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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.1 The adherence to written constitutional rules that structure and limit the exercise of political power is central to this mission.2 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?3

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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. 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. 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.” In this constituent position, the people themselves become the author of constitutional rules, maximizing the democratic “legitimacy”


of these rules and transforming them into a form of higher law.\(^7\)

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.”\(^8\) 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.\(^9\)

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.”\(^10\) 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.”\(^11\) The relative success of this form of parliamentary

\(^7\) 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.


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.\(^\text{12}\)

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.\(^\text{13}\) 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.”\(^\text{14}\)

This Article will explore why popular constitution-making has led to constitutional dictatorship. Part I will detail the theoretical underpinnings of popular constitution-making.\(^\text{15}\) 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.\(^\text{16}\) 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 sidestep parliamentary opposition and push through “authoritarian constitutions” that concentrated vast power in their own hands.\(^\text{17}\) Part IV will conclude by stressing the importance of stable rules and institutions in constraining the constitution-making process.

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\(^{13}\) See infra Part III.


\(^{15}\) 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.18

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?19 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.”20

To address this question, theorists began by considering strategies for boosting the “democratic legitimacy” or “respect-worthiness” of a new democratic constitution.21 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.”22

20. ACKERMAN, LIBERAL REVOLUTION, supra note 5, at 47.
This author-based approach drew heavily on the concept of “constituent power” developed by the French theorist Emmanuel Joseph Sieyes. 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 constitue), such as a parliament, an executive, or courts. 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.
Popular constitution-making theory draws its inspiration from Sieyes’s belief that popular sovereignty is synonymous with the unitary concept of the nation. 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. 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” for a new democratic constitution. Illegal revolu-

(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).


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. 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. 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.”

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. This extraordinary process would help foster the le-

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 “[t]he 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 . . . .”

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

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. Although newly elected post-Communist legislatures were unlikely to legally authorize these irregular institutions, Ackerman was not worried. 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
authority arose only from its legal form. . . . As the revolu-
tionary years moved on, Americans insisted that the People
could deliberate on constitutional matters only in special bod-
ies whose very name—“convention”—denied that legal forms
could ultimately substitute for the engaged participation of
citizens. 41

Ackerman also argued that popular referendums should be
an important part of the constitution-making process. He be-
lieved that referendums echoed the spirit of the American Rev-
olution where the drafters “appealed for support from the Peo-
ple over the heads of existing governments.” 42 In particular, a
referendum would be critical in ensuring that the constitution
would serve as “a popular symbol of the revolutionary genera-
tion’s achievement” 43 and would capture a “mandate from the
people.” 44

To mobilize popular opinion around these irregular institu-
tions, Ackerman called for strong charismatic presidential
leadership. 45 In particular, Ackerman pushed for the constitu-
tionalization of presidential charisma to avoid a constitution
with “soft constitutional norms” that would be “too easy for a
parliamentary majority” to ignore. 46 Consequently, he encour-
aged 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 constitu-
tion. 47

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-

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).
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.”

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. He reasoned that conventions “promote the predominance of reason over interest” because “the pressure on speakers to produce impartial arguments may be especially strong in the constitutional setting, compared to ordinary legislatures.” 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.”

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.

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

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50. Id. (emphasis in original).  
out employing the mechanisms and rhetoric of popular constitution-making. 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.” 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.”

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.” The Hungarian Parliament rejected this option after the Constitutional Court ruled that the “constitution cannot be amended by referenda.” 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. 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.” Finally, in Poland, a center-right party “drummed up half-a-million signatures and demanded a parallel referendum on their version of

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.


58. Id.


60. Id. at 146.
The Polish parliament successfully blocked this attempt to appeal to the people through irregular processes. Instead, the Central and East European countries amended and established new constitutional orders by combining ordinary and extraordinary institutional mechanisms. 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. 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. 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.”

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

67. See Sanford, supra note 61, at 89–90.
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.
condemned easy paths to constitutional modification in Eastern Europe . . . and denounced more generally the ‘confusion’ between constitutional politics and ordinary politics characteristic of every post-Communist society.” 74 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.” 75 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.” 76 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.” 77 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. 78

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.” 79 Additionally, Jon Elster lamented Central and Europe-

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

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. 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.

Scholars have begun to acknowledge that mixing ordinary and extraordinary mechanisms in constitution-making presents an alternate route to constitutionalism. 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.” 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

82. ARATO, supra note 56, at 167–68.
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.”85 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.”86 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.”87 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.”88

III. POPULAR CONSTITUTION-MAKING AND AUTHORITARIAN CONSTITUTIONS

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<tr>
<th>Country</th>
<th>Drafter(s)</th>
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<tr>
<td>Russia</td>
<td>Presidentially appointed Constitutional Convention</td>
<td>Referendum</td>
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<tr>
<td>Belarus</td>
<td>Presidential administration</td>
<td>Referendum</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>Presidential administration</td>
<td>Referendum</td>
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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.
89. RICHARD SAKWA, RUSSIAN POLITICS AND SOCIETY 49 (2008).
90. Lukashuk, infra note 177, at 314–317.
91. MARTHA BRILL OLCCOTT, 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. 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. 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.

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


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. 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.” To govern between its meetings, the Congress elected a permanent standing body, the Supreme Soviet.

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. 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. Mr. Rumiantsev’s draft constitution ultimately sought to draw on this advice to create a western-style semi-presidential system in Russia.

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).
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. 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.”

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.” The Zorkin Court did not just limit presidential power, later decisions also struck down unconstitutional extensions of power by the Russian Parliament.

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 unwilling...

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104. Id.
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.\(^\text{107}\) 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.”\(^\text{108}\)

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.\(^\text{109}\)

\(^{106}\) Scheppelle, supra note 102, at 1795.  
\(^{107}\) See infra note 123.  
\(^{108}\) Boris Yeltsin, If you destroy the presidency – you destroy Russia, FINANSOVYE IZVESTIIA [FIN. IZV.] (Russ.) Mar. 12, 1993, at 1 (emphasis in original).  
This aide insisted that this system was democratic because of its basis in popular sovereignty, or narodovlastie. 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.111

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. 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.113 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.”114 Drawing on the language of

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].
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.115

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.116

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”).117

As the constitutional debate raged on, the Congress met again in March 1993.118 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

115. Id. at 2–3.
constitutional, democratic methods have been exhausted.”

The Congress responded by stripping Yeltsin of his extraordinary powers, reducing the Russian Presidency to its textual role as head of the executive branch in a formal semi-presidential, separation-of-powers system.

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.” 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)].

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. The Constitutional Court convened a special ses-

120. SAKWA, supra note 89, at 49.
121. Id.
122. Id.
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. The Congress also met on March 21st and called an emergency session for March 26th. 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.”

The Congress convened a special session on March 28th to consider Yeltsin’s impeachment and the referendum. 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.” 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. 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:

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

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.\textsuperscript{132} 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.”\textsuperscript{133}

After a fierce political campaign, 58.05\% of voters in the referendum expressed their confidence in Boris Yeltsin’s leadership.\textsuperscript{134} 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,”\textsuperscript{135} 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.\textsuperscript{136} 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.”\textsuperscript{137} 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.

\textsuperscript{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).
\textsuperscript{137} \textit{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.\textsuperscript{138} He commented that \textquote{\textipa{[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.}}\textsuperscript{139} 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.\textsuperscript{140} 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.\textsuperscript{141}

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.\textsuperscript{142} As the embodiment of the people and the head of the unitary state, the president was the \textquote{guarantor} of the constitution and en-

\textsuperscript{138} Vlasti posle referenduma [The President names the day of the Constitutional Convention], KOMMERSANT, VLAST, (Russ.) May 12, 1993.
\textsuperscript{139} Id.
\textsuperscript{140} AHJIEH, supra note 100, 59.
\textsuperscript{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. 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. 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.” 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. The parliament swore Aleksandr Rutskoi in as the new president and he began issuing decrees. President Rutskoi also called for a mass strike to resist Yeltsin’s unconstitutional actions, and a tense standoff ensued. Yeltsin, in his

144. Medvedev, supra note 122, at 105–6.
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.\footnote{Boris N. Yeltsin, \textit{ZAPISKI PREZIDENTA [NOTES OF A PRESIDENT]} 381 (N.N. Kudriavtseva & B.D. Minaev eds., 1994).}

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.\footnote{See infra notes 170–71.} 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.”\footnote{Statement of the Ministry of Justice at the Constitutional Meeting, (Russ.). \textit{Informatsionnyi Biuleten’} No. 2 (1993), 26.}

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:

\[\text{[The Congress of People’s Deputies [parliament] simply was unable to comprehend any rule of law higher than constitutional law, and that the Congress is unable to distinguish constitutional law from constitutional principles. The principles expressed in the current Constitution have never achieved the level of being ‘constitutional.’ Instead, the Constitution of the Russian Federation itself might be unconstitutional. This idea is based upon the simple notion that the current Constitution expresses principles that are in direct conflict with the will of the Russian people.}\]


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
officials gave their full backing to Yeltsin, arranging for a large economic package to help support him. 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.” 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.”

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.

Another influential New York Times columnist, Serge Schmemann, 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.”

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

153. Id.
154. Id.
been justified in using military force to “control the situation.”\footnote{Survey conducted by LABADA-TSENTR, Rossiiane o sobytiakh 3-4 oktia-bria 1993 goda [Russians on the events of October 3-4, 1993] (Oct. 3, 2005), available at http://www.levada.ru/press/2005100301.html.} 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.\footnote{JAMES H. BRUSSTAR & ELLEN JONES, NATIONAL DEFENSE UNIVERSITY, THE RUSSIAN MILITARY’S ROLE IN POLITICS 24–27 (1995).} 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.\footnote{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).} 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 . . \footnote{Id.}

its long list of individual rights, the key provisions ensured that there were no constitutional limits on presidential power. 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. 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. Furthermore, the president had the power to annul any executive branch edicts. 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. 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.” 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.” 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. In order to

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.\textsuperscript{170} 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.\textsuperscript{171} 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.”\textsuperscript{172}

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.\textsuperscript{173} 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

\begin{footnotesize}
\textsuperscript{170} See Paul Chaisty, Legislative Politics and Economic Power in Russia 104 (2006).
\textsuperscript{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.”).
\textsuperscript{172} Chaisty, supra note 170, at 105.
\textsuperscript{173} Konstitutsiya Rossiskoi Federatsii [Konst. RF] [Constitution] art. 83 (Russ.).
\end{footnotesize}
are exasperated by the rise in crime.”\textsuperscript{174} 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.\textsuperscript{175}

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.\textsuperscript{176} 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.”\textsuperscript{177} On the other, nationalist political parties argued that, “[e]conomic, legal, and administrative chaos required a strong state and a strong executive.”\textsuperscript{178}

\textsuperscript{174} Vera Kuznetsova, \textit{Will a Fundamentally Reformed Government Be Able to Conduct Fundamental Reforms?}, 45 \textsc{Current Dig. of the Post-Soviet Press}, Jan. 19, 1994, at 1 (translating \textsc{Nezavisimaya Gaz.}, Dec. 23, 1993).

\textsuperscript{175} Eugene Huskey \textit{supra} note 97, at 32.

\textsuperscript{176} Gönenç, \textit{supra} note 59, at 190.

\textsuperscript{177} Alexander Lukashuk, \textit{Constitutionalism in Belarus: A False Start}, in \textsc{1 Democratic Consolidation in Eastern Europe: Institutional Engineering} 293, 300 (Jan Zielonka ed., 2001).

\textsuperscript{178} \textit{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.\textsuperscript{179} The newly established office of the president was given significant constitutional powers, becoming the head of state and the head of the executive.\textsuperscript{180} 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.\textsuperscript{181} Most importantly, the president could not dissolve the parliament.\textsuperscript{182}

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 . . . .”\textsuperscript{183} 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.”\textsuperscript{184}

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.\textsuperscript{185} 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

\textsuperscript{179} Id. at 302.
\textsuperscript{180} Constitution Watch: Belarus, 3 E. EUR. CONST. REV. 3 (1994).
\textsuperscript{181} Lukashuk, \textit{supra} note 177, at 302–03.
\textsuperscript{182} Id. at 304.
\textsuperscript{183} DAVID MARPLES, BELARUS: A DENATIONALIZED NATION 79 (1999).
\textsuperscript{184} Lukashuk, \textit{supra} note 177, at 309.
\textsuperscript{185} Id.
direct representative of the people.\textsuperscript{186} A former Belarusian Constitutional Court Judge described how “lawyers in the president’s circle referred to the ‘theory of legal laws.’”\textsuperscript{187} 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.”\textsuperscript{188}

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.”\textsuperscript{189} 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.”\textsuperscript{190} The previously disparate political parties in parliament also began to coalesce in opposition to Lukashenko’s utter disregard for legality.\textsuperscript{191} 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.\textsuperscript{192}

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.”\textsuperscript{193} In response, Lukashenko pledged to ignore Constitutional Court decisions and demanded that the Constitutional Court Chief Justice resign.\textsuperscript{194} Several months later, “Lukashenko issued a de-

\begin{footnotesize}
\begin{itemize}
  \item 187. Lukashuk, \textit{supra} note 186, at 64.
  \item 188. \textit{Id.}
  \item 189. Lukashuk, \textit{supra} note 182, at 309–10.
  \item 190. \textit{Id.} at 312.
  \item 191. \textit{Id.}
  \item 192. \textit{Id.}
  \item 193. \textit{Id.} at 311.
  \item 194. Marples, \textit{supra} note 183, at 79.
\end{itemize}
\end{footnotesize}
cree “obliging government and local authorities to carry out all his previous decrees and disregard the rulings of the Constitutional Court.”

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?” 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. Parliament countered by adding its own proposed changes to the constitution that would abolish the post of president altogether.

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.” 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.”

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.” 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

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.202

Prior to the referendum, Lukashenko saturated the official mass media with pro-presidential propaganda.203 This media strategy worked; ultimately, 77.6% of the populace supported Lukashenko’s pro-presidential changes to the constitution.204 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.205

Ruling as a dictator, Lukashenko scheduled a new referendum for November 1996 to introduce an entirely new constitution.206 This constitution would create, as Lukashenko maintained, a “real separation of powers.”207 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.”208 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-

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.  

After Kazakhstan gained independence in 1992, President Nazarbaev understood the importance of writing a new constitution and appointed a working commission to draft one. 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.”

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.” Nazarbaev’s working commission produced a draft constitution in June 1992, establishing a strongly presidential form of government. 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. The Kazakh Parliament obediently adopted this draft on January 28, 1993. 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.

Although weak, the parliament still possessed the right to amend the

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.\textsuperscript{218}

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.”\textsuperscript{219} 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.”\textsuperscript{220}

In May 1994, the parliament took the unprecedented step of giving Nazarbaev’s Prime Minister a vote of “no confidence.”\textsuperscript{221} In July, parliament was able to override Nazarbaev’s veto of two consumer-friendly bills.\textsuperscript{222} 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.”\textsuperscript{223} 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.”\textsuperscript{224} Additionally, the parliament created a new party to ensure respect for the existing constitution called the “Legal Development of Kazakhstan.”\textsuperscript{225}

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


\textsuperscript{219} OLCOTT, supra note 91, at 109.

\textsuperscript{220} Id. at 101.

\textsuperscript{221} Id. at 103.

\textsuperscript{222} Id. at 103–04.

\textsuperscript{223} Id. at 109.

\textsuperscript{224} Id.

control of the Constitutional Court to dismiss the parliament “legally.” Unlike Russia or Belarus, the first Kazakh Constitutional Court had close ties with the presidential administration. After playing no role in Kazakh politics since its inception, the Court unexpectedly ruled on a major electoral claim. 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.”

After the decision, Nazarbaev appeared before parliament and declared the nullification of parliament’s popular mandate. He then disbanded parliament, turning off its power, water, and telephone, and sending in workmen to begin remodeling the building. Ruling as a dictator, he then created his own handpicked People’s Assembly, which postponed the next presidential elections until 2000. 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.

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.” This new constitution eradicated any possibility of parliamentary checks on presidential power. 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.

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. Relying on appeals to the constituent power, a force “that bursts apart, breaks, interrupts, unhinges any pre-existing equilibrium and any possible continuity,” 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.

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 “superhuman, irresistible ‘general will’” 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” by pointing to the role of extraordinary political mechanisms in fostering a deep “dialogue between leaders and citizenry that finally succeeds in

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.
238. See ARENDT, supra note 236, at 217–18.
239. Id. at 54.
generating broad popular consent for a sharp break with the received wisdom of the past.”

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. 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.

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. Instead, it was the product of a top-down implosion of the Communist party. This kind of implosion is common in post-Cold War political change, and characterizes a number of

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.

245. Id.
political transformations in one-party states across Asia, including Indonesia, Taiwan, and South Korea. 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. 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.

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. Furthermore, in Venezuela, President Hugo Chavez has repeatedly sought to use the mechanisms and rhetoric of constitutional politics to strengthen his power. 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

247. ARATO, supra note 56, at 142–43.
248. THE FEDERALIST 10 (Madison).
the secular parts of society. 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.

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. 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? 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.

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.” 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-

251. Lisa Anderson, Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt, and Libya, 90 FOREIGN AFF. 2, 7 (2011).
253. See, e.g., Amar, supra note 29, at 1043–44, 1046; U.S. CONST. art. V.
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.’”).
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).