Fixing Popular Participation in Constitution-Making†

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Abstract

The article addresses the double-standard of popular participation at the moment of creating or reforming constitutions. While constitutions require in most cases qualified majorities in order to be approved at the constitutional assembly, they normally require only simple majorities to be ratified at the referendum. The article shows that the normative reasons to use either qualified majorities or simple majorities are applicable to both cases. It then argues that in order to fix popular participation, thereby increasing the legitimacy and stability of constitutions, the same majority rule should be used at the assembly stage and the referendum stage unless specific circumstances of the case dictate otherwise. It presents a two-stage evaluation mechanism to identify the cases in which each majority rule should be used to increase stability and legitimacy. This evaluation mechanism is then applied to the double-standard cases of Poland, Bolivia and Egypt.

Keywords: Constitution-making, Referendum, Popular Participation, Unanimity, Majority Rules, Qualified Majority, Direct Democracy

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1 Introduction

Broad-based public involvement is usually considered beneficial for the constitution-making process. This idea has been discussed at some length in the legal literature (see for example Samuels, 2006, p. 670; Banks, 2008, pp. 1048-1050; Carey, 2009, pp. 156-157) and can be linked to the concept of a dualistic democracy, where the citizens are particularly attentive in constitutional moments, which differ from times of normal law-making (Ackerman, 1991, pp. 6-7).

A number of studies contend that popular participation increases the legitimacy of a constitution (Elster, 1993, p. 179; Samuels and Wyeth, 2006, p. 3); Ginsburg et al. (2009, p. 206) argues that "participation thus legitimates and constrains, substituting inclusive processes for consent to make effective government possible."\(^1\) Moreover, a participatory constitution-making process increases the stability of a newly carved document. Empirical evidence suggests that inclusive processes (such as referendums) have a positive impact on the lifespan of constitutions (Ginsburg et al., 2009, p. 139).

This is especially important when a new constitution is drafted in turbulent times.\(^2\) When a country undergoes a political regime change, a new constitution is one of the typical demands. A recent example of this can be found in the process of constitution-making that followed the Arab Spring in Egypt, Tunisia and Libya. One challenge for constitution-making, particularly in those post-conflict settings, is the inclusion of all important societal groups, factions and ethnicities into the process.

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

\(^1\)It has been argued that legitimacy problems of constitutions differ according to the path of constitution-making (Ackerman, 2015, p.1). This argument could put the legitimacy-enhancing effect in perspective, especially in the case of elite constructions. For a more detailed analysis of elite constructions, see Murkens (2014). However, given that elite constructions are not the exclusive type of constitution-making, the overall effect of popular participation on legitimacy can be described as positive.

\(^2\)This is by no means a rare occurrence. In the past 40 years, more than 200 constitutions have been drafted under the threat of domestic violence. For a detailed discussion, see Widner (2008).
Public referendums to ratify the constitution have grown more popular over the past decades. Data shows that this method was used to ratify 44% of all constitutions in force by 2005 (Ginsburg et al., 2009) and the trend has become more pronounced in the last several years. This number is salient when compared to the negligible use of direct democracy in other areas of politics. While most procedural rules vary substantially across countries and depend on national characteristics, referendums for constitutional ratification are used across the world. This trend has led many analysts to claim that public participation is emerging as virtually the only international norm in constitution-making (Hart, 2010, p. 42; Franck and Thiruvengadam, 2010, p. 14; Landau, 2013, p. 934).

While recent years have seen a wide range of articles focusing on the process of constitution-making (Banks, 2008; Tushnet, 2008; Barnett, 2009; Partlett, 2012; Landau, 2012, 2013), scholarship has so far paid little attention to the specific decision-making rules of referendums. Given the growing popularity of referendums, the question of which majority rule procedures a specific country decides to implement is relevant for policy-making.

Although it is common to find qualified majority rules in place for the constitution-making body itself, they are rarely used in referendums for ratification (Tierney, 2012, p.274). This differential treatment of ratification within the constitutional assembly and ratification in the referendum can be found across the world.

While a simple majority is often considered sufficient for a constitutional draft to pass the referendum, it is doubtful that normative considerations that demand the use of qualified majorities for ratification within the constitutional assembly do not apply to

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3Ten out of the eighteen constitutions that entered in force between 2005 and 2010 required a referendum for ratification.

4Throughout this chapter we abstract from the issue of quorums in the referendum. The reason for this is that the main problems discussed in this chapter are still relevant even with a quorum. As long as the relevant groups all have similar access to the voting booth, turnout requirements will not solve the legitimacy issues discussed in this contribution.

5Possible constitution-making bodies include the ordinary legislature, the executive or a specifically elected constitutional assembly.

6In this chapter, we will take the use of the referendum itself and the reasons for using it as given. The focus is on the different majority requirements for the two stages and not on explaining why we see a referendum in the first place.
the referendum stage of the ratification process. This difference can be called the double-standard in constitution-making.\footnote{One could also imagine a different double-standard with simple majority at the assembly stage and a qualified majority at the referendum stage. While interesting in theory, this setting is not found in practical constitution-making and thus omitted from the analysis in this chapter.} This chapter argues that there are relevant reasons to use qualified majorities for all stages of constitutional ratification, including both the drafting at the constitutional assembly and the subsequent referendums. Thus, if a double-standard exists, it would require some additional justification and should not be the default mode of constitution-making. In case no such justification can be provided, the process should follow the legal principle of treating like cases alike and employ the same majority rule at both stages.

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

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

# Majority Rules in Constitution-Making

## Choosing Under a Veil of Uncertainty

(Rousseau, 1762, book 1, ch. 5, §3.) first addressed the question of what kind of voting rule would be required for the ratification of a constitution. This question has been brought forward in the seminal contribution of (Buchanan and Tullock, 1962, ch.7), who argued that unanimous consent to a constitution is necessary from a normative
standpoint. Their argument is based on an analysis of the costs of the political process and the existence of a veil of uncertainty. A brief summary provides a good starting point for the discussion at hand.

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

A rational and welfare-maximizing individual would agree \textit{ex-ante} (under a veil of uncertainty) to a decision-making rule that minimizes overall cost.\footnote{The decision might not be optimal for her from an ex-post perspective, depending on whether she turns out to be on the winning or losing side of the policy decision.} At the level of constitutional choice, individuals know that they will face collective decisions in the future and that they will sometimes be on the winning side and sometimes on the losing side. As long as they face uncertainty at the constitutional stage about their positions in these future decisions, they will agree to a lower requirement than the unanimity rule for future decisions in order to reduce the high decision-making costs that would result from this rule for each decision-making process.

The high decision-making costs of unanimity, for these reasons, are justified at a constitutional stage in order to agree on which less-than-unanimous rules will be used later on. In this way, the requirement of unanimity at the constitutional stage is normatively justified, together with the use of the less-than-unanimous decision rules for later stages in which the veil is lifted.

However, implementing a unanimity rule is not without problems. A key problem with unanimity rule is that it generates an opportunity for strategic voting. Under this rule, a single voter can stop the whole process in order to obtain personal benefits in exchange for her agreement. This situation has been described in economics as a holdout problem, which arises when the consent of multiple right-holders is required for
the completion of a project. In this situation, each individual holds veto power for the entire project and has strategic incentives to use this veto power to extract more benefits than are proportional. This may create a scenario in which it is impossible to complete the project. Typical examples for the holdout problem are urban development projects such as the building of a new road, where the consent of all land owners is required.

This problem led to the development and use of qualified majority rules in constitution-making. Qualified majority rules are more demanding than a simple majority without requiring unanimous consent. These rules allow for the retention of the main benefits from the unanimity rule while avoiding the holdout problem, presenting a compromise between the appeal of unanimous consent and the necessities of a functioning voting procedure.

2.2 Utility Weights

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

To evaluate these utilitarian concerns, Laruelle and Valenciano argue that it is necessary to introduce a further element into the discussion. If one agrees that minorities should be given protection in a political community, then it is reasonable to consider that one should give them special consideration at the stage of constitutional choice. It is possible that citizens put different utility weights on being on the winning side.

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9This is linked to the Dworkinian argument of treating people with equal concern and respect as a central value in designing a society. See Dworkin (1977).
depending on whether they are in favor or against a constitution. Since the constitution defines the basic rules of the society, it is arguably the case that citizens will find it more important to prevent a constitutional draft when they oppose it than supporting it in the contrary case.

Under this assumption, the voting rule for ratification should require a qualified majority under utilitarian calculations, since the negative utility per capita for those opposing a constitution would be larger in average than the gains for those favoring the constitution.\(^{10}\) The level of the qualified majority depends on the degree to which the members of the opposition in the society value not living under the rules of the constitutional draft which they oppose. In an extreme case where the disutility of the minority is very high, these considerations could even justify unanimous consent.

### 2.3 Protecting Minorities

Even when the levels of disutility of opposition groups are low enough to allow for a simple majority rule, other consequentialist normative concerns can justify the use of qualified majority rules. One of these concerns is the protection of minorities from the so-called “tyranny of the majority”.\(^{11}\) Using a majority rule to achieve protection of minorities is counter-intuitive, since the protection of minorities is counter-majoritarian in nature and normally achieved through tools such as judicial review and basic rights. However, at the stage of constitution-making these tools are not yet in place and need to be included in the constitutional draft in order to ensure adequate protection.

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

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

11John Adams was the first to use the term, while Alexis de Tocqueville popularized it. See Adams (1787); de Tocqueville (1835)
categorize minorities and majorities is the issue on ballot.\textsuperscript{12}

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

Since citizens at the stage of referendum are not able to add further content to the draft, they can only rely on their blocking power to prevent drafters from excluding minority protection from the constitution. A qualified majority rule is equivalent to a lower blocking requirement and makes it more likely that this threat will force drafters to include basic rights, judicial review and other counter-majoritarian tools. Thus, a referendum requiring a qualified majority can be seen as an indirect counter-majoritarian device. In this way, qualified majorities can mitigate the tyranny of the majority problem at the level of constitution-making.

An objection to this argument could be raised based on the idea that the minority could obtain too much power under this regime. The use of a qualified majority requirement is equivalent to giving a minority a veto power approximating the holdout problem identified for unanimity rules. If the minority is large enough, for example more than one-third of the votes for the typical two-third qualified majority, they would be able

\textsuperscript{12}For example, imagine a person of ethnicity A and religion B, and a person of ethnicity B and religion A, in a society which consists mostly of people of ethnicity A and religion A. Both individuals will have an interest in minority protection, even if part of a majority group, since they will be in the minority for one of the two issues.
to prevent the constitution from being ratified and thereby obtain further concessions from the majority. This situation is the mirror image of a tyranny of the majority, thus coined tyranny of the minority. The more demanding the qualified majority requirement is, the more relevant this consideration becomes.

Two arguments can, however, be raised against using the idea of the tyranny of the minority as a justification for demanding simple majorities at the referendum stage. First, a constitution-making process that includes both majority and minority groups in society is the prime example of inclusive constitution-making which, as was mentioned, increases the stability and legitimacy of the constitution (Ginsburg et al., 2009, p. 206). Furthermore, individual citizens have no incentives for strategic voting at the moment of referendums as long as the qualified majority requirements are not excessively high, since only a substantial part of the population would be able to block the proposal. If a sizeable part of society objects to a certain constitutional draft, the possibility that the constitutional draft is unbalanced becomes more pronounced.

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

Because the risk of a tyranny of the minority is hardly driven by the referendum stage, there is no justification of a different treatment of the two stages. What is critical in determining the optimal majority threshold is the tradeoff between better protection of minorities (higher threshold) and a reduced blocking power of those minorities (lower threshold). This issue has been extensively discussed in the literature (see for example Aghion and Bolton, 2003; Aghion et al., 2004; Harstad, 2005; Gersbach, 2011; Holden, 2014). A 64% rule, which has been brought forward by Caplin and Nalebuff (1988), is
reasonably close to the typical qualified majority requirement of two-thirds (Democracy Reporting International, 2011, p. 4). The argument of Caplin and Nalebuff, however, does not build upon the tradeoff discussed above, but rather on the avoidance of Condorcet cycling.

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

### 2.4 Choosing a Majority Rule for Constitutional Referendums

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

As it was mentioned, while the use of qualified majority rules is widespread for constitutional assemblies, they are rarely used in referendums for ratification. Given the value that decision rules have in constitution-making, and the importance that referendums seem to have in light of this development, it is unclear why a qualified majority should be imposed only at one stage of the constitution-making process but not at later stages.

This double-standard runs contrary to the intuition that procedural rules should specify the same decision rules for ratification throughout the entire process, which is a specification of the legal principle that like cases, or like situations, should be treated alike. The general reasons for a qualified majority are applicable to both stages and a

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

14 For example, the 2009 referendum of Saint Vincent and the Grenadines required a two-thirds qualified majority and serves as a notable exception.
deviation for the referendum stage would require some justification.

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

For the purposes of this analysis, we consider that constitution-making processes have two main objectives: to ensure the legitimacy and the stability of the constitution being written. These issues have been extensively discussed in the literature. Jackson (2008) sees legitimacy and stability as parts of the normative value of constitutionalism. Hart (2003) argues that constitution making aims at stability, which is also been echoed by Carey (2009, p. 158) who claims that stability is accepted as a typical aim of constitutions. Barnett devoted an entire article, Constitutional Legitimacy (2003), to this very topic, and returns to this topic writing at length about different theories of constitutional legitimacy (Barnett, 2009). Banks (2008) and Tierney (2009) discuss how legitimacy is affected by participatory processes, while Landau (2012, 2013) argues that dominant actors in the process might threaten legitimacy.

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

\[\text{For a detailed discussion of advantages and drawbacks of constitutional longevity, see (Ginsburg et al., 2009, ch.2).}\]
Fallon approaches the question of a constitution’s legitimacy by drawing a distinction between a legal, a moral and a sociological dimension. Legal legitimacy is achieved if the constitution is ratified in a lawful way. Moral legitimacy depends on the moral justifiability of the constitution. Sociological legitimacy is achieved if the public thinks of the constitution as agreeable and justified (Fallon Jr., 2012, pp. 1794-1801). This classification has several shortcomings. The moral dimension is essentially indeterminate, as it depends on the assumption of an ontology that includes objective morality with the epistemological possibility of accessing it, ideally, absent disagreements. Moreover, the legitimacy of a constitution based on either the moral and sociological dimension is orthogonal to the legal dimension. The legal dimension must determine the legitimacy or illegitimacy of the constitution based on the extent to which its normative power can be derived from the previously existing (if any, in fact, exist) constitutional norms in the legal system. This question and the legal problems associated with it are of great interest to legal scholars. The moral and sociological dimensions are non-informative with respect to assessing the necessary elements of a legitimate constitution from a legal perspective.

While a referendum in itself is not able to make the process of constitution-making more (or less) lawful, and while even a constitution that enjoys wide support can be morally illegitimate, a referendum is a good test for the sociological legitimacy of a constitutional draft. The main concern with regard to public participation in constitution-making is not so much the question of legal or moral legitimacy, but rather whether the people at large are sufficiently involved in the constitution-making process. Thus, for the purpose of this chapter, legitimacy refers to sociological legitimacy (Fallon Jr., 2012, pp. 1795-1796). Despite the difficulties inherent in Fallon’s presentation, his dimensional approach is helpful in allowing us to approach a constitutional referendum from a legitimacy perspective.

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

The next sections analyze the arguments for and against a simple majority rule for the constitutional referendum, given that the assembly has ratified the constitution under a qualified majority requirement.

3 When to Use a Simple Majority Rule

3.1 Swift Stability in Times of Crisis

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

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

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

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

3.2 High Decision-Making Costs

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

It can be argued that the costs of renegotiating and redrafting are higher in the case of
a referendum than in the case of an assembly not only because setting up a referendum
is costly and time-intensive but also (and mainly) because a negative vote requires the whole drafting process to start anew. In situations where the costs of constitution-making are very high,\textsuperscript{16} the risk of a negative vote could justify the use of a simple majority requirement. However, two qualifications to this argument apply.

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

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

\section{Uncertainty of Drafters about Citizens’ Vote}

In the last section we argued that drafters will attempt to write a constitutional draft that will pass the referendum. However, this argument relies critically on the ability

\textsuperscript{16}These costs include some or all of the following elements: the prolonged continuation of a status quo without a constitution; the increased risk of a violent solution if no return to a stable political situation is achieved, the monetary costs of running a constitutional assembly and the constitution-making process in general as well as the loss in investment due to the unstable situation.
of politicians to correctly predict the voting behavior of citizens. A higher majority requirement makes it more difficult for drafters to anticipate the political atmosphere correctly, since a lower veto threshold increases the possibilities for failure. This risk is prevalent in scenarios with normal decision-making costs as much as with high decision making costs, since the loss in time caused by the additional round of referendum is generally problematic. It is, therefore, necessary to look at the factors that decrease the politicians’ ability to properly predict electoral outcomes.

A high level of heterogeneity is one of the main factors that makes an accurate prediction of voters’ behavior problematic. If the electorate is divided in many different groups, the risk of a wrong expectation from the drafters increases. Jottier et al. (2012) test this argument in a survey with Belgian politicians and find that more heterogeneity increases the prediction error. The case of the European constitution, where different nation states (and thereby also societies that differ substantially) had to agree on a shared basic set of rules, is a good example of these difficulties. The drafters, as well as the local governments, were unable to predict voters’ behavior. The drafters did not foresee the risk of failed ratification and expected a vote in favor that did not materialize.

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

4 When to Use a Qualified Majority Rule

4.1 Sociological Legitimacy

It has been argued that, unlike ordinary referendums, constitutional referendums are more than a decision-making mechanism; they allow citizens of both democratic and non-democratic societies to feel identified with the constitution, and as a consequence to feel identified with the State (Tierney, 2009, p. 366). Tierney argues further that the constitutional referendum makes individual citizens feel part of the demos as defined by
the constitution to be approved. It can easily be seen that a higher majority threshold increases the minimum level of sociological legitimacy at the moment of the referendum. This higher threshold, similarly, can be used to increase cohesion. In cases with a looming conflict between different groups within society, simple majority referendums can lead the minority groups to boycott the referendum entirely and resort to more violent measures. Despite being about different issue, namely independence, the cases of Northern Ireland and Bosnia, where conflicts were exacerbated by referendums, are good examples of this. Although it remains unclear whether a higher requirement would have stopped the ensuing conflicts, putting a brake on the tyranny of majority risk increases the legitimacy of a successful referendum.

Legitimacy can also arise through an influence of the citizens’ choice in the referendum on the content of the draft. It has been claimed that qualified majorities are useless at the stage of referendums because the decision of the voters is binary (to accept or to reject), without the actual possibility of shaping the content of the constitution or of encouraging compromise. This claim only holds for the direct effect of the referendum while it ignores its indirect effect. Since the drafters are aware (ex-ante) that they need (ex-post) a given level of public agreement for their draft to pass, they will adapt their draft to this expectation, and in this way a higher majority requirement of the referendum will change the content of the draft due to the anticipation of the drafters. The analysis of the economic effects of direct democracy institutions provides further evidence of the effects of mandatory referendums.\footnote{Blume et al. show that the existence of (mandatory) referendums has a significant effect on fiscal variables. Their study analyses the economic effects of referendums on a global scale and this evidence highlights that politicians will take referendums into account at the stage when content is shaped (Blume et al., 2009).} Thus, the claim that qualified majorities at the referendum stage are not able to shape the content of the constitution does not seem to hold. A higher majority requirement thus increases the power of the citizens rather than the power of the drafters and leads to a more legitimate outcome.
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4.2 Abuse of Power During Times of Crisis

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

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

In these cases, the use of a referendum with a simple majority requirement might not be sufficient to deliver the level of legitimacy and stability the new constitution would need in order to survive future shocks. A qualified majority requirement can mitigate this problem, since the higher threshold increases the minimum level of sociological legitimacy and should also increase the expected longevity. Especially in cases of non-democratically created assemblies, the use of qualified majority referendums could provide the necessary boost in legitimacy to make the constitution more stable. This layer of additional control of the drafters through the assembly is the topic of the following subsection.
4.3 Additional Control of Politicians in the Assembly

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

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

A final word of caution is required. While drafters would face additional controls in a non-democratic setting, it is unclear whether the referendums in these cases are merely shams. One can easily imagine a referendum where the results are rigged by the ruling autocrat.

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

5 Discussion

5.1 Two-stage Evaluation Criterion

The chapter has argued that it is relevant to ask which majority requirement should be chosen for constitutional referendums. To answer this question, a two-stage evaluation
based on the arguments presented appears adequate. As discussed in section 2, a qualified majority requirement can be normatively justified for constitutional ratification in general. Starting from this base, the two-stage evaluation for referendums assesses in a first stage whether one or several of the arguments in favor of a simple majority referendum are applicable. The second stage is employed to weigh this potential arguments with the arguments in favor of a qualified majority.

If the assessment of the first stage is negative, the legal principle of treating like cases alike would prescribe the use of the same majority rule at the assembly and the referendum stage. Thus, if the ratification in the assembly requires a qualified majority, this regime should also be used for the ratification through a referendum.

If the assessment of the first stage is positive, then the more fine-grained second stage is required. Given that some reasons for a deviation from the treating like cases alike principle can be found, it is necessary to check whether any of the reasons in favor of qualified majorities simultaneously apply. If this is not the case, then a simple majority requirement can be normatively justified. However, as soon as normative arguments in favor of both majority requirements can be made, these need to be weighted according to the specific circumstances of the country.

The way in which this two-stage evaluation could be applied can be shown by looking at three examples of the double-standard and checking whether the decision to use simple majority requirements can be justified from the perspective of the criteria discussed in the previous sections.

The cases of Poland, Bolivia and Egypt can be used as examples of this double-standard. For different reasons, all three countries used qualified majorities in the constitutional assembly, but choose to use a simple majority in their constitutional referendums. The following subsections will analyze these cases with the proposed criteria.
5.2 Poland

Poland was the first country of the three cases to give itself a new constitution. Following the fall of the communist party, a full democratic transition took place in Poland. President Walesa (previously chairman of the trade union Solidarity, was elected in 1990) and the newly elected parliament aimed to quickly install a new constitution and replace the Soviet document of 1952. The fragmentation of the parliament as well as a disagreement about the degree of power that the president should wield prevented, however, a quick and complete drafting of the new constitution. Thus, the decision-makers opted for a "small" constitution in 1992 which defined basic government functions leaving the process of completing a "large" constitution for the future.

The constitutional committee that was tasked with preparing the large constitution consisted of ten percent of the members of the two Polish houses—the Sejm and the Senate. To make sure that the interests of the different political factions (including the post-communist parties) were reflected in the new constitution, the ratification procedures required a two-third majority in the national assembly, which is a combined assembly of all members of the Sejm and the Senate. This qualified-majority requirement was easily fulfilled in the vote in the assembly.

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

\footnote{Garlicki and Garlicka (2010) provide an in-depth analysis of the constitution-making process in Poland.}

\footnote{Another legitimacy issue with the Polish referendum was the turnout requirement. The initially proposed threshold of 50% was not achieved as only 42.9% of the eligible voters casted their votes. Nevertheless, the Supreme Court subsequently ruled that the constitution could be introduced despite
majority requirement for the referendum would have required some sort of compromise, since the referendum would have otherwise failed.

When considering the criterion of high decision-making costs, it should be noted that the small constitution already defined the most basic government functions and maintaining the status quo was thus not extremely costly to the society. Nevertheless, the process of constitution-making itself required a long time before the final draft was put to ratification and another delay through a failed referendum could have further increased this cost. However, given this long time frame it should have been possible to reach a consensus acceptable for a qualified majority of society thereby also including the opposing Solidarity movement. Such a development would have increased support for the constitution, heightening its degree of legitimacy. It is unlikely that the drafters labored under a high level of uncertainty, but the close result is rather due to the conflict with Solidarity. Altogether, the justification for a simple majority purely based on decision-making costs does not appear strong enough and a qualified majority requirement could have helped to increase the legitimacy of the constitution.

5.3 Bolivia

A breakdown of the political order, although in a different context, also led to the demand for a new constitution in Bolivia when the leftist movement Movimiento al Socialismo (MAS) won the elections in 2005 and ended the enduring reign of a coalition of the long-established parties in Bolivia.\textsuperscript{20} Despite losing the elections, the opposition parties were still strong enough to have some bargaining power in the constitution-making process. Both sides agreed on the need for a new constitution, although for different reasons. President Morales from MAS wanted a constitution that offered more social inclusion due to the fact that the indigenous groups were one of his major bases of support, while the opposition parties aimed for more regional autonomies due to their stronghold in the (richer) eastern regions of Bolivia (Landau, 2013, p. 952).
The electoral rule for the constitutional assembly used a district magnitude of three giving the first two seats to the party or movement that received the most votes and the third seat to the party or movement with the second-most votes.\textsuperscript{21} This deviation from a first-past-the-post system (in which there is one winning candidate per district defined as the person receiving the most votes) allows for a better representation of minorities at the assembly. Furthermore, the voting rules within the assembly required a two-third majority for the ratification of the draft and a subsequent public referendum to complete the ratification process. Nevertheless, the referendum only required a simple majority of votes. The conflict between established parties and a new movement as well as the spatial dispersion of voter-support led to the choice of procedures and voting rules that protected minorities at every stage, except for the referendum stage.

Bolivia is special in the sense that opposition and government parties both agreed to a constitutional change. There is no proper justification for the use of a simple majority, as the absence of an immediate crisis mitigated the potential of high costs during the process. The increased risk of a failed referendum of a qualified majority is by itself not enough in this setting. Furthermore, since both factions needed to agree on the procedural rules, the referendum could have served to add further veto players as a backup for the weaker group. Additionally, the conflict between rich and poor probably could have made it easier for the drafters to be certain whether or not a proposed draft would be ratified in the referendum, given that the clear structure of Bolivian society made it easier to predict compared to a more complex setting with more factions and groups. Given this clear division in the society, a successful constitution-making process should require a high degree legitimacy so that the constitution will remain stable also in case of a regime change. This aim could have been achieved in a better way by using a qualified majority. To sum up, the case of Bolivia does not present strong arguments to justify the use of the simple majority.

\textsuperscript{21}This election rule has some precedent in the region since Argentina chose it as the way to elect its senators in its constitution of 1853.
5.4 Egypt

The most recent of the cases is constitution-making in Egypt. After the Arab Spring revolution resulting in the reign of the Muslim Brotherhood, a military take-over ensued in July 2013 because of protests against the government of President Mursi. One of the first steps of the military government was to put the 2012 constitution out of force and set up a new constitutional committee, which was formed in September 2013 (El-Din, 2014). The procedural rules of the assembly, whose members were selected by the interim government, specified that a 75% majority was required in case of any disagreements on substantive matters.\textsuperscript{22} Despite the fact that the assembly was not democratically elected, many minority groups were, for the first time, represented in the constitution-making process (the representatives of Nubia and of the Disability Challengers serve as examples). In the light of the previous conflict and the instability of the previous constitution, it makes sense that the government made an effort to include different groups. These efforts may, however, have been hampered by the improper influence of the military government. Furthermore, the Muslim Brotherhood (and thereby a large and important part of Egyptian society) was basically excluded from the process of constitution-making.

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

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

\textsuperscript{22}See article 16 of the procedural rules of the constitutional committee (available at http://www.constitutionnet.org/files/2013_09_12_-_50_member_committees_rules_of_procedure_english.pdf). For a graphical overview of the affiliations of the members, see Fayek (2013).
The heterogeneous makeup of Egyptian society made it extremely difficult for the drafters to predict the voters’ behavior.

On the other hand, it is doubtful how successful a constitution that excludes a major part of society really can be. The increase in legitimacy through a stricter requirement could have mitigated this effect. Furthermore, since the assembly was selected by the military leaders, additional control through the constituents is an important argument in favor of a qualified majority. Finally, the process clearly took place during a time of crisis. Given that all arguments for both sides apply, it is not clear why the treat like cases alike rule is not applied here and the qualified majority that was used in the assembly was discarded in favor of a simple majority regime for the referendum.

Before turning to some concluding remarks, a note of caution is required. A normative analysis of the procedural rules of constitution-making ignores the problem that the drafters are often the same people designated to create the procedural rules. Thus, the drafters may be motivated to create procedural rules that promote their own self-interests rather than constitutional stability and legitimacy. In terms of policy advice, it is therefore an important task to ensure that the procedural rules are legitimate. International norms and best practices in terms of setting up these rules could possibly help to overcome this risk.

6 Concluding Remarks

The generality of the double-standard in constitutional referendums remains puzzling, since in many if not most cases, the same considerations that lead to the use of qualified majorities for constitutional assemblies also apply for constitutional referendums. As a tentative hypothesis, the reason behind this puzzling outcome could be found in historical path dependency, as well as in the self-interest of those politicians that create the procedural rules of constitution-making.

Despite the prevalence of the double-standard, there have been no theoretical justifications for the differential treatment. Some justification is necessary in order to
legitimately use different majority rules for two voting mechanisms with similar characteristics and the same aim: ensuring constitutional stability and legitimacy. This chapter highlights that while under some specific circumstances this justification can be provided, in most cases it is lacking. This finding is striking when one takes into account that nearly every constitutional referendum is held under a simple majority rule.

It is shown that using simple majority referendums as a default rule without proper scrutiny based on societal characteristics can lead to losses in constitutional stability and legitimacy. Therefore, a two-stage procedure with a default rule of using the same majority rule for assembly and referendum can be seen as superior.

The case made for the ratification of a constitution in this chapter also holds for constitutional amendments that also require a referendum.\textsuperscript{23} Constitutional amendments typically require a qualified majority of the legislative and thus resemble the drafting of a constitution in an assembly with respect to the majority rules.

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

These findings lead to the suggestion that there is good reason for using a coherent criterion such as the two-stage evaluation presented here to determine in which cases the use of a simple majority is justified. For the others, the recommendation that follows is to eliminate the double-standard and use the same majority rules throughout the ratification process. This rule would fix popular participation, would lead to more stable and legitimate constitutions, and would make constitution-making compatible to the principle of treating like cases alike.

While the last chapters have focused on the constitution-making process itself, the following chapter will focus on an outcome of the constitution-making process that substantially constrains politicians in the future, namely unamendable constitutional

\textsuperscript{23}In 2010, 98 countries around the world used referendums for constitutional amendments. See Anckar (2014)
provisions.
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