens, Hears Top Leaders*, in 45 CURRENT DIG. OF THE POST-SOVIET PRESS, Apr. 28, 1993, 1–5.



constitutional, democratic methods have been exhausted.”<sup>119</sup> The Congress responded by stripping Yeltsin of his extraordinary powers,<sup>120</sup> reducing the Russian Presidency to its textual role as head of the executive branch in a formal semi-presidential, separation-of-powers system.<sup>121</sup>

Yeltsin refused to accept this arrangement. In a March 20th televised speech, he called for “special administrative rule, a condition in which the Supreme Soviet and the Congress of People’s Deputies would be subordinated to the president and would not have the right to cancel his decrees or to pass laws contradicting them.”<sup>122</sup> In support of this coup, he argued that the Congress was undermining the people’s ability to realize their constituent power:

The eighth Congress was, in point of fact, a dress rehearsal for revenge by members of former Party nomenklatura. They simply want to deceive the people. We hear them lie in the oaths of loyalty to the Constitution that they continually take; from Congress to Congress, that document is bent and reshaped in their own interests, and blow after blow is dealt to the very foundation of the constitutional system of popular sovereignty [(*narodovlastie*)].<sup>123</sup>

This move, however, met stiff resistance; the existing constitutional rules still commanded respect. Most importantly, the head of the Russian Armed Forces spoke out against Yeltsin’s speech in a hastily convened session of the Presiding Committee of the Supreme Soviet, saying that the Armed Forces would not participate in political infighting and would follow the constitution.<sup>124</sup> The Constitutional Court convened a special ses-

119. *Speech by R.I. Khasbulatov, Chairman of the Russian Federation Supreme Soviet*, 44 CURRENT DIG. OF THE POST-SOVIET PRESS, Apr. 7, 1993, at 1 (translating ROSSIISKAYA GAZETA [ROS. GAZ.], Mar. 11, 1993, at 1).

120. SAKWA, *supra* note 89, at 49.

121. *Id.*

122. ROY MEDVEDEV, POST-SOVIET RUSSIA: A JOURNEY THROUGH THE YELTSIN ERA 96 (George Shriver ed. and trans., 2000).

123. *Boris Yeltsin Offers The Country a Peaceful Way Out Of The Crisis*, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, Apr. 21, 1993, at 1 (translating ROSSIISKIYE VESTI [ROS. VESTI], Mar. 23, 1993, at 1–2).

124. MEDVEDEV, *supra* note 122, at 97. According to Medvedev, Yeltsin had taped the speech on the morning of March 20th and had distributed tapes to the foreign embassies before consulting his advisors. The secretary of Yeltsin’s Security Council, Yuri Skokov, refused to endorse the new decree and tried to persuade Yeltsin not to take this step. *Id.*

sion on March 21st and, by the morning of March 22nd, had declared Yeltsin's speech unconstitutional.<sup>125</sup> The Congress also met on March 21st and called an emergency session for March 26th.<sup>126</sup> Yeltsin backed down when he saw that his attempt at a rupture in legality was not going to be successful; the published decree from his speech on March 24th deleted any mention of "special administrative rule."<sup>127</sup>

The Congress convened a special session on March 28th to consider Yeltsin's impeachment and the referendum.<sup>128</sup> In Red Square, Yeltsin gave a speech to a crowd of supporters claiming that the impeachment vote did not matter because he would only submit to the "verdict of the people."<sup>129</sup> 66 percent of the deputies called for his impeachment, uncomfortably close to the 75 percent needed. The deputies also voted to hold a referendum on April 25, 1993.<sup>130</sup> Yeltsin's political luck had held; he now would have his chance to appeal to the limitless constituent power of the people.

#### 4. The April Referendum

The Congress approved four questions for the April 25th referendum, asking the Russian people:<sup>131</sup>

1. Do you have confidence in Boris Yeltsin, the President of Russia?
2. Do you approve of the social and economic policy of the President of Russia and of Russia's government since 1992?
3. Do you consider early presidential elections necessary?
4. Do you consider early elections for the full Parliament necessary?

After a dispute between parliamentary members and the president, the Constitutional Court ruled that the first two questions did not have "legal significance" and therefore would not

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 99.

129. *Id.*

130. *Id.*

131. *Id.* at 101.

make any legal changes to the constitution.<sup>132</sup> Yeltsin's team, however, ignored this decision. For them, a mandate from the people transcended any pre-existing rules or institutions. As one of Yeltsin's closest constitutional advisors, Sergei Shakhrai, stated "[i]f the president receives a vote of confidence on the first referendum question while on the fourth question the electorate votes for early elections for the People's Deputies, he will fully implement the provisions in his March 20 televised address to the people."<sup>133</sup>

After a fierce political campaign, 58.05% of voters in the referendum expressed their confidence in Boris Yeltsin's leadership.<sup>134</sup> Despite the Constitutional Court's decision, Yeltsin's team immediately capitalized on these results. Yeltsin proclaimed that "[t]he Russian Soviet Federation Socialist Republic has been peacefully replaced by the Russian Federation. The state has changed its legal identity,"<sup>135</sup> A key Yeltsin advisor held a press conference and proclaimed that the Congress could no longer remove the president from his post, force the government to resign, or adopt a new constitution.<sup>136</sup> Asked what would happen if the Congress failed to comply, he said "[t]he president and the government received a vote of confidence in the referendum. They will conduct the economic reform on the basis of their own decisions."<sup>137</sup> The message from the Yeltsin Administration was clear—no pre-existing institution or rule could limit the supreme force of the Russian people's constituent power.

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132. Postanovlenie Konstitutsionnogo Suda Rossiiskogo Federatsii, Apr. 21, 1993. In VKS, No. 2-3, pp. 38-44 (1994).

133. Viktor Kozhemyako, *Threat Of A State Of Emergency*, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, May 19, 1993, at 9 (translating *Pravda*, April 24, 1993, at 1).

134. Georgy Ivanov-Smolensky, *According To The Latest Data From The Central Electoral Commission, 58.05% Of Russian Citizens Participating In The Referendum Cast Their Votes For Boris Yeltsin*, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, May 26, 1993, at 1 (translating *Izvestia*, Apr. 28, 1993, at 2).

135. Vasily Kononenko, *President Of Russia Begins Promised Changes By Presenting Draft of New Constitution*, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, May 26, 1993, at 7 (translating *Izvestia*, Apr. 30, 1993, at 1-2).

136. *Sergei Shakhrai: The Deputies Must Repeal Their Most Recent Decisions*, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, May 26, 1993, at 3-4 (translating ROS. VESTI, Apr. 28, 1993, at 1).

137. *Id.*

To realize his popular mandate and formalize its transformative effects, Yeltsin convened an appointed constitutional convention. Yeltsin saw this extralegal body, which unlike the Congress was unelected, as a kind of proto-legislature that would replace the sitting parliament.<sup>138</sup> He commented that “[i]t seem[ed] to [him] that the constitutional convention can be transferred into a Federation Council and will be one of the houses of parliament.”<sup>139</sup> Parliamentary delegates were not welcome. For instance, after trying to take the podium in the early days of the Convention, Khasbulatov was shouted down by the audience, after which he led seventy representatives from local parliaments in walking out and in calling the conference a sham.<sup>140</sup> The sessions of the Constitutional Convention were closed, and only the working commission could approve changes to the constitution. The working commission was a smaller body comprised of Yeltsin’s closest advisors and regional executives who saw Yeltsin’s desire to eliminate legislative power as a way of increasing their own power in the regions.<sup>141</sup>

### 5. Legitimizing Extra-legality

The Constitutional Convention eventually produced a constitution that formalized the Yeltsin Administration’s authoritarian vision for Russia’s constitutional system. In order to avoid any parliamentary checks, the Constitutional Convention placed the president above the system of separated power.<sup>142</sup> As the embodiment of the people and the head of the unitary state, the president was the “guarantor” of the constitution and en-

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138. *Vlasti posle referendum* [The President names the day of the Constitutional Convention], KOMMERSANT, VLAST, (Russ.) May 12, 1993.

139. *Id.*

140. AHDIEH, *supra* note 100, 59.

141. William Partlett, *Separation of Power Without Checks and Balances: The Failure of Semi-Presidentialism and the Making of the Russian Constitutional System, 1991–1993*, in THE LEGAL DIMENSION IN COLD WAR INTERACTIONS: SOME NOTES FROM THE FIELD 129 (William Simons & Tatiana Borisova eds., 2012).

142. *Id.* at 129–34 (describing the Yeltsin Administration’s intention of raising the president above the system of separated powers).

sured the harmonious interaction of the branches.<sup>143</sup> The text contained very few limitations on presidential power.

Unsurprisingly, neither parliament nor the regional parliaments were eager to ratify this new constitution. Refusing to compromise with the parliament, which had written its own draft constitution based on Western constitutionalism, Yeltsin issued a decree on September 21, 1993 disbanding the Russian Parliament and all regional parliaments, and prohibiting the Constitutional Court from meeting.<sup>144</sup> The decree suspended any parts of the existing constitution that contradicted the decree. The decree claimed legitimacy from the parliament's "direct opposition to the will of the people, reflected in the referendum of April 25, 1993. . . [which] had the highest possible legal force across the entire Russian nation."<sup>145</sup> Yeltsin was making the classic constituent power argument: Both the parliament and constitution under which it drew its powers were illegitimate because they had opposed the people's sovereign constituent power.

As they had done in March, both parliament and the Constitutional Court reacted immediately. The Constitutional Court declared Yeltsin's decree unconstitutional and authorized the legislature to impeach Yeltsin under the existing constitution for attempting to illegally disperse a lawfully enacted representative body.<sup>146</sup> The parliament swore Aleksandr Rutskoi in as the new president and he began issuing decrees.<sup>147</sup> President Rutskoi also called for a mass strike to resist Yeltsin's unconstitutional actions, and a tense standoff ensued. Yeltsin, in his

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143. See Sergei Chugayev, *S. Shakhrai on The New Constitution*, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, June 2, 1993, at 6 (translating *Izvestia*, Apr. 30, 1993, at 2).

144. MEDVEDEV, *supra* note 122, at 105–6.

145. *Id.*; Ukaz No. 1400: O poetapnoi konsitutsionnoi reforme v Rossiiskoi Federatsii [Decree Number 1400: About Phased Constitutional Reform in the Russian Federation], SOBRANIE AKTOV PREZIDENTA I PRAVITEL'STVA ROSSIISKOI FEDERATSII [SAPP] [Collection of Acts of the President and Government of the Russian Federation] Sept. 21, 1993, No. 39, Item 3597, p. 3912. William Partlett, Reassessing the Founding of the Russian Constitutional Order, Presentation at the University of Helsinki, Institute of International Economic Law Seminar: Russian Law at the Crossroads: Legal Scholarship and Practice in Contemporary Russia (Oct. 28–29, 2010) (transcript available at <http://www.helsinki.fi/katti/RussianLaw-PRESENTATIONS/Partlett.pdf>).

146. MEDVEDEV, *supra* note 122, at 106–07.

147. *Id.* at 107.

own memoir, remembered how close he was to losing control of the country at this point.<sup>148</sup>

As power hung in the balance, Yeltsin's team worked furiously to establish the legitimacy of his dissolution of parliament and proroguing of the Constitutional Court both domestically and internationally. The central argument in this effort was that President Yeltsin had acted in accordance with the constituent power and therefore his actions had been legitimate, if not technically legal.<sup>149</sup> For instance, the Ministry of Justice issued a statement after the dissolution of parliament seeking to justify Yeltsin's actions: "[Although the president] acted beyond the legal framework, he acted in accordance with the constitutional principles of government by the people, and to protect the will of the people."<sup>150</sup>

Yeltsin also sought to shore up his international backers. In a speech to an audience in the United States, one of Yeltsin's advisors attacked the Russian Parliament for defying the people. He claimed:

[T]he Congress of People's Deputies [parliament] simply was unable to comprehend any rule of law higher than constitutional law, and that the Congress is unable to distinguish constitutional law from constitutional principles. The principles expressed in the current Constitution have never achieved the level of being 'constitutional.' Instead, the Constitution of the Russian Federation itself might be unconstitutional. This idea is based upon the simple notion that the current Constitution expresses principles that are in direct conflict with the will of the Russian people.<sup>151</sup>

In contrast to Yeltsin's failed coup attempt in March, Yeltsin's September decree was far more successful in marshaling support amongst key Yeltsin constituencies in three ways. First, Yeltsin's "victory" in the April referendum helped him obtain key support from the most powerful player in the international community: the United States. During the tense standoff between Yeltsin and the parliament, United States

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148. Boris N. Yeltsin, ZAPISKI PREZIDENTA [NOTES OF A PRESIDENT] 381 (N.N. Kudriavtseva & B.D. Minaev eds., 1994).

149. See *infra* notes 170–71.

150. Statement of the Ministry of Justice at the Constitutional Meeting, (Russ.). *Informatsionnyi Biulleten'* No. 2 (1993), 26.

151. Alexander Yakovlev, *Russia: The Struggle for a Constitution*, 7 EMORY INT'L L. REV. 277, 291 (1993).

officials gave their full backing to Yeltsin, arranging for a large economic package to help support him.<sup>152</sup> United States government officials used the language of constituent power-based, extraordinary politics to justify this support. The Senate majority leader, George Mitchell of Maine, said that Yeltsin's actions were justified because they were "consistent with the views of the overwhelming majority of the Russian people."<sup>153</sup> Lee Hamilton, chairman of the House Foreign Affairs Committee, described the existing Russian Constitution as "unworkable" and that the April referendum "stated the clear preference of the Russian people for early elections and for the Yeltsin reforms."<sup>154</sup>

Second, key opinion leaders in the United States media also drew on the language of constituent power to justify Yeltsin's actions. A New York Times editorial supported Yeltsin's actions:

Mr. Yeltsin can claim a degree of rough-and-ready democratic legitimacy for his decrees. His 1991 election as President represented a fuller democratic choice than the 1990 parliamentary elections, in which many Kremlin-endorsed candidates ran unopposed. Just this past April, a national plebiscite conferred a fresh vote of confidence on the President and, most importantly, endorsed the early dissolution of Parliament. Given the lack of constitutional clarity, that vote gives Mr. Yeltsin moral authority to act as he did.<sup>155</sup>

Another influential New York Times columnist, Serge Schmemmann, relied on the concept of popular constitution-making to describe, how "a constitution itself could be 'unconstitutional' if it served only a small clique, that 'the people' was not only a rhetorical flourish, that a popularly elected president might have higher moral authority than a legal but dysfunctional assembly."<sup>156</sup>

Third, Yeltsin also enjoyed domestic support. A 1993 public survey found that 50% of Russians believed that Yeltsin had

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152. Thomas L. Friedman, *Showdown in Moscow; U.S. to Speed Money to Bolster Yeltsin*, N.Y. TIMES, Sept. 23, 1993, at A13.

153. *Id.*

154. *Id.*

155. Editorial, *Russia: A Democrat's Coup*, N.Y. TIMES, Sept. 22, 1993, at A26.

156. Serge Schmemmann, *In Russia, Legitimacy Remains an Elusive Goal*, N.Y. TIMES, Sept. 26, 1993, at E1.

been justified in using military force to “control the situation.”<sup>157</sup> Most importantly, as the regional assemblies remained largely on the sidelines, Defense Minister Pavel Grachev reluctantly complied with Yeltsin’s order to suppress street level disturbances and forcibly disband the parliament.<sup>158</sup> Only a few thousand Russians took to the streets in support of the existing constitutional legality; Yeltsin’s attempts to delegitimize the previous system had proven successful.

## 6. An Authoritarian Constitution

As Yeltsin assumed his position as dictator in the absence of an elected parliament or constitutional court, he quickly worked to solidify his new position by ratifying a new constitution. Consequently, he signed a decree stating that he would place a draft constitution before the Russian people in a nationwide referendum set for December 12, 1993.<sup>159</sup> He once again sought to justify this decision by appealing to the constituent power of the people:

[r]ecognizing the unshakable nature of people’s rule as the foundation of the Russian Federation’s constitutional system, cognizant of the fact that the repository and sole source of power in the Russian Federation is its multinational people, and with a view to implementing the people’s right to directly resolve the most important questions of the life of the state . . .<sup>160</sup>

Yeltsin published the official Draft Constitution on November 9, 1993.<sup>161</sup> Although many western commentators focused on

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157. Survey conducted by LABADA-TSENTR, *Rossiiane o sobytiakh 3-4 oktiabria 1993 goda* [Russians on the events of October 3-4, 1993] (Oct. 3, 2005), available at <http://www.levada.ru/press/2005100301.html>.

158. JAMES H. BRUSSTAR & ELLEN JONES, NATIONAL DEFENSE UNIVERSITY, *THE RUSSIAN MILITARY’S ROLE IN POLITICS* 24–27 (1995).

159. *Decree of the President of the Russian Federation: On Holding a Nationwide Vote on the Draft Constitution of the Russian Federation*, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, Nov. 17, 1993, at 7 (translating ROS. VESTI, Oct. 19, 1993).

160. *Id.*

161. Serge Schmemann, *Yeltsin Approves New Constitution Widening His Role*, N.Y. TIMES, Nov. 9, 1993, at A1; Victoria Schwartz, *The Influences of the West on the 1993 Russian Constitution*, 32 HASTINGS INT’L & COMP. L. REV. 101, 110 (2009). The full text of the Draft Constitution can be found in 45 CURRENT DIG. OF THE POST-SOVIET PRESS, Dec. 8, 1993, 4–16.



its long list of individual rights, the key provisions ensured that there were no constitutional limits on presidential power.<sup>162</sup> The presidency remained outside the tripartite system of separated powers, exercising a fourth type of "presidential power," and enjoyed significant control over each of the three subordinate branches of government.<sup>163</sup> First, the President had a virtual monopoly over executive power. Article 111 (4) of the Constitution provided that if the lower house of the parliament (the *Duma*) rejected the president's choice of Prime Minister to lead the government, the president was then required to appoint a Prime Minister and dissolve the *Duma*.<sup>164</sup> Furthermore, the president had the power to annul any executive branch edicts.<sup>165</sup>

Second, the president held significant constitutional power to control the legislative branch of the government. This was particularly true with regard to the upper house of the Russian Parliament, the Federation Council.<sup>166</sup> Article 95 (2) stated that the Federation Council was comprised of "two representatives from each of Russia's subjects: one from the executive branch and one from the legislative branch."<sup>167</sup> Furthermore, according to Article 77 (2), the bodies of executive power in the federal center and in the regions formed a "unified system of executive power."<sup>168</sup> Because of the president's monopoly over the executive branch, one-half of the "senators" in the Federation Council were therefore subordinated to the president. This subordination was deliberate because Yeltsin had originally seen the Federation Council as only a consultative body that would help the Russian president exert power in the regions.<sup>169</sup> In order to

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162. See, Partlett, *supra* note 141, at 105, 106-07.

163. The full text of the Draft Constitution can be found in 45 CURRENT DIG. OF THE POST-SOVIET PRESS, Dec. 8, 1993, 4-16.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. See Aleksei Zuichenko & Lev Bruni, *Parliament: The Council of the Federation Will Be Formed by the Voters*, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, Nov. 10, 1993, at 16-17 (translating *Sevodnya*, Oct. 12, 1993, at 1). Yeltsin's Decree Number 1400 disbanding the parliament initially stated that the upper house would be made up automatically of the heads of the executive and legislative branches of government in the regions. Most of these executive representatives were Yeltsin appointees. However, because of

ensure that the Federation Council would remain in this simply advisory role, Yeltsin personally intervened in the final days before releasing the draft and “insisted that the Federation Council be “formed” rather than “elected” as originally envisioned by the Constitutional Convention.<sup>170</sup> In making this change, Yeltsin hoped to ensure that this powerful body, which had the power to veto bills passed by the lower house and to confirm all judicial appointments, would stay out of party politics and remain subordinated to the presidential apparatus.<sup>171</sup> As the Chairman of the Federation Council said in 1999, “the upper house of the Federal Assembly is an element of stability; in a period of abrupt change it protects the country from social upheaval. For the first time in the history of Russia, a non-political organ has emerged which influences state policy and stands by the people.”<sup>172</sup>

Third, the president had full control over the judicial branch of government. The president appointed all of the judges to both the Supreme Court and the Constitutional Court with the consent of the Federation Council.<sup>173</sup> Because the Federation Council was under presidential control, the president’s appointment power was essentially unchecked.

On December 12, 1993, this authoritarian constitution received a slight majority in a national referendum. In the aftermath of constitutionalizing his vision of a presidential republic, Yeltsin used the language of popular constitution-making to describe the ratification, declaring, “[a] popular mandate to strengthen the system of government has been received.” “No matter whom the voters cast their ballots for, they were agreed on one point: Russia needs strong rule, Russia needs order, people are irritated by the amorphous nature of power, they are tired of inconsistent and halfhearted decisions, and they

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the widespread opposition amongst the heads of the legislative branches, he temporarily decided that elections would yield a more pliant group of legislative representatives in the Federation Council. *See id.*

170. *See* PAUL CHAISTY, LEGISLATIVE POLITICS AND ECONOMIC POWER IN RUSSIA 104 (2006).

171. REMINGTON, *supra* note 96, at 181 (“[T]he Federation Council would not be party run or party oriented. Instead, it would be overseen by a chairman and deputy chairmen.”).

172. CHAISTY, *supra* note 170, at 105.

173. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 83 (Russ.).

are exasperated by the rise in crime.”<sup>174</sup> Yeltsin’s aides were not shy about the nature of the constitutional system that they had created. One aide

admitted that the illusion of a smooth and swift transfer from a dictatorship to a free-market democracy is gone. . . . Now the talk is of a transitional regime of ‘enlightened authoritarianism’ or ‘guided democracy’ or some such hybrid that makes no secret of the need for a prolonged concentration of power in the presidency.”<sup>175</sup>

### *B. Belarus and Kazakhstan*

Kazakhstan and Belarus initially ratified their post-Communist constitutions through parliamentary constitution-making. As the success of Yeltsin’s extralegal actions resonated across the post-Soviet space, however, presidents in these countries, who shared Yeltsin’s disdain for limitations on presidential power, exploited the rhetoric and mechanisms of popular constitution-making to assert, and legitimize, their own presidentially dominated, authoritarian constitutions.

#### 1. Belarus

The Belarusian Parliament drafted Belarus’s first post-Soviet constitution. The process began in November 1991, when the parliament’s Constitutional Commission submitted a draft constitution to the Belarus Parliament.<sup>176</sup> The most debated aspect of the constitution surrounded the creation of an elected president. On one side, the Speaker of the Belarus Parliament, himself a frontrunner for the presidency, warned against introducing a president for “at least another three years” in order to ensure that “the parliament should shape up and help strengthen existing democratic institutions.”<sup>177</sup> On the other, nationalist political parties argued that, “[e]conomic, legal, and administrative chaos required a strong state and a strong executive.”<sup>178</sup>

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174. Vera Kuznetsova, *Will a Fundamentally Reformed Government Be Able to Conduct Fundamental Reforms?*, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, Jan. 19, 1994, at 1 (translating NEZAVISIMAYA GAZ., Dec. 23, 1993).

175. EUGENE HUSKEY *supra* note 97, at 32.

176. GÖNENÇ, *supra* note 59, at 190.

177. Alexander Lukashuk, *Constitutionalism in Belarus: A False Start*, in 1 DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE: INSTITUTIONAL ENGINEERING 293, 300 (Jan Zielonka ed., 2001).

178. *Id.* at 301.

After numerous drafts, on March 15, 1994, the parliament finally ratified a compromise creating a strong president by a margin of four votes.<sup>179</sup> The newly established office of the president was given significant constitutional powers, becoming the head of state and the head of the executive.<sup>180</sup> This new constitution also created an independent parliament, which was the “highest representative, standing, and sole legislative body of state power” and had the power to elect the judges to the Constitutional Court.<sup>181</sup> Most importantly, the president could not dissolve the parliament.<sup>182</sup>

Soon after ratification of the new constitution, Belarus elected Aleksandr Lukashenko as its first President. Lukashenko was no democrat, however, and shared Yeltsin’s view that political power should be concentrated in the Presidency. As parliament became a major source of opposition to Lukashenko’s policies, he increasingly moved to limit parliamentary power. In a 1995 interview on state media, President Lukashenko argued that Belarus had a similar history to Germany and therefore needed a strong leader to bring it out of its profound political and economic crisis. He stated that “German history teaches that the leading role of the president at [that] stage in history was critical and indisputable . . . .”<sup>183</sup> Echoing President Yeltsin’s conception of the presidency, Lukashenko stated later in a speech that his ideal constitution had “three branches of power; legislative, executive, and judicial. And all these branches grow on the tree of the presidency.”<sup>184</sup>

A year after his election, Lukashenko began to draw on the rhetoric and mechanisms of popular constitution-making to advance his authoritarian vision of a presidentially dominated constitutional system. “In the spring of 1995, [he] demanded the right to dissolve parliament,” and illegally added that issue to a national referendum on the national symbols of Belarus.<sup>185</sup> He also began issuing decrees that encroached on parliamentary powers, justifying these actions on the idea that the president cannot issue an illegal decree because of his status as the

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179. *Id.* at 302.

180. *Constitution Watch: Belarus*, 3 E. EUR. CONST. REV. 3 (1994).

181. Lukashuk, *supra* note 177, at 302–03.

182. *Id.* at 304.

183. DAVID MARPLES, *BELARUS: A DENATIONALIZED NATION* 79 (1999).

184. Lukashuk, *supra* note 177, at 309.

185. *Id.*

direct representative of the people.<sup>186</sup> A former Belarusian Constitutional Court Judge described how “lawyers in the president’s circle referred to the ‘theory of legal laws.’”<sup>187</sup> This approach was based on the belief that “the president automatically knew better because he was popularly elected” and that “[i]f a law contradicts the public mood and the intentions of the president, on the other hand, it is ‘non-legal’ and may be ignored.”<sup>188</sup>

Parliament resisted Lukashenko’s attempts to weaken its powers. It issued a proclamation that Lukashenko’s statements regarding “his unwillingness to obey the constitution and the law, his disrespect and insult of other branches of power, first of all the Supreme Soviet, his promises to introduce ‘direct presidential rule’ show that the process of damaging the foundations of law and civic stability has begun.”<sup>189</sup> In 1996, parliament promoted a “Movement in Support of the Constitution,” which demanded “support for the rule of law and the decisions of the Constitutional Court.”<sup>190</sup> The previously disparate political parties in parliament also began to coalesce in opposition to Lukashenko’s utter disregard for legality.<sup>191</sup> Civil society was beginning to rally around Belarus’ ordinary political institutions. In May 1996, the parliament threatened to refuse to approve Lukashenko’s ministers; in return, Lukashenko appointed them anyway.<sup>192</sup>

As in Russia, the newly created Belarusian Constitutional Court worked alongside parliament to counter President Lukashenko’s actions, and “[i]n 1995, the Court examined 14 Presidential decrees and ruled 11 of them illegal.”<sup>193</sup> In response, Lukashenko pledged to ignore Constitutional Court decisions and demanded that the Constitutional Court Chief Justice resign.<sup>194</sup> Several months later, “Lukashenko issued a de-

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186. Alexander Lukashuk, *Interview with Former Constitutional Court Justice Mikhail Chudakou*, 6 E. EUR. CONST. REV. 63, 64 (1997). See GÖNENC, *supra* note 59, at 190–92.

187. Lukashuk, *supra* note 186, at 64.

188. *Id.*

189. Lukashuk, *supra* note 182, at 309–10.

190. *Id.* at 312.

191. *Id.*

192. *Id.*

193. *Id.* at 311.

194. MARPLES, *supra* note 183, at 79.

cree “obliging government and local authorities to carry out all his previous decrees and disregard the rulings of the Constitutional Court.”<sup>195</sup>

As the standoff devolved into a constitutional crisis, Lukashenko exploited the rhetoric of popular constitution-making and called for a referendum to ask the people, among other questions, whether Belarus should adopt the 1994 constitution with “those changes and additions proposed by President Lukashenko?”<sup>196</sup> The changes included new powers for the president to appoint the majority of Constitutional Court judges and the creation of a bicameral legislature where the president would appoint one-third of the legislators in the upper house.<sup>197</sup> Parliament countered by adding its own proposed changes to the constitution that would abolish the post of president altogether.<sup>198</sup>

Seeking to serve as intermediary, the Constitutional Court issued a ruling that neither amendment should be decided by referendum, warning that Belarus “is a young state and such hasty and ill-thought out moves can only worsen the political situation.”<sup>199</sup> The chairman of the Constitutional Court also cautioned parliament about the dangers that Lukashenko’s changes posed to the constitution, stating “[t]omorrow we will have a totalitarian regime in the centre of Europe—complete with a castrated parliament and Constitutional court.”<sup>200</sup>

As the crisis deepened and the likelihood of violence increased, Russian officials stepped in to help broker a compromise. These officials, however, ended up taking a pro-Lukashenko stance. Yeltsin called the Speaker of the Belarusian Parliament and warned him “not to mess with the president.”<sup>201</sup> The powerful mayor of Moscow and the leader of one of the Parliament’s largest parties sided with Lukashenko. Ultimately, Lukashenko “agreed that the referendum’s results would be consultative rather than binding [and] parliament

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195. Lukashuk, *supra* note 177, at 311.

196. *Id.* at 313.

197. *Id.*

198. *Id.* at 314.

199. *Id.*

200. *Id.* at 315.

201. *Id.*

agreed to halt the impeachment proceedings" and schedule the referendum.<sup>202</sup>

Prior to the referendum, Lukashenko saturated the official mass media with pro-presidential propaganda.<sup>203</sup> This media strategy worked; ultimately, 77.6% of the populace supported Lukashenko's pro-presidential changes to the constitution.<sup>204</sup> Although these results were technically non-binding, it was impossible to resist the bare political logic of a broad-based popular mandate for presidential power. In political reality, the legitimacy of a popular mandate obliterated any attempts to maintain legality. Citing the results of this referendum, Lukashenko immediately dissolved the parliament.<sup>205</sup>

Ruling as a dictator, Lukashenko scheduled a new referendum for November 1996 to introduce an entirely new constitution.<sup>206</sup> This constitution would create, as Lukashenko maintained, a "real separation of powers."<sup>207</sup> This nation-wide referendum was also a success for the president, as a majority of the populace ratified a new constitution "establishing a semi-authoritarian regime."<sup>208</sup> Lukashenko's new constitution gave the Belarusian president powers similar to those of the Russian president, including a virtual monopoly of executive power, a stronghold on the upper house of the parliament, and complete control of the judicial branch. Lukashenko therefore had followed the Yeltsin model, making wide use of the mechanisms and rhetoric of popular constitution-making to justify his elimination of parliament and the ratification of a presidentially dominated, authoritarian constitution.

## 2. Kazakhstan: Managed Democracy

In contrast to Belarus and Russia, Kazakhstan's president, Nursultan Nazarbaev, dominated the early period of constitution-making. The former leader of the Kazakh Communist Party, Nazarbaev had made a quick transition to electoral politics in the post-Communist period. In December 1991, 95% of Ka-

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202. Lukashuk, *supra* note 177, at 315–17.

203. *Id.* at 315.

204. GÖNENÇ, *supra* note 59, at 192.

205. *See id.*

206. *Id.*

207. *Id.*

208. *Id.*

zakhs elected Nazarbaev to the presidency, largely because no one had been permitted to run against him.<sup>209</sup>

After Kazakhstan gained independence in 1992, President Nazarbaev understood the importance of writing a new constitution and appointed a working commission to draft one.<sup>210</sup> Nazarbaev was not a proponent of pluralistic electoral democracy. Instead, he envisioned the president as the manager of political life and valued economic reform before democratic reform, stating that, “[i]n this vitally important sphere [of the economy] there is no room for an orgy of democracy.”<sup>211</sup> He went on to comment that “the stabilization of the economy and the transition to the market demand a categorical ban on any party, political, or ideological interference in this process.”<sup>212</sup>

Nazarbaev’s working commission produced a draft constitution in June 1992, establishing a strongly presidential form of government.<sup>213</sup> President Nazarbaev’s appointed commission tightly controlled the debate throughout, the most contentious question being whether Kazakhstan’s national language would be Russian or Kazakh.<sup>214</sup> The Kazakh Parliament obediently adopted this draft on January 28, 1993.<sup>215</sup> This new constitution established a system of government with a very strong president, positioning him as the guarantor of rights and liberties and of the constitution itself.<sup>216</sup> The constitution created a parliament but gave the president wide appointment power “from the chief executives responsible for implementation of policy down to the lowest level of government.”<sup>217</sup> Although weak, the parliament still possessed the right to amend the

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209. JAMES MINAHAN, *MINIATURE EMPIRES: A HISTORICAL DICTIONARY OF THE NEWLY INDEPENDENT STATES* 136 (1998).

210. Steven Kanter, *Constitution Making in Kazakhstan*, in 5 *INT’L LEGAL PERS.* 65, 67 (1993).

211. Martha Brill Olcott, *Nursultan Nazarbaev and the Balancing Act of State Building in Kazakhstan*, in *PATTERNS IN POST-SOVIET LEADERSHIP* 169, 180 (Timothy Colton & Robert Tucker eds., 1995) (citations omitted).

212. *Id.*

213. Kanter, *supra* note 210, at 76, 88.

214. *Id.* at 76.

215. *Id.* at 65–66.

216. *Id.* at 88.

217. Olcott, *supra* note 211, at 179.



constitution by a supermajority, and was the highest representative body in the nation.<sup>218</sup>

As time went on, the Kazakh Parliament began to exercise its limited powers. In particular, it began "to develop some of the fundamental characteristics of an institution capable of providing the checks and balances essential to the functioning of a pluralistic society."<sup>219</sup> Underlying this parliamentary opposition was unhappiness with Nazarbaev's macroeconomic policy, which had led to a "flailing economy that sported a 2,500 percent annual inflation rate."<sup>220</sup>

In May 1994, the parliament took the unprecedented step of giving Nazarbaev's Prime Minister a vote of "no confidence."<sup>221</sup> In July, parliament was able to override Nazarbaev's veto of two consumer-friendly bills.<sup>222</sup> The Speaker of the parliament also began to see an important role for the parliament in Kazakhstan's system of political government. He "began holding the government accountable for its actions and decrees, claiming that they must have a basis in law and that parliament had to propose and pass new legislation rather than leave the initiation of legislation to the executive branch."<sup>223</sup> He also called on parliamentary members to defend a parliamentary tradition in Kazakhstan that "stretch[ed] back to the councils of *biis* of the fifteenth to eighteenth centuries."<sup>224</sup> Additionally, the parliament created a new party to ensure respect for the existing constitution called the "Legal Development of Kazakhstan."<sup>225</sup> As in Russia and Belarus, the beginnings of a civil society were coalescing around the "ordinary" Kazakh parliament.

Nazarbaev had little patience for this growing parliamentary opposition. Instead of dispersing the parliament by force, however, Nazarbaev chose to cloak his actions in the language of popular constitution-making. His first strategy was to use his

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218. The constitution required a three-fourths majority for amendments "concerning the basis of the Constitutional system." KONSTITUTSIIA RESPUBLIKI KAZAKHSTAN (1993) [KONST. RK] [CONSTITUTION] art. 129 (Russ.); see *The Constitution of the Republic of Kazakhstan*, 5 INT'L LEGAL PERSP. 109 (1993).

219. OLCOTT, *supra* note 91, at 109.

220. *Id.* at 101.

221. *Id.* at 103.

222. *Id.* at 103–04.

223. *Id.* at 109.

224. *Id.*

225. See SALLY CUMMINGS, KAZAKHSTAN: POWER AND THE ELITE 26 (2005).

control of the Constitutional Court to dismiss the parliament “legally.”<sup>226</sup> Unlike Russia or Belarus, the first Kazakh Constitutional Court had close ties with the presidential administration.<sup>227</sup> After playing no role in Kazakh politics since its inception, the Court unexpectedly ruled on a major electoral claim.<sup>228</sup> This decision rendered the parliament invalid because “[a]lthough the complaint had been brought about a single voting district in Almaty, the constitutional court ruled that the entire 1994 parliamentary elections had been unconstitutional.”<sup>229</sup>

After the decision, Nazarbaev appeared before parliament and declared the nullification of parliament’s popular mandate.<sup>230</sup> He then disbanded parliament, turning off its power, water, and telephone, and sending in workmen to begin remodeling the building.<sup>231</sup> Ruling as a dictator, he then created his own handpicked People’s Assembly, which postponed the next presidential elections until 2000.<sup>232</sup> Then, “[c]laiming that he wanted to defer to the ‘popular will,’” he held a referendum on the postponement of presidential elections in April 1995.<sup>233</sup>

Nazarbaev then held another referendum to endorse the adoption of another constitution in August 1995, which “expanded presidential power at the expense of the legislature, which became a largely consultative body, with legislation initiated by the president.”<sup>234</sup> This new constitution eradicated any possibility of parliamentary checks on presidential power.<sup>235</sup> Although it is likely that Nazarbaev would have found a way to defeat his parliamentary opponents, Nazarbaev’s decision to follow this path suggests the importance of the language and mechanisms of popular constitution-making in legitimizing the elimination of parliament and the foundation of a presidential dictatorship.

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226. *Id.* at 25.

227. *See* OLCOTT, *supra* note 91, at 110–11.

228. *Id.* at 109–10.

229. *Id.* at 110.

230. *Id.* at 111.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 111–12.

235. *Id.* at 112.

## IV. THE IMPORTANCE OF PRE-EXISTING INSTITUTIONS OR RULES IN CONSTITUTION-MAKING PROCESS

Post-Communist constitution-making vividly shows how charismatic executives can strategically use the populist rhetoric and irregular mechanisms of popular constitution-making to marginalize ordinary political institutions and legality.<sup>236</sup> Relying on appeals to the constituent power, a force “that bursts apart, breaks, interrupts, unhinges any pre-existing equilibrium and any possible continuity,”<sup>237</sup> magnetic leaders have been able to convert a moment of popular endorsement into an opportunity to unilaterally reshape the institutional framework of the state and secure constitutional dictatorship.<sup>238</sup>

Captured by the revolutionary potential of popular constitution-making, theorists have therefore made a critical error: They have failed to grasp that post-authoritarian countries have weak institutions. In this environment, popular constitution-making can allow an individual or party to ignore existing institutions and unilaterally reorganize the institutional apparatus of the state in their interests by appealing to the “super-human, irresistible ‘general will’”<sup>239</sup> of the people’s constituent power (the nation). To avoid unilateral seizures of this constitution-making power, constitution-making must be grounded in stable institutions—even at the risk of weakening popular legitimacy.

Bruce Ackerman is guilty of this error. He dismisses charges that popular constitution-making can “degenerate into unspeakable tyranny with bewildering speed”<sup>240</sup> by pointing to the role of extraordinary political mechanisms in fostering a deep “dialogue between leaders and citizenry that finally succeeds in

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236. See HANNAH ARENDT, ON REVOLUTION 217–81 (1963). Hannah Arendt refers to these stable and spontaneous institutions as the “treasure” of the “revolutionary tradition.” *Id.*

237. ANTONIO NEGRI, INSURGENCIES: CONSTITUENT POWER 11 (1999). Canada’s Joel Colón-Ríos similarly argues that the people’s constituent power is the ideal basis for a democratic constitution. Joel Colón-Ríos, *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform*, 48 OSGOODE HALL L.J. 199, 199–203 (2010).

238. See ARENDT, *supra* note 236, at 217–18.

239. *Id.* at 54.

240. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 473–74 (1989).

generating broad popular consent for a sharp break with the received wisdom of the past.”<sup>241</sup> Popular constitution-making in the American Founding period, however, encouraged deep deliberation because of a strong network of state and local representative institutions. These institutions tightly controlled constitution-making, encouraging deliberation, negotiation, and compromise.<sup>242</sup> As Willi Paul Adams observed,

In the Whig theory of social contract, “the people” were the final authority to which all political power reverted in cases of flagrant abuse of delegated governmental power. But in the actual assumption of political power, no unit as vast and amorphous as “the people” could possibly act as the vehicle of the political process. It was instead the remarkably stable territorial units of towns, cities, counties, and colonies that took control.<sup>243</sup>

Modern post-authoritarian countries, however, do not have these networks of institutions to organize the people and constrain unilateral appeals to that amorphous people. As Steven Kotkin demonstrates, post-Communist collapse was not the result of stable institutional pressure from an organized civil society.<sup>244</sup> Instead, it was the product of a top-down implosion of the Communist party.<sup>245</sup> This kind of implosion is common in post-Cold War political change, and characterizes a number of

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241. *Id.*

242. KALYVAS, *supra* note 45, at 227–28. Andreas Kalyvas writes:

[T]he American revolutionaries were able to avoid the language and practice of absolute ruptures . . . [because] they relied on a pre-existing legal layer composed of royal and company charters, common law, and colonial pacts, which remained intact during the entire period of political foundation. By refusing to eliminate them, the American revolutionaries remained within the law even during such exceptional moments. They escaped the lawlessness and power vacuum that a complete break would have necessarily created. The preexisting legality was not broken; it was used as a foothold to secure the new beginning.

*Id.* at 227.

243. WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 27 (Rita Kimber & Robert Kimber trans., 2001).

244. STEVEN KOTKIN, *UNCIVIL SOCIETY: 1989 AND THE IMPLSION OF THE COMMUNIST ESTABLISHMENT*, xiv (2009).

245. *Id.*

political transformations in one-party states across Asia, including Indonesia, Taiwan, and South Korea.<sup>246</sup> Consequently, modern post-authoritarian societies must seek other ways to institutionalize popular power to avoid unilateral assertions of constitution-making power.

Post-Communist countries in Eastern Europe solved this problem by relying on the “ordinary” rules and institutions inherited from the Communist era. Although this solution undoubtedly sacrificed democratic legitimacy, this solution highlights a hidden advantage of a legacy of sham constitutionalism.<sup>247</sup> Given new life in free elections, this constitutional framework can provide a set of rules and institutions for refining and enlarging the voice of the people while also constraining unilateral appeals to an amorphous concept of a nation.<sup>248</sup>

The lessons of post-Communist constitutionalism remain highly relevant across the world. Indeed, in the midst of economic and political crisis, charismatic figures still deploy the mechanisms and rhetoric of constituent power to dismantle existing institutions and expand their personal power. In Ukraine, for instance, President Viktor Yanukovich—an advocate of a Russian style presidential system in Ukraine—called for a referendum to overcome parliamentary opposition and strengthen the role of the president in Ukraine’s political system.<sup>249</sup> Furthermore, in Venezuela, President Hugo Chavez has repeatedly sought to use the mechanisms and rhetoric of constitutional politics to strengthen his power.<sup>250</sup> Finally, the latest wave of authoritarian collapse in the Middle East has demonstrated a similar shortage of informal extralegal institutions that can channel popular participation, particularly for

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246. ROBERT W. COMPTON, *EAST ASIAN DEMOCRATIZATION: IMPACT OF GLOBALIZATION, CULTURE, AND ECONOMY* 181–89 (2000).

247. ARATO, *supra* note 56, at 142–43.

248. THE FEDERALIST 10 (Madison).

249. Mikhail Mihalisko, Maryana Drach & Robert Coalson, *Ukraine Court Bolsters Presidential Powers*, RADIO FREE EUROPE/RADIO LIBERTY (Jan. 10, 2010, 11:40 AM), [http://www.rferl.org/content/Ukraine\\_Rules\\_In\\_Favor\\_Of\\_Stronger\\_Presidential\\_Rule/2173534.html](http://www.rferl.org/content/Ukraine_Rules_In_Favor_Of_Stronger_Presidential_Rule/2173534.html).

250. Simon Romero, *Venezuelans Decide Whether to Give Chávez More Power*, N.Y. TIMES (Dec. 3, 2007), <http://www.nytimes.com/2007/12/03/world/americas/03venez-ih.html?fta=y>. See also David Landau, *Constitution-Making Gone Wrong*, ALABAMA L. REV. (forthcoming).

the secular parts of society.<sup>251</sup> In these countries, successful constitutional lawmaking also requires institutional-based constitution-making. In Egypt, the military's decision to set the guidelines for the constitutional lawmaking process is an important step toward constraining any attempts at unilateral assertion of power by the dominant party.<sup>252</sup>

The insights of constitutional politics in the former Communist world also shed important light on American constitutional law debates. In recent years, influential legal scholars have questioned whether Article V provides the only process for amending the United States Constitution.<sup>253</sup> Without Article V as a guide, however, is every potential process valid as long as it commands the direct voice of "the nation"? For instance, could a charismatic United States President at a time of crisis rewrite the United States Constitution and put it to a nationwide referendum?<sup>254</sup> The post-Communist experience shows the dangers of amending a constitution through a referendum; whether future drafters follow the procedures of Article V or not, the United States should continue to base constitutional change on stable representative institutions.<sup>255</sup>

In sum, the post-Communist constitutional experience reveals the dangers of grounding a new constitution on the unorganized and diffuse constituent power of "We the National Majority."<sup>256</sup> It therefore reminds us of a fundamental requirement for the constitution-making process: That there are external rules or institutions for ensuring the deep democratic deliberation and compromise needed for a successful constitutional or-

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251. Lisa Anderson, *Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt, and Libya*, 90 FOREIGN AFF. 2, 7 (2011).

252. See David D. Kirkpatrick, *Egypt's Military Expands Power, Raising Alarms*, N.Y. TIMES, Oct. 15, 2011, at A1; see also Ozan Varol, *The Democratic Coup d'état*, 53 HARV. J. INT'L L. 291 (2012).

253. See, e.g., Amar, *supra* note 29, at 1043–44, 1046; U.S. CONST. art. V.

254. Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Amar, *supra* note 29, at 1043–44.

255. Stable institutions help encourage compromise and negotiation, which help ensure a healthier process of democratic deliberation. See SUNSTEIN, *supra* note 2, at 6–8.

256. Henry Monaghan, *We the People(s), Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 174 (1996) (describing how he has "considerable doubts about the wisdom of constitution-making by 'We the Majority.'").

der.<sup>257</sup> The use of an inherited constitutional order is just one method of ensuring a stable institutional basis for constitution-making. Whatever method employed, however, it is difficult to avoid the simple conclusion that the process of constitutional lawmaking risks enabling constitutional dictatorship unless institutional constraints are placed on the process of constitutional creation.<sup>258</sup>

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257. DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3 (1990) (defining institutions as “rules of the game . . . or . . . humanly devised constraints.”).

258. Vicki Jackson describes how “the use of non-democratic, ‘independent’ elements to secure the guarantees of an interim or permanent constitution may also have an important role to play [in constitution-making] in deeply polarized settings.” *Supra* note 2, at 1295. In the United States, state legislatures have balked at calling a special Constitutional Convention under Article V of the Constitution for fear that it would be completely unconstrained. James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Process*, 30 HARV. J.L. & PUB. POL’Y 1005, 1010–11 (2007) (discussing need for external constraints to avoid constitutional dictatorship).