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## 7. The constitutional referendum in historical perspective

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“I was the future once.”

David Cameron (his final words in the House of Commons, July 13, 2016)

As miscalculations go, David Cameron’s decision to hold the Brexit referendum in 2016 must be one of the most regretted. The second-guessing and hand-wringing started almost as soon as the ballot results came in and may never stop. Not ones to resist piling on, we contribute to the post-mortem here by assembling and analyzing the historical record. You may wonder, as we do, what citizens typically *do* when asked to back elite decisions about matters of higher law? Yea-say, one would think (contra Brexit). But who really knows? For that matter, when and where has the constitutional<sup>1</sup> referendum been used, how often, and to what effect?

Referenda – and, for us, it is “referenda” not “referendums”<sup>2</sup> – have seemingly become a ubiquitous means of ratifying constitutional change. Countries as diverse as Iceland and Uruguay have used referenda in recent years. Indeed, we find that constitutional referenda truly *are* on the rise, becoming increasingly common especially after 1990. The majority of new constitutions are now approved through referenda. As of 2018, 69 of the 194 national constitutions currently in force (35.6 percent) were ratified through a referendum. And one would expect that figure to rise in the next decade. Importantly, we find that referenda on new (replacement) constitutions almost never fail, while referenda on amendments fail almost 40 percent of the time. We explore this difference and offer some possible explanations for it. We also describe many of the contextual elements of constitutional referenda, such as the regions where constitutional referenda have been more common, the relationship between ratifying referenda and democracy, the trends in usage over time, and the characteristics of the cases in which voters declined to ratify a new constitution. We begin with a broad review of the literature on referenda, and constitutional referenda in particular, and then introduce an original set of data that we have collected to answer such questions.

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<sup>1</sup> While not included in the data we use for analysis here, the Brexit referendum motivates some of our theorizing throughout the chapter.

<sup>2</sup> The plural of referendum is controversial, with apparently no technically correct version (referendum is a gerund of a Latin verb, with no Latin plural). “Referendums” sounds wrong to many; “referenda” sounds right but rests on shaky grammatical footing. It is exactly this sort of impasse for which the referendum was made, and a reporter at the *Daily Edge* has obliged. Interested readers can weigh in here: [www.dailyedge.ie/lets-figure-this-out-whats-the-real-plural-of-referendum-261522-Oct2013/](http://www.dailyedge.ie/lets-figure-this-out-whats-the-real-plural-of-referendum-261522-Oct2013/). As of this writing “referenda” holds a sizable majority at 59 percent, with 5,190 (and counting) readers having voted. In second place is the choice “have we nothing better to vote on?” at 25 percent. “Referendums” sits at distant third place with 17 percent. It may be that scholars prefer “referundums,” but the people have spoken.

## I. CONCEPTUAL AND THEORETICAL BACKGROUND

### A. Concepts

The conceptual terrain surrounding constitutional referenda is somewhat rocky. A primary conceptual distinction is that between *referenda* and *plebiscites*. It turns out that the terms have specific legal meanings in different jurisdictions. For example, in Australia, the term “referendum” is reserved for popular votes on constitutional amendments (conducted with mandatory voting and binding results), while the government may also call “plebiscites” to consult the public on other issues (these are non-binding, and voting is not usually compulsory). David Altman, a central scholar in this domain, notes that there are some differences between US and European scholars in the use of these terms.<sup>3</sup> He himself uses the term “plebiscite” to describe many votes that others would count as “referenda.” Still others, including us, discern little practical difference between the two terms.<sup>4</sup> Nevertheless, for purposes of this chapter, we define a referendum as any government-sanctioned vote on a proposed piece of legislation, or amendment to legislation. These votes may be binding or merely advisory, legally required or optional, elite- or citizen-initiated. Votes that meet our broad criterion of a government-sanctioned vote and that seek public approval of a new constitution or constitutional amendment are included in our dataset.

One can also differentiate among referenda on the basis of the *type* of question that is addressed. Some of the most well-known and controversial referenda have considered sub-national secession or accession of new territories. In some countries (and some US states), referenda are also held to address policy questions. However, we limit our data collection and analysis to referenda on questions of an explicitly constitutional nature. Certainly, referenda on issues such as secession have constitutional importance, but we see referenda on national autonomy and public policy as reasonably distinct from those on constitutional change.<sup>5</sup>

As noted above, we include both *optional* and *mandatory* referenda in our data and analysis. That is, elections that are optional or mandatory for elites to *hold*, not for voters to participate. The degree to which referenda on constitutional change are legally mandated varies from case to case, and is further complicated by the fact that many constitutions provide more than one path for constitutional change. It is also important to note that constitutional replacement does not always follow the procedure for constitutional amendment described in the existing text. Furthermore, in some cases referenda have been thought to be required for constitutional reform even when the constitutional text did not clearly stipulate such (as in the case of Kenya’s 2005 referendum).<sup>6</sup>

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<sup>3</sup> David Altman, *Direct Democracy Worldwide* (Cambridge University Press 2010) 10.

<sup>4</sup> David Butler and Austin Ranney (eds.), *Referendums: A Comparative Study of Practice and Theory*. AEI Studies 216 (American Enterprise Institute for Public Policy Research 1978); Mark Clarence Walker, *The Strategic Use of Referendums: Power, Legitimacy, and Democracy* (Palgrave Macmillan 2003) 135.

<sup>5</sup> Walker, *ibid.*, 9.

<sup>6</sup> The decision was made by the Nairobi High Court in *Timothy Njoya v. Attorney General*, (2004) 4 LRC 559 (Kenya HC).

A final distinction is between referenda that are *binding* and those that are simply *advisory*. And, of course, like any rule and custom, “binding” can operate in degrees, as political considerations may be more important than legal requirements in some cases. While most of the referenda in our data were of a binding nature, we also include a few advisory referenda (e.g. Canada 1992), as these have often functioned as if they were binding. Our analysis does not focus on differences between either optional and mandatory or binding and advisory, although we recognize these as distinctions worth investigating.

## B. Ivory-tower Views of Referenda and their Merits

The spark that ignited contemporary scholarly interest in referenda (at least among Anglophones) seems to have been ~~the~~ two referenda in the United Kingdom in the 1970s: the 1973 referendum on the future of Northern Ireland, and the 1975 referendum on remaining in the European Economic Community (a decision subsequently reversed by 2016’s Brexit referendum). However, constitutional theorists have been interested in the possibilities of referenda in constitutional reform since at least the late 19th century, when Dicey argued that the **devices**’ use for amendment approval could protect constitutions from self-serving changes on the part of the government of the day.<sup>7</sup> Referenda, of course, have their roots in ancient Greece, and were revived in Europe following the French Revolution. Their use has steadily increased since then, as we shall see. The literature on referenda is presently anchored by ~~what turned into something of~~ a series of edited volumes, first by Butler and Ranney,<sup>8</sup> and continued by Qvortrup.<sup>9</sup>

Butler and Ranney summarized with great breadth the theoretical arguments for and against the use of referenda, and we will not attempt to repeat their synthesis here.<sup>10</sup> Briefly, referenda were advocated by early 20th century Progressives on the grounds that the most legitimate way to make a political decision was through a measurement of the unmediated opinions of the people.<sup>11</sup> The Progressives further argued that decision making through referenda would yield decisions on a more complete set of political issues, increase transparency in decision making, more accurately express the general will of the political community, end apathy, and help individuals maximize their potential.<sup>12</sup> ~~A democratic panacea, of sorts.~~ To these arguments we could add that decision making through referenda might increase discussion of political issues, and public investment in important decisions.<sup>13</sup>

Leaning heavily again on Butler and Ranney,<sup>14</sup> we can recite an equally long bill of

<sup>7</sup> Albert Venn Dicey, ‘Ought the Referendum to Be Introduced into England?’ (1890) 57 *The Contemporary Review* 489–511.

<sup>8</sup> Butler and Ranney, *Referendums: A Comparative Study*; David Butler and Austin Ranney (eds.), *Referendums around the World: The Growing Use of Direct Democracy* (AEI Press 1994).

<sup>9</sup> Mads Qvortrup (ed.), *Referendums around the World: The Continued Growth of Direct Democracy* (Palgrave Macmillan 2014).

<sup>10</sup> Butler and Ranney, *Referendums: A Comparative Study*, 23–27.

<sup>11</sup> *Ibid.*, 24.

<sup>12</sup> *Ibid.*, 24–33.

<sup>13</sup> Mads Qvortrup, *A Comparative Study of Referendums: Government by the People* (Palgrave 2002).

<sup>14</sup> Butler and Ranney, *Referendums: A Comparative Study*, 34–37.

particulars *against* referenda. Arguments against might mention a referendum's potential to weaken the institutions of representative government, in general, and legislatures in particular; a lack of sufficient knowledge and interest on the part of ordinary citizens; a referendum's inability to measure intensity of preferences; its proclivity towards dissensus over consensus; and the possibility of a decision that harms minorities. Building on some of these critiques, more recent scholars have suggested that without careful design, referenda may stifle democratic deliberation.<sup>15</sup> Additionally, there is some anecdotal evidence that expansions in direct democracy have gone hand-in-hand with expanded executive powers, as in the recent Andean constitutions.<sup>16</sup>

The scholarly consensus at this point seems to be that referenda reflect the political context in which they take place. They are in many cases salutary additions to a system of representative democracy, but can also be used by authoritarian regimes to provide a democratic cover for anti-democratic decisions.<sup>17</sup> Walker is particularly critical of referenda and suggests that:

Political actors use referendums to achieve their goals. They do so deliberately and sometimes manipulatively with respect to the general public. . . Actors in nondemocratic regimes have used referendums for the same purpose. Indeed authoritarian states have developed a fondness for referendums because they grant legitimacy to a policy position and the implementers of the device by utilizing the vote of the people.<sup>18</sup>

And, while referenda are sometimes understood to be an objective means of determining Rousseau's "general will," or a method for making "correct" decisions, these contentions have been questioned on both normative and empirical grounds.<sup>19</sup>

Even if one accepts that referenda have great potential to offer the public a meaningful voice in important decisions, one must still deal with the potential for manipulation. Setälä argues that manipulation can take place on three levels: procedural manipulation, manipulation of the public agenda, and manipulation of public preferences.<sup>20</sup> Procedural manipulation can begin with the timing of the vote,<sup>21</sup> but is perhaps most obviously seen in things such as the wording of referendum questions. Even in the seemingly simple remain/leave choice in Brexit, the wording of the question was controversial.<sup>22</sup> Both

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<sup>15</sup> Simone Chambers, 'Constitutional Referendums and Democratic Deliberation' in Matthew Mendelsohn and Andrew Parkin (eds.), *Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns* (Palgrave 2001) 231–255; Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation*. Oxford Constitutional Theory (Oxford University Press 2012).

<sup>16</sup> Zachary Elkins, 'Constitutional [R]evolution in the Andes' in Ros Dixon and Tom Ginsburg (eds.), *Comparative Law in Latin America* (Routledge 2017).

<sup>17</sup> Maija Setälä, *Referendums and Democratic Government: Normative Theory and the Analysis of Institutions* (Springer 1999); Qvortrup, *A Comparative Study of Referendums*; Walker, *The Strategic Use of Referendums*.

<sup>18</sup> Walker, *ibid*, 1.

<sup>19</sup> Setälä, *Referendums and Democratic Government*, 161.

<sup>20</sup> *Ibid*, 161–162.

<sup>21</sup> Walker, *The Strategic Use of Referendums*, 2.

<sup>22</sup> The original proposal for the question wording (in a private member's bill) was "Do you think the UK should be a member of the European Union?" The UK's Electoral Commission

journalists and politicians pointed to framing effects and psychological biases as potential sources of manipulation in question wording.<sup>23</sup> As with any electoral device, there is ample opportunity for manipulation of the vote count as well. In the constitutional referendum in Turkey in April 2017, the margin of success was very narrow, and opponents of the change were quick to point to signs of irregularities in the vote.<sup>24</sup>

The frequent use of referenda by authoritarian regimes has been a subject of some fascination for scholars. Butler and Ranney suggest, “Perhaps it should be seen as a tribute to the power of democratic ideology that countries which lack the reality of open discussions and freely voted consent should embrace its forms.”<sup>25</sup> They go on to note that while there are only a few examples in which the outcome was ever in any doubt in an authoritarian referendum, it is surprising that the referendum device should ever be used at all in that context. Altman observes that such long-tenured autocrats as Ceausescu, Lukashenko, “Baby Doc” Duvalier, and Marcos, regularly resorted to referenda to advance their agenda.<sup>26</sup> The Nazi regime in Germany also used referenda at several critical points in its process of consolidating power. However, it was also a referendum – long-promised and dutifully carried out – that ultimately removed Pinochet from power in Chile in 1988. There is certainly a calculation of risk and reward that leads an authoritarian regime to submit its policy to a referendum – it seems that many autocrats have either made this calculation correctly, or have manipulated the process to ensure a favorable result.

Even in well-functioning democracies, the vast majority of referenda would seem to result in a “yes” vote. While this skewed result may be an effect of acquiescence bias, it may also be one of selection bias. That is, it is probable that in discretionary cases, elites do not submit questions to referenda unless they are reasonably certain of the outcome. Butler writes:

Most referendums are not to decide anything but to legitimize *faits accomplis*. . . The subject matter of referendums provides the explanation. They have been called, in the main, to endorse some well-matured constitutional or territorial change and they would not have been put before the people unless there was good reason to suppose they would be accepted.<sup>27</sup>

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thought that this wording was both confusing (current status is unclear) and leading. The final question was: “Should the UK remain a member of the European Union or leave the European Union?” Instead of a yes/no response option, the options were written out as “Remain a member of the European Union,” or “Leave the European Union.”

<sup>23</sup> Mark Gilbert, ‘Cameron’s Trick Question on UK’s Future in EU’ *Bloomberg View*, September 2, 2015. [www.bloombergvew.com/articles/2015-09-02/cameron-s-trick-question-on-u-k-s-future-in-eu](http://www.bloombergvew.com/articles/2015-09-02/cameron-s-trick-question-on-u-k-s-future-in-eu); Jon Henley, ‘The Power of Yes: Why the Wording of Britain’s EU Referendum Matters’ *The Guardian*, May 27, 2015, sec. Politics. [www.theguardian.com/politics/shortcuts/2015/may/27/power-of-yes-why-wording-of-britains-eu-referendum-matters](http://www.theguardian.com/politics/shortcuts/2015/may/27/power-of-yes-why-wording-of-britains-eu-referendum-matters).

<sup>24</sup> Patrick Kingsley, ‘Videos Fuel Charges of Fraud in Erdogan’s Win in Turkey Referendum’ *The New York Times*, April 18, 2017, sec. Europe. [www.nytimes.com/2017/04/18/world/europe/turkey-referendum-is-haunted-by-allegations-of-voter-fraud.html](http://www.nytimes.com/2017/04/18/world/europe/turkey-referendum-is-haunted-by-allegations-of-voter-fraud.html).

<sup>25</sup> Butler and Ranney, *Referendums: A Comparative Study*, 9.

<sup>26</sup> Altman, *Direct Democracy Worldwide*.

<sup>27</sup> David Butler, ‘The World Experience’ in Austin Ranney (ed.), *The Referendum Device: A Conference* (The Institute 1981).

This is clearly different from the dynamic in countries where citizens can propose referenda. However, in the vast majority (if not all) of the cases we consider here, the referendum was either constitutionally required, or proposed by the government of the day. Perhaps because referenda can be used by governments of any political stripe, Butler and Ranney find that contrary to the folk theory of the referendum, the device does not have an inherently conservative bias; it has been used, and abused, for both conservative and progressive ends.<sup>28</sup>

### C. On Constitutional Referenda in Particular

Our specific focus in this chapter is on the use of referenda to ratify constitutional change, which happens to be a common theme in the literature on referenda. In its revival since the 18th century, the referendum has been closely tied to constitutional change. The earliest modern use of referenda was in ratifying state constitutions in the United States of America in the late 18th century.<sup>29</sup> Around the same time, there were a series of referenda in the states that we now know as the Netherlands and Switzerland. Indeed, in one of the first attempts to catalog the use of national-level referenda, Butler and Ranney found that the majority of referenda until that time had been on constitutional questions.<sup>30</sup> As we note above, some of the most important theoretical work on referenda was motivated by concerns about constitutional change in the United Kingdom. Dicey, for one, worried about parliamentary sovereignty.<sup>31</sup> For him, the combination of a multi-document constitution, an upper chamber that is increasingly powerless, and a monarch that is unlikely to withhold royal assent from a bill that was duly passed in parliament, translated to higher law that is at the mercy of the governing coalition in the lower house. He found this situation to be troubling, and argued (using the example of the Swiss process of constitutional reform) that referenda could prevent the UK's government of the day from changing the constitution in ways that were in its blatant self-interest.

At a theoretical level, the most important characteristic that distinguishes constitutional referenda from those on policy questions, or national autonomy, is that constitutional referenda often address questions about the distribution of power (either vertically or horizontally) among political institutions. As Walker describes, a referendum in this domain introduces the citizenry as an independent arbiter in a dispute between political institutions.<sup>32</sup> This dynamic is considerably different from referenda on policy questions. While it is not clear whether citizens are better suited to make good decisions about policy or about constitutional change, the possibility that citizens can be arbiters in disputes between political institutions may be normatively appealing to some. For others, the concern is that the public vote will be manipulated in contests that are over rather abstract institutional ideas.<sup>33</sup>

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<sup>28</sup> Butler and Ranney, *Referendums: A Comparative Study*.

<sup>29</sup> However, we do not include sub-national constitutions in the data presented here. Our first observation is France's 1793 referendum.

<sup>30</sup> Butler and Ranney, *Referendums: A Comparative Study*.

<sup>31</sup> Dicey, 'Ought the Referendum to Be Introduced?'

<sup>32</sup> Walker, *The Strategic Use of Referendums*, 13.

<sup>33</sup> Setälä, *Referendums and Democratic Government*.

Within the subset of referenda that propose changes to constitutions, we make a further distinction between those that seek to ratify a *new* constitution, and those that seek approval for amendments. Tierney considers more types of constitutional referenda in his book-length analysis, but notes that the distinction between replacement and amendment is particularly critical and may have implications for legitimacy.<sup>34</sup> Relatedly, Tierney invokes Kalyvas' distinction between "command sovereignty" and "constituent sovereignty" in his discussion of the sources of authority for constitutional change.<sup>35</sup> The first source of sovereignty is original and fundamental, while the other is delegative. According to Tierney, referenda on constitutional amendments do not rise to the level of constituent sovereignty, operating instead within the command sovereignty of the existing constitution. Referenda on new (replacement) constitutions take on a special significance as in these instances, "the people act as original constitutional authors, bringing about a clear break in the old order; and whether forming new states or new constitutions they imbue the new construct with a new popular source of legitimacy."<sup>36</sup> This is an important theoretical insight, which may help us to better understand how citizens might view their responsibility in these different contexts. Of course, the difference between a package of amendments and a replacement constitution could be essentially semantic. Formally, at least in our formulation, the distinction between a "new" constitution, and an "amended" constitution hinges on the process through which the text was developed (does the reform result from the amendment procedure or not). But new constitutions can be quite similar to those they replace (the most obvious example being the series of 35 constitutions in the 200 years of the Dominican Republic), while some constitutions have through amendment become wholly new creations (witness how Mexico's 1917 constitution has evolved over 100 years). Still, for reasons that we describe below, we expect to see non-trivial differences in the behavior of voters in amendment as against replacement conditions. Indeed, in the data we describe below, we find that referenda on amendments are considerably less likely to pass than are referenda on wholesale replacements of constitutions. Much of this difference, we suggest, turns on cognitive differences in the way that voters approach and comprehend discrete as opposed to comprehensive reform.

## II. DATA AND ANALYSIS

### A. Our Data

We introduce here a new set of original cross-national historical data on referenda and their outcomes (Hudson 2019). Our universe and sample of cases matches roughly that of the Comparative Constitutions Project: all independent countries from 1789–2016.<sup>37</sup> We are interested principally in the outcome of the vote, the percentage (or number) of votes

<sup>34</sup> Tierney, *Constitutional Referendums*.

<sup>35</sup> Ibid, 11–12; Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12(2) *Constellations* 223–244. doi:10.1111/j.1351-0487.2005.00413.x.

<sup>36</sup> Tierney, *Constitutional Referendums*, 12.

<sup>37</sup> Zachary Elkins, Tom Ginsburg and James Melton, 'Characteristics of National Constitutions, Version 2.0.' Comparative Constitutions Project. Last modified: April 18, 2014. Available at: www.



for each choice on the ballot, as well as a series of other contextual variables (see below). Having no interest in reinventing the wheel, we build on the hard work of others who have started down this path. As far as we can tell, one of the best extant sources of data on referenda is a collection created by the Centre for Research on Direct Democracy. 258 observations from their database make up something of a cornerstone for our collection. A second major source is the series of data handbooks created by Dieter Nohlen and his co-authors. The Nohlen handbooks contribute an additional 204 observations. For an additional 69 referenda, we collected data from national electoral agencies. Finally, we include data collected by Mads Qvortrup (38 observations) and Beat Müller (75 observations). In all, our dataset includes 644 referenda spanning the years 1797 to 2016. We suspect that our sample comes close to matching the universe of cases, such that we have data on nearly every national-level constitutional referendum that has taken place during the last two centuries plus. We, of course, are not under any illusion that we have identified every referendum. How many we are missing, and whether those missing are missing systematically, is not yet clear to us.

Given the binary obsession on winning, the point of greatest interest for readers may be the ratio of successes to failures in ratifying referenda. Nevertheless, a first question has to do with the incidence of the votes themselves. We thus begin this section with some descriptive information about the use of constitutional referenda over time, and the regions of the world where they have seen the greatest use.

## B. The Incidence of Constitutional Referenda

How often do we observe referenda in the world's national jurisdictions? How have they evolved over time? And where are their natural habitats, historically?

### i. Temporal trends

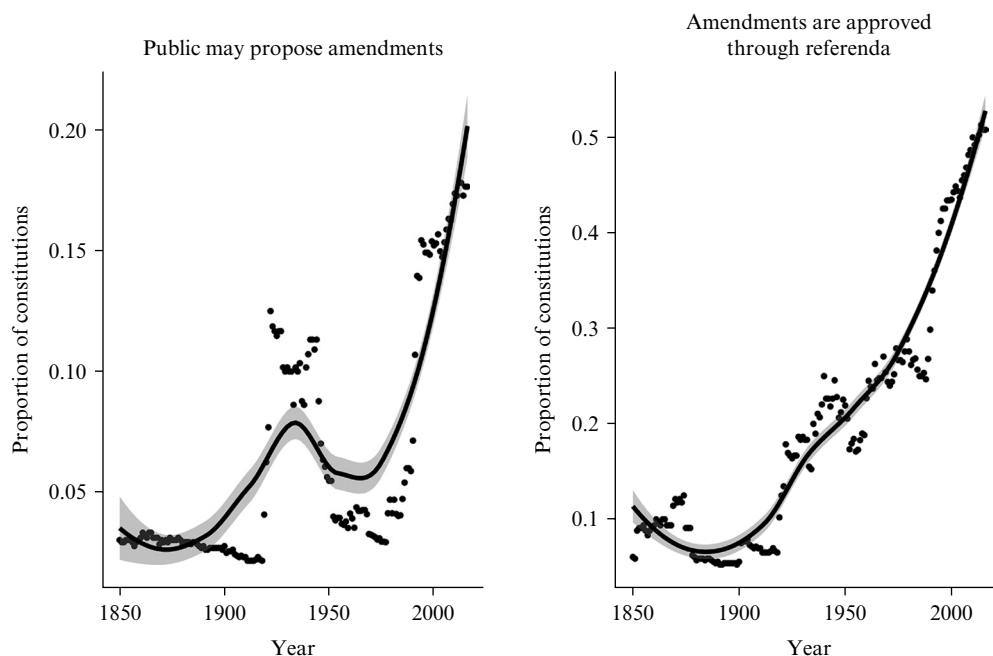
In terms of both legal possibility and realized events, direct citizen involvement in constitutional reforms has become increasingly common. Although there were a number of isolated referenda in Europe in the 18th and 19th centuries, the modern return to the use of referenda began in the wave of constitution making after the First World War. Speaking of the frequent provision for referenda in constitutions drafted in that era, a contemporary scholar wrote that "the new constitutions have not been content with the mere statement of the fact of popular sovereignty, but have sought direct means of giving to the people the power of exercising their sovereign rights."<sup>38</sup> In addition to this inter-war renaissance, there has been a large increase in the provision for constitutional referenda since the 1990s. In data from the Comparative Constitutions Project, we find that by 2013, 21 percent of constitutions provided for citizen-initiated constitutional amendments, while 59 percent provided for ratification of constitutional amendments through referenda (see Figure 7.1).

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comparativeconstitutionsproject.org; Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009).

<sup>38</sup> Agnes Headlam-Morley, *The New Democratic Constitutions of Europe: A Comparative Study of Post-War European Constitutions with Special Reference to Germany, Czechoslovakia, Poland, Finland, the Kingdom of the Serbs, Croats & Slovenes and the Baltic States* (Oxford University Press 1928).





Notes: Universe/Sample:  $n = 763$  of the 847 known constitutional systems, 1850–2016.

Source: Comparative Constitutions Project.

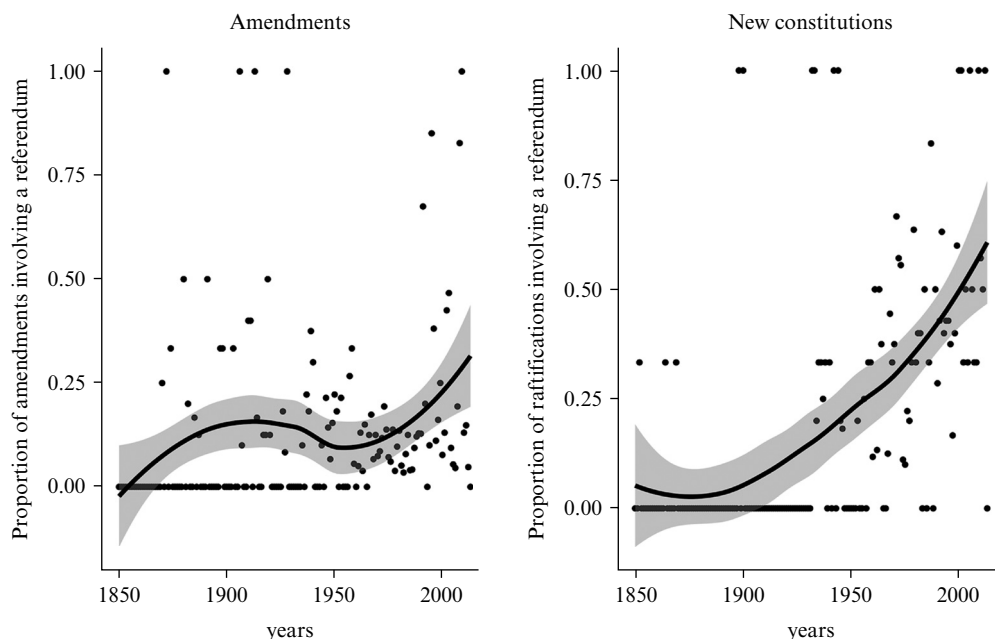
Figure 7.1 *Constitutions in force that provide for public initiative and ratification for constitutional amendments, by year*

The *use* of these institutional avenues for public input varies greatly from year to year, but the trend has been toward the increased use of referenda in constitutional change. In the 2000s, an average of more than half of the constitutional amendments that were approved had been submitted to the voters in a referendum (see Figure 7.2). In a particularly busy year, as many as a dozen countries may have a constitutional referendum (including those on amendments and new constitutions). The average since 1945 has been 4.7 instances per year.

## ii. Geographical trends

Evidently, many countries have never treated their citizens to a constitutional referendum, while some (such as Switzerland and Australia) hold them regularly – on average, more than one per year in the Swiss case. In Figure 7.3 below, we depict the number of elections since 1789 in which each state has placed a constitutional referendum on the ballot. Countries in white are those who have never held a constitutional referendum, while darker shades of grey indicate higher numbers.<sup>39</sup> (Our apologies to geographically small

<sup>39</sup> Note that the count here is referendum questions, not occasions on which a vote(s) took



Source: Hudson (2019).

Figure 7.2 Incidence, by year, of the (1) amendments, and (2) replacements, of constitutions that involve a public referendum

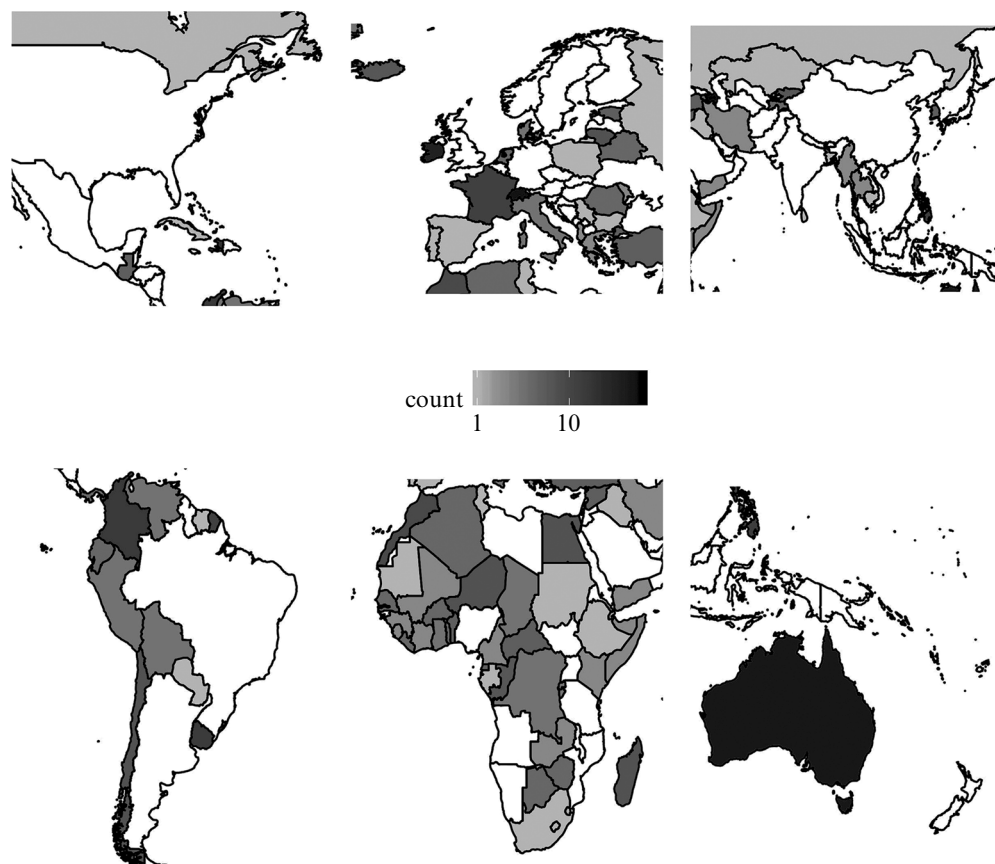
states for their lack of visibility in the maps.) There is no discernible (to us) regional trend, which indicates the global penetration of the practice. Rather, many countries around the world have used a referendum to settle a constitutional question at least once. Continent-level rates are not particularly helpful, but we can say that in those terms, Oceania leads the way with a rate of more than ten referenda per state. South America and Europe appear high on that measure as well.

Africa's total seems especially high given the relative age of its states. Indeed, ratifying referenda have been common in Africa precisely because of the process of gaining independence from colonial powers. The first constitutional referendum on the continent took place in Liberia in 1847, the year Liberian founders declared independence. In all, a total of 40 African states have held at least one constitutional referendum. Morocco heads the list with nine. Niger, Madagascar, and Egypt have each held seven. Most of the African referenda have been on replaced or new constitutions, with relatively few on amendments.

Constitutional referenda have been comparatively rare in Asia, with only two countries making regular use of them. Perhaps surprisingly, the country that has submitted the greatest number of constitutional changes to voters is Azerbaijan, where voters have

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place. In some cases voters have been presented with many questions on one occasion. We have counted each question separately.



*Notes:* Accumulated number of referenda between 1789–2016.

*Figure 7.3* An historical count of constitutional referenda, by region

been asked to answer a record 67 referendum questions. These questions have been squeezed into four ballots. The most recent Azerbaijani referenda (2009 and 2016) have each included 29 questions regarding a host of changes to the constitution. The next most-frequent sighting of referenda in Asia has been in the Philippines, where leaders have held 13 constitutional referenda since 1935, including proposals for three new texts, and nine amendments.

Within Europe, the two countries that have held the most referenda are Switzerland (51) and Ireland (33). In both of these states, referenda are required to pass constitutional amendments. France has also made extensive use of referenda, with 12. France is also notable in that their 1793 referendum to ratify the second revolutionary constitution is the first observation in our dataset.

The vast majority of the constitutional referenda in North America have been in the Caribbean. It may not surprise those familiar with rates of constitutional transition that Haiti leads the way with 20 referendum questions, followed by the Bahamas with

nine. The most democratically suspect of Haiti's referenda occurred during the Duvalier dictatorship, but Haitians have been deciding on constitutional change through referenda as early as 1918 (when they hosted one while under US occupation). Given our interest in elite (mis-)calculations, it is notable that it was a referendum-too-far that led to the ouster of the Duvalier regime. Although the Duvaliers had pushed through a clearly fraudulent referendum in 1971, the equally manipulative constitutional referendum of 1985 was evidently too much for the people of Haiti, and inspired the protests the following year that finally pushed the Duvaliers out of power. The constitutional referenda in the Bahamas are worthy of special note because Bahamian voters have rejected *all* nine proposals, a seemingly disastrous record by global historical standards.

Constitutional referenda have been reasonably popular in South America, although two of the continent's largest countries have not held any. Colombia has made the greatest use of constitutional referenda, having put 16 constitutional questions to the people. All but one of these questions were asked in one referendum in 2003. On that occasion, despite high levels of support among those who voted, only one question was answered with enough valid votes (greater than 25 percent of registered voters) for the measures to pass. Uruguayan voters have had the opportunity to vote on constitutional changes on 13 occasions, with a total of 15 questions. The majority of these have been on constitutional amendments, but in 1980 the Uruguayan voters turned down a new constitution proposed by the military regime. Despite this seemingly clear answer from the people, the regime implemented some of the proposed changes anyway.

Although Australia is the most conspicuous natural habitat for referenda on our map, some of the island nations of Oceania are also noteworthy settings. Australia has had an impressive 46 constitutional referenda since 1898. Undeterred by failure in their first referendum in 1898, Australians proceeded to approve their current constitution through a referendum in 1900. Appropriately, that constitution stipulates that changes to the text must be approved through the voters in a referendum. Yet only eight of the 44 subsequent attempts to change the constitution have received sufficient support from the voters. Excessive yea-saying does not appear to be a problem among Australians, at least in the constitutional context. The neighboring Marshall Islands are not far behind Australia in terms of referendum activity, having submitted 40 constitutional changes to its 50,000 citizens, on three occasions. The constitution of the newly-independent Marshall Islands

Table 7.1 Referenda and outcomes by continent (1789–2016)

	Africa	Asia	Europe	N. America	S. America	Oceania
Rejected	6	2	43	17	25	97
Passed	123	122	110	24	28	47
Total	129	124	153	41	53	144
Rate/country <sup>40</sup>	2.39	2.58	3.48	1.78	4.42	10.29

Source: Hudson 2019.

<sup>40</sup> Not standardized by year, which underestimates the rate of relatively new states and Africa in particular.

was passed in a referendum in 1979. In 1990, a package of four proposed constitutional amendments passed, while in the next referendum in 1995 only one of the 35 proposals passed. The Federated States of Micronesia have also presented a large number of constitutional proposals to the voters, including one for a new constitution in 1978, which passed. Again, many of these proposals have come in packages. In the only other episode in Micronesia, the voters approved only four of 26 proposed changes to the constitution.

Some of these findings speak to the success (and lack thereof) of referendum proposals, which constitutes our central research question, and one to which we now turn.

### C. Success and Failure in Constitutional Referenda

Our primary preoccupation – and probably that of leaders in David Cameron’s unenviable position – is to establish some baseline forecast of the voting public’s response to constitutional questions on referenda. To what degree have citizens backed elite proposals, historically? Generally, most proposals pass, but it turns out that the passage rate depends substantially on whether the proposal is for a replacement as opposed to an amendment. In referenda on *new* constitutions, the voters have approved 94 percent of proposals, as against 61 percent of *revision* proposals (Table 7.3). 94 percent seems in line with at least *our* expectations of rampant yea-saying. But 61 percent is not only relatively lower, as expected, but also rather low in absolute terms. Hitting safely 60 percent of the time may be an impressive batting average in baseball’s major leagues, but it is decidedly *not* so in constitutional politics. Leaders should be doing better with voters, one would think.

While win/loss is an important and decisive binary outcome, the underlying distribution of votes provides a more precise picture. As one would expect, not only are the passage rates different between replacements and amendments, but so too are their margins of victory. New constitutions often pass with a relatively high level of support, while the margins are much tighter in amendment votes. On average, replacements receive 84 percent of the vote, while amendments receive 73 percent. Figure 7.4 depicts the two distributions across the 644 proposals in our sample. Both distributions are highly skewed toward 100 percent, which indicates an unusually high degree of consensualism; clearly, a large and distinct species of these votes has a unanimous flavor. However, compared with that of replacement votes, the distribution of amendment votes is more uniform, with a dense outcropping of votes around 50 percent. The decisions around amendments seem clearly to be more contested – sometimes highly so – than those around new constitutions.

Average effects can be misleading. It seems quite possible that there is some heterogeneity in the way amendments and replacements operate across countries. Indeed, when we unpack the data, it is evident that amendments are contested in some places but not others. Many of the close amendment votes have taken place in settings with vigorous democratic cultures (such as Australia, Ireland, and Switzerland), while many of the lopsided ratifications have occurred in countries in which the official vote counts are more suspect, such as Azerbaijan.<sup>41</sup> Likewise, it seems that votes to ratify new constitutions have more often taken place in less democratic states. So, part of the difference between

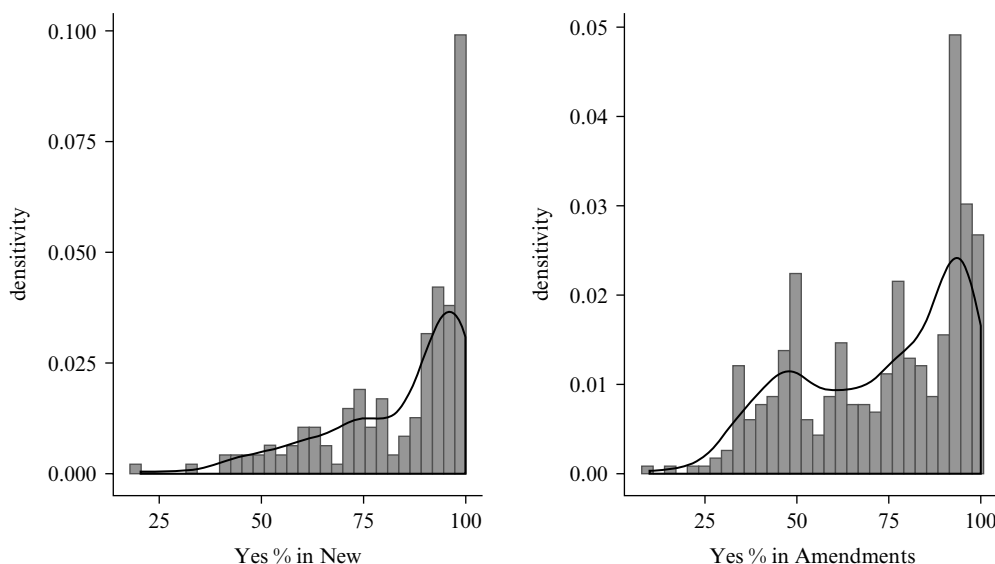
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<sup>41</sup> In fact, among the 44 Swiss constitutional amendments we include in our dataset, the median “yes” vote is 48.8 percent, while the mean is 50.3 percent.

Table 7.2 Success and failure of constitutional referenda (1789–2016)

	New Constitutions			Amendments		
	Ratified	Rejected	Total	Ratified	Rejected	Total
Number	168	11	179	277.4%	174	451
%	93.9%	6.1%	100%	61.4%	38.6%	100%

Source: Hudson 2019.



Source: Hudson 2019.

Figure 7.4 Margin of victory in constitutional referenda (1789–2016)

replacement and amendment could be a selection effect, in that amendment reform is a practice of competitive democracies with stable constitutions whereas replacement is more likely to be found in noncompetitive states. In the analysis below, we evaluate exactly these sorts of questions.

We further explore these expectations of success and failure in constitutional referenda in a multivariate analysis. In particular, we run a set of logistic regression models predicting the success (or not) of constitutional proposals. Given the differences in passage rates between replacement and amendment proposals, we conduct the analysis within three samples: (1) all proposals, (2) replacements only, and (3) amendments only. Note that in the case of replacements, the very low number of failures has the potential to bias our estimates, so we estimate a rare events logistic regression using the Zelig package.<sup>42</sup>

<sup>42</sup> Kosuke Imai, Gary King, and Olivia Lau, *Zelig: Everyone’s Statistical Software* (2007)

Our first model (Table 7.2, column 1) explores the regional dynamics more systematically. Note that the table presents the odds ratios associated with success; estimates greater than one represent increased odds and those less than one represent decreased odds. We estimate the effects of region on outcome (success or not) for all types of referenda (replacement and amendment). The results provide a more precise geographic cut at what seems (in the descriptive numbers above), to be some significant variation in passage rates across regions. The model includes dummy variables for each region except for Europe (East and West), the reference category. We also include a dummy variable for Switzerland, a unique setting for both incidence and outcome; Switzerland accounts for a full eight percent of cases in the sample. The results suggest two distinct geographic clusters: South America and Oceania, where referenda are significantly more prone to failure than they are in Europe. In both regions, proposals are roughly one fifth (odds ratios of 0.21 and 0.18) as likely to pass than they are in Europe.

We recognize that the competitiveness of referenda elections will – almost by definition – vary with levels of democracy. Each model in Table 7.2 thus includes a measure of democracy (Polity). Sure enough, the results seem to corroborate the adage (à la Przeworski<sup>43</sup>) that democracies are those systems in which elites can and do lose elections (though not in the case of replacement constitutions). A shift of one standard deviation up (towards democracy) on the democracy variable decreases the probability of winning an amendment referendum by 40 percent. This result seems to corroborate intuitions (and scattered evidence) about elite manipulation and/or oppression in non-democratic referenda. For example, Wheatley and Germann had found something similar in a smaller-bore investigation of some 30 cases.<sup>44</sup> The authors identified a class of constitutions that were ratified through referenda as a sort of “rubber-stamp” on a non-democratic constitution. They described these constitution-making exercises as “characterized by minimal public participation and a referendum that was no more than a fig leaf to mask authoritarian rule.”<sup>45</sup> Our aggregate results, together with other theory and evidence, seem to accord with the intuition that the uncertainty surrounding referenda results is limited to democracies.

We also reason that it should matter whether the referendum is a stand-alone vote, or coincident with another election. One thing that happens in comprehensive ballots is that more voters turn out. A larger, more representative set of voters may not actually be propitious for a government interested in rubber stamping its reforms. As such, our expectation is that, on average, holding the referendum alongside another election would tend to decrease its probability of success. As it happens, it is hard to make any such a comparison for new constitutions. There are only 18 cases in which a new constitution was ratified in

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<http://GKing.harvard.edu/zelig>; Christine Choirat, Christopher Gandrud, James Honaker, Kosuke Imai, Gary King, and Olivia Lau, *Relogit: Rare Events Logistic Regression for Dichotomous Dependent Variables*. Zelig: Everyone's Statistical Software (2017) <http://zeligproject.org/>.

<sup>43</sup> Przeworski, A. (1986). Some Problems in the Study of the Transition to Democracy. In G. O'Donnell, P. C. Schmitter, & L. Whitehead (Eds.), *Transitions From Authoritarian Rule: Comparative Perspectives* (Vol. 3). Baltimore and London: The Johns Hopkins University Press.

<sup>44</sup> Jonathan Wheatley and Micha Germann, 'Outcomes of Constitution-Making: Democratization and Conflict Resolution' in Jonathan Wheatley and Fernando Mendez (eds.), *Patterns of Constitutional Design: The Role of Citizens and Elites in Constitution-Making* (Routledge 2013) 49–68.

<sup>45</sup> *Ibid*, 55.



Table 7.3 Probability of referenda success (logistic regression – odds ratios)

	Universe			
	Replacements and Amendments	Replacements and Amendments	Replacements	Amendments
Intercept	12.69*** (5.96)	9.55*** (3.41)	0.04*** (0.02)	9.40*** (5.04)
Democracy (Polity2)	0.81*** (0.04)	0.80*** (0.02)	0.86 (0.07)	0.79*** (0.03)
North America	0.49 (0.29)			
South America	0.21*** (0.09)			
Africa	2.21 (1.29)			
Asia	3.31 (2.71)			
Oceania	0.18*** (0.08)			
Switzerland	1.81 (0.74)			
Constitutional provision for popular approval of amendments		1.27 (0.47)	2.83 (2.40)	1.18 (0.58)
Referendum at same time as election		0.41*** (0.14)		0.36** (0.13)
AIC	346.44	385.86	53.24	299.28
BIC	379.62	402.32	62.22	314.03
Log Likelihood	-165.22	-188.93	-23.62	-145.64
Deviance	330.44	377.86	47.24	291.28
Num. obs.	468	452	147	295

a referendum alongside an election, and none of them has failed. Based on these sparse data, contemporaneous elections are a perfect predictor of success, but of course, success is probable in that domain anyway. But there are sufficient data to estimate the effect of referendum timing for the amendments, and here we see that having the referendum on the same day as another election is a statistically significant predictor of failure.

Finally, we expect that when referenda are mandatory, they will be less likely to succeed. Our sense, as we elaborate below, is that a prior commitment to hold a referendum forces the hand of elites, who might otherwise opt not to test the treacherous waters of public approval. It is difficult to accurately code the legal necessity of constitutional referenda, but we proxy this by using a variable from the Comparative Constitutions Project, which captures whether or not the constitution then in force required constitutional amendments to be ratified through a referendum. Nevertheless, we find no significant relationship between this variable and the success of a proposal among either new or amended constitutions. Some of this non-relationship could be a result of measurement error in our

measure of mandatoriness (see below). Still, we find little *prima facie* evidence to suggest that the hand of leaders is forced into ill-advised votes.

### III. A FOCUS ON FAILED REPLACEMENTS

The failure of new (replacement) constitutional proposals is a fairly rare event, which lends itself to some more intensive case analysis. To recall, while failures are rare for *replacement* proposals, they are relatively common among *amendment* proposals. Failures account for only 11 of the 179 single-question referenda on new constitutions held since 1793. As we describe above, we expected that some of these failures were less about miscalculation and more about elite commitments to ratification. That is, we expected that referenda would fail to ratify a new constitution only in cases in which the referendum was unavoidable, either because the government was bound by constitutional law, a court ruling, or a prior agreement to hold the referendum. Call this a *forced-hand* theory. The argument is based on the common-sense notion that governments will not submit their proposal to a vote unless they are reasonably certain of success. Throughout the literature on referenda, there is an assumption that political elites have a good understanding of the probabilities that public votes will approve their projects. And yet, elites seem to have faced rejection in 11 cases<sup>46</sup> in which voters were asked a simple up/down question<sup>47</sup> about the proposed constitution.

In our statistical analysis above, we found that constitutional commitments to ratification were *not* associated with failure of *new* or *amendment* proposals, but we must admit that our proxy for “forced-handedness” is a relatively weak one. Through a brief study of the history of these 11 cases, we find that in five of these cases, the referendum *was* to some degree mandatory. As we describe above, the line between mandatory and discretionary is sometimes quite fine. In only three of these cases (Estonia twice, and Saint Vincent and the Grenadines) was the referendum constitutionally mandated. As noted earlier, in Kenya in 2005, the referendum was required by the Nairobi High Court, on the basis of its interpretation of the practical requirements of popular sovereignty in constitutional reform. In the final mandatory case, the French constitutional reform that followed the end of the Second World War involved several referenda on constitutional reform. Critically, a 1945 referendum itself decided aspects of the constitution-making process, including a mandate that the new constitutional text be ratified through referendum.<sup>48</sup> This effectively committed the French government to a referendum to ratify the new text in 1946. Following this procedure, a new constitutional text was voted down in May 1946. A revised proposal was approved in a second referendum in October 1946.<sup>49</sup>

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<sup>46</sup> Netherlands (Batavian Republic) 1798, Australia 1898, Estonia 1932, Estonia 1933, France 1946, Uruguay 1980, Seychelles 1992, Albania 1994, Zimbabwe 2000, Kenya 2005, Saint Vincent and the Grenadines 2009.

<sup>47</sup> We make this last distinction because in some cases voters have been presented with more than one option. We exclude those cases from this count because of the simultaneous successes and failures.

<sup>48</sup> Jon Cowans, ‘French Public Opinion and the Founding of the Fourth Republic’ (1991) 17(1) *French Historical Studies* 62–95. doi:10.2307/286279.

<sup>49</sup> The constitution voted on in May 1946 had been drafted by two leftist parties, and provided

The opposite of the forced-hand failures are the *unforced errors*. These are cases in which referendum appeared to be optional, but yet the leaders scheduled one anyway and lost. Among such cases, four (Uruguay 1980, Seychelles 1992, Albania 1994, Zimbabwe 2000) involve an ambitious executive or an autocratic regime that held a referendum on their own constitutional project. These four cases are in some ways the most interesting, since they are instances in which it seems that the referendum could have been avoided entirely; yet, like Cameron and his Brexit decision, the leaders appeared to have miscalculated badly with dramatic consequences.

Our remaining cases of a failed vote are somewhat different. Details about the earliest case, a referendum in an early 19th century incarnation of the Netherlands (the so-called Batavian Republic) that took place in 1798, are difficult to confirm. It appears that this referendum was optional, and that the vote took place by voice, among a very small electorate. In this sense, it is not clear how comparable the case is to more modern referenda, though ~~we remain curious about the event.~~

The Australian case in 1898 also stands by itself. The circumstances of the vote concerned the drafting of the first constitution of a united and self-governing Australian Commonwealth. The colonial governments<sup>50</sup> agreed that there would be a referendum to approve the new constitution, and that there would be additional requirements about the threshold of the “yes” vote in each of the colonies. A majority of the overall votes were for approval, but the referendum narrowly missed the required threshold in one of the colonies. This referendum was by all accounts optional, though the circumstances of its failure are somewhat unique (at least among referenda on new constitutions).

Reviewing the 11 cases then, we find that a full five of these failed referenda were mandatory. Four of the referenda appear to have taken place on the basis of a mistaken belief that the voters would approve the constitutional project proposed by a power-seeking leader. The remaining two cases have elements that make them less comparable to the others. Our sense, then, is that we have just as many unforced errors as we do forced ones. That is, referenda do not fail only in circumstances in which leavers have no choice in holding the referendum. Miscalculation is responsible for half of these failures and, what is more, some of the miscalculation comes at the hands of autocrats, who may underestimate either the courage or loyalty of their citizens.

#### IV. EXPLAINING THE DIFFERENCE BETWEEN REPLACEMENTS AND AMENDMENTS

The central puzzle lurking in these data is the striking difference between amendments and replacements with respect to success. Why? We can begin to test empirical implications related to various explanations, but at this point in the research cycle it also makes

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for a unicameral parliamentary system of government. This was opposed by parties of the center and the right. The October 1946 proposal was much like that the constitution of the Third Republic, with a bicameral parliament, and a weak, indirectly elected president. Alistair Cole, *French Politics and Society* (Routledge 2017).

<sup>50</sup> Australia was ruled as six separate colonies at this time.

sense to engage in ideation – to think broadly about possible suspects.<sup>51</sup> One can classify the plausible explanations from the perspective of (1) citizens and that of (2) elites. The background assumption is that the inquiry allows us to understand democratic processes better.

### **A. Elite Behavior**

One explanation recognizes that elites are strategic and opportunistic, and more or less so under certain conditions. Arguably, authorities have considerably more discretion in the planning and introduction of a referendum vote in the case of replacements than they do in that of amendments. Whether, when, and how are important factors in the success of ballot questions and discretion on those questions matters.

In general, we have good reason to believe that elites have historically had greater leeway in deciding whether or not to subject a new constitution to a referendum.<sup>52</sup> For one thing, as new constitutions are created in a new exercise of constituent power, it is easier to justify a new ratification process. We can test, or at least probe, this assumption. Recall that CCP data records whether or not a referendum is a part of a constitution's amendment process. That data point informs us about procedural expectations. The relevant empirical test then, is whether a replacement constitution is approved through referendum in cases in which a referendum would have been required for an amendment. That is, to what degree have elites avoided a referendum under conditions in which a referendum was expected, or in some sense, required. The CCP's dataset on constitutional events records 728 new constitutions between 1789 and 2014. Among these, there have been 68 new constitutions in which a referendum might be expected given the amendment procedures of the prior constitution. Exactly half (34) of those were in fact ratified through a referendum. Thus, among those constitutions emerging from a clearly specified referendum tradition, a full 50 percent avoid the referendum. That, to us, appears to be a remarkably high number and suggests that political elites may in fact exercise a significant degree of discretion in their decision about whether to invoke a referendum vote.

Whether this discretion helps elites avoid election failure is another question. We investigated this possibility indirectly in the regression analysis above. That is, we tested the assumption that seemingly obligatory votes would fail at higher rates than would voluntary ones. The macro data showed little evidence for this proposition, though as the use of "seemingly" in the prior sentence suggests, we harbored some skepticism about the measurement of obligation. A closer case analysis of replacement failures revealed that half of the failed votes were, in fact, required. Small sampling issues aside, that pattern suggests that we cannot rule out the idea that failures stem from obligatory referenda.

Another possibility revolves around the relative importance of replacements compared with amendments, something that affects both elites and masses. In the case of elites, it may be that they invest more resources in marketing a full text to the public than they do in raising support for individual amendments.

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<sup>51</sup> Thanks to David Landau for sharing various ideas in this section.

<sup>52</sup> The ubiquity of ratifying referenda over the past several decades is likely to reduce the ability of elites to ratify referenda through other means going forward.

A cross-cutting set of explanations – related to the type of elite actor – has to do with the findings regarding democracy above. It seems likely that non-democrats are more likely to replace a constitution than are democrats,<sup>53</sup> and since the proposals of non-democrats do better at the polls than do democrats (whether legitimately, or otherwise), the relative success of replacement provisions may just be something of an indirect regime-type effect.

## B. Citizen Behavior

A second set of explanations focuses on the behavior of voters. Clearly, voters face different decisions under the two conditions. Under the replacement condition, voters are asked to react to a comprehensive, symbolic, and once-in-a-lifetime reform. Under the other, they face a discrete and, probably, more narrow reform. Consider the cognitive challenges in assessing aggregate versus specific proposals. For example, imagine the evaluation of the Japanese Constitution, as a document, as against the evaluation of its Article 9, the famous peace clause. Or an evaluation of the US Constitution, on the one hand, and the second amendment (the right to bear arms), on the other. Aggregate proposals, such as a full constitutional document, are, by definition, multidimensional, whereas amendments are mostly unidimensional. Furthermore, aggregate proposals are typically not only multidimensional, but also substantially longer: roughly the difference between reading a paper of ten to 20 thousand words versus reading a paragraph. Both of these properties (multidimensionality and length) lead, we suspect, to non-opinions. Non-opinions, when translated to votes, might well be overwhelmed by an affirmative response bias (yea-saying). That is, there will be a lot of noise and very little signal in one's assessment of the content, and much of the signal in the assessment will come from a systematic error (response bias) embedded in the measurement instrument (ballot question).

One way to think of this phenomenon is as an example of the philosophical concept of *emergence*, in which a phenomenon is more than the sum of its parts. For example, individually-ordinary water molecules, whose fractal patterns comprise a snowflake, emerge as something beautiful only in the aggregate. Similarly, with respect to constitutions, one may quibble with parts of a text if asked to consider them individually, but still profess a high opinion of the text (mostly, perhaps, because one has not actually read it).<sup>54</sup> We thus expect that, on average, specific proposals for amendments – especially ones that are clearly stated – will be more contested than full constitutions will be.

Given the challenge of aggregate proposals, some states have pursued a hybrid approach, in which they assess citizens' evaluation of both the draft as a whole as well as its more

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<sup>53</sup> Elkins, Ginsburg, Melton, *The Endurance of National Constitutions*.

<sup>54</sup> As a concrete example, just such an expectation was likely at work in the way the government framed the referendum on Canada's Charlottetown Accord in 1992. As Clarke and Kornberg describe it, "the government's decision to phrase the [single] question in a very general way may have reflected recognition of the threat to a 'yes' majority posed by a coalition of negative minorities who disagreed with one or more specific aspects of the proposal. By deemphasizing its particulars and asking voters for a simple yes or no verdict on the entire package, this threat might be minimized." Harold D. Clarke and Allan Kornberg, 'The Politics and Economics of Constitutional Choice: Voting in Canada's 1992 National Referendum' (1994) 56(4) *The Journal of Politics* 940–962. doi:10.2307/2132068, p. 943.

specific elements. Some examples include Bolivia (2009) and Iceland (2012). The adoption of Brazil's 1988 Constitution provides an interesting variant; there, drafters scheduled a referendum on fundamental aspects of the Constitution (specifically, on presidentialism and on the restoration of the monarchy) five years after the Constitution's adoption.

Another way to understand citizen attitudes is to think about their approach to the risk associated with reform. The data would suggest that voters are more risk-taking (reform accepting) in the context of wholesale reform than they are in the context of small-scale reform. Why would that be? Why might amendment proposals provoke status-quo favoritism, while replacement proposals provoke what appears to be an adventurous gamble? One reason might be that citizens can more fully understand the risk associated with narrow concrete reform. In that amendment case, the risk appears real, and voters adopt the kind of risk-averse behavior that prospect theory might suggest.<sup>55</sup> Another explanation, consistent with prospect theory, might be that those considering a new constitutional proposal may feel that they are operating in the domain of losses. That is, voters may perceive that they face two bad choices: stick with the failed status quo or gamble with the new one. In the domain of losses (failed status quo arrangements), individuals are often more risk accepting, which may lead them to support a new constitutional regime.

## V. CONCLUSIONS

The referendum device seems to have great appeal to political leaders, and for obvious reasons. It offers an unmatched opportunity to gain popular approval, and can also be a means of bypassing obstacles (i.e. other constitutional actors) within the political system. But as we have seen in recent years, some leaders have misjudged their ability to convince voters to approve their projects, sometimes with results that may have been destructive to both their own careers and their nation's prosperity.

Like many, we are curious about how to handicap a referendum election. Do such proposals usually pass, or is Brexit more common than we might think? And what conditions would affect the probability of a referendum's passing? Scholars and, probably more often, *leaders*(!) have pondered these questions. Our approach is to collect and analyze the historical data. Having done so, we are left with a very clear baseline finding. Votes on full constitutions almost never fail (they fail six percent of the time), while those on amendments fail 40 percent of the time.

We had expected high passage rates, in general, and the modest passage rates for amendments gives us pause. Yet we have some strong theoretical priors about why referenda on amendments are distinct from those on new constitutions. These factors operate on both the elite and mass levels. Specifically, replacement proposals allow elites significant discretion as to the timing and procedure of referenda; by contrast, amendment proposals are more procedurally constrained. But also, the practical and cognitive dynamics of these votes, as voters apprehend them, are substantially different. Specifically, factors such as the multidimensionality and length of full constitutions in comparison with amendments

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<sup>55</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011).

lead to an accentuation of affirmative response bias among voters. We have characterized this as a constitution taking on a quality of *emergence* for voters, in which whole constitutions take on properties that may not be shared by their parts.

We are motivated, in part, by the question of how we might advise – purely hypothetically – would-be constitution revisers on their prospects in a referendum. Who is to say as to whether these votes *should* pass, by whatever welfare perspective. Regardless, our findings suggest that leaders maximize their chances of success when the constitutional change takes the form of a new constitutional text. If amendments are the chosen path, more amendments are better than fewer, and special referenda are better than those that co-occur with other elections. However, from the perspective of the citizen who wishes to effectively exercise a veto on potentially anti-democratic constitutional change, the reverse is true. Indeed, it may be that referenda on discrete changes at long intervals offer the voting public the best chance to correctly assess and arrest such changes.

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