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The Impact of Public Participation in Constitution Making

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The Impact of Public Participation in Constitution Making

by

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Dedicated to Marianna

Without whose patience, sacrifice and encouragement this would not have been possible.

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The Impact of Public Participation in Constitution Making

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Public participation has long been an important element of constitution-making processes. It increasingly takes place early in the process, ostensibly offering citizens an opportunity to contribute directly to the text of their new national charter. Despite growth in the use and political prominence of participatory mechanisms, we know little about their effects. This dissertation argues that the impact of public participation on the text of constitutions is small in almost all cases, but that there are systematic ways in which this impact varies.

Specifically, the variation in the effects of public participation is for the most part determined by the strength of political parties in the constitution-making process. In constitution-making bodies where there are strong parties, there is very little room for effective public participation. In such systems, there will be almost no impact from public participation, even where significant amounts of time and money are devoted to facilitating it. Conversely, in constitution-making bodies where political parties are not present, or where parties are weak, there will be a greater impact from public participation, as drafters are unprotected from pressure groups and also more reliant on the information they provide. I further argue that the informational

challenges of assessing the impact of public participation prevent the majority of participants from determining whether or not the participation program was effective. Thus, public participation programs can serve to increase public support for a constitution even when drafters do not make any changes to the content of the constitution in response to public input.

This theory is tested through studies of three cases of highly participatory constitution making. Keeping the level and means of participation relatively constant, the three cases have been chosen to include a case with strong parties (South Africa), a case with weak parties (Brazil), and a case where the constitution was drafted without parties (Iceland). As predicted, the South African case shows negligible impacts from public participation, Brazil has some scattered impacts, and Iceland shows high levels of impact. The findings here demonstrate that the expected relationships between citizens, political parties, and interest groups exist even in constitution-making processes. Moreover, it shows that there are trade-offs between stability, textual quality, and more effective public input.

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Chapter 1

Introduction

In the final months of 1995, about one-third of South Africans encountered an interesting full page advertisement in a newspaper or magazine. It was a picture of President Nelson Mandela standing on a pavement outside a building, dressed in a suit, and talking on a cellular phone. The speech bubble above his head read, "Hello, is that the Constitutional Talk-line? I would like to make my submission" (Segal and Cort, 2011; Everatt et al., 1996, 156). This advertisement was part of a large campaign to encourage South Africans to participate in the constitution-making process. The central message was that South Africans of any background, level of education or income, could meaningfully contribute to the drafting of the constitution. It intimated that their participation was wanted, and that participation was easy. This message was buttressed by the publication of comic strips that illustrated the constitution-making process and the content of the constitution, and TV and radio programs that brought the constitution-making process into the living rooms, minibuses and cars of the "rainbow nation." But what was it all for? Did it have any impact on the words of the constitution?

Public participation programs are often marketed to the general public with

this kind of aspirational and positive message. The broader advertising slogan of the South African Constitutional Assembly was: "You've made your mark, now have your say." Later followed by advertising that made an implicit promise that this participation would be effectual, as it read: "You've made your mark. You've had your say. Now we're making sure it counts" (Segal and Cort, 2011, 163). In Brazil, documents produced by the Constituent Assembly suggested "You too are a member of the constituent assembly, participate!"[1] Though less clear than the South African advertising, the suggestion that the member of the public are in some sense members of the constituent assembly seems to convey a similar promise that what they have to say about the constitution will matter.

Many sophisticated analysts of political rhetoric and behavior would not believe these advertisements to be sincere. But they did have traction with voters. In a survey conducted shortly after this advertising campaign in South Africa, 41% of respondents indicated that they thought the Constitutional Assembly would pay attention to their input (Everatt et al., 1996, 22). In a poll taken under similar circumstances in Brazil, a majority of respondents with higher levels of education expressed enthusiasm about participating in the constitution-making process (Globo, 1987a). These reactions from the public raise a number of empirical questions. Did drafters give these submissions a fair hearing? Did it matter for what they wrote in the constitution? Why or why not?

The drafting of a new constitution is in itself a momentous political event in any nation. But it also often takes place at a critical juncture in country's history, such as recovery from war, a transition to democracy, or the consolidation of an

[1] Você também é constituinte, participe!

authoritarian regime. Thus the participatory process matters for the constitution itself, but also for the stability of the political system and for establishing new patterns of political behavior. Public participation in constitution-making processes may have significant impacts far beyond the constitutional text.

Over the last several decades, public participation in constitution making has taken many forms. The classic means of public involvement is in ratifying constitutions through referenda. Between 1789 and 2016, 168 constitutions were ratified through referenda, and as of 2018, more than two-thirds of constitutions in force were ratified through a referendum (Elkins and Hudson, 2017). However, as noted above, it is becoming more and more common to involve voters *earlier* in the process through such means as public consultations, petitions, written and oral submissions, and even popular amendments. Recent examples include a promise from the government of Chile to "open up dialogue on the constitutional process to citizens" in their reform process that began in October 2015 (de la Jara and O'Brien, 2015; Mohor, 2016), and the Citizen Assembly on constitutional change in Ireland that took place in 2016-2017 (Lynott, 2017). This kind of public involvement is not limited to democracies either, as countries like Zimbabwe have held public consultations on constitutional change, and Azerbaijan has used referenda (perhaps of dubious integrity) to allow the public an opportunity to affirm or deny constitutional changes.

Despite this increasing participation of the public in constitution-making processes, the purpose of all this activity has been somewhat obscured, and its impact little explored. There are certainly reasons to believe that one purpose of popular involvement is to increase the legitimacy of the constitution. However, many public outreach programs are pitched in terms of giving the public an opportunity to con-

tribute to the constitutional text, and perhaps even to assume the role of co-author with the members of the drafting body. In this dissertation, the latter issue is pursued.

Inspired by scenarios like the advertisement featuring Mandela, there are two central questions in this dissertation. They work in order, as the first question is descriptive, and the second is inferential.

1. To what extent does public participation in constitution-making processes affect the text of the constitution?

2. What explains the variation in this impact?

Beyond these, there are other questions that are addressed along the way. Such as, to what extent can drafters use submissions from the public in an effective way – do logistical or cognitive challenges impair their ability to utilize input from the public? Do citizen-participants have the ability to determine the extent to which public input was effective? Does participation increase the legitimacy of the constitution? If so, for how long? And finally, what sort of guidance can we give to designers of constitution-making processes about how best to implement a public participation program.

The theoretical contribution of this dissertation is an application of established understandings of how political parties function to a new setting, and a correction to both the popular mythology of constitution making, and the guidance often given by international organizations. The second chapter of this dissertation discusses the theory in some depth, and situates it within the literature in political science and law. To briefly state the theory: I propose that the impact of public participation in constitution-making processes varies across cases, and that the variation is determined primarily by the strength of the political parties in the drafting body. Specifically,

stronger parties are less likely to include input from the public in the constitutions that they produce, while weak parties are more exposed to public pressure, and thus include more content from the public. In the rare case where a constitution is drafted without the participation of political parties, the impact of public participation is strongest. To be sure, there are many other factors that can influence the degree to which public consultation has an impact. However, I argue that the other variables at work here interact with party strength in such a way that strong parties essentially preclude significant influence from individuals in the constitution-making process, and significantly lessen the influence of interest groups in the later stages of the process.

The first paragraph of this chapter introduced one of the cases considered, but there are two more. The cases examined in this dissertation are each examples of highly participatory constitution-making processes. In each of the cases, innovations were made in involving the public in the process at the earliest stages. Critically, the cases provide the greatest possible variation on the key independent variable: party strength. South Africa's parties with their rigid discipline and clear ideological commitments give us a picture of how strong parties serve to stifle public involvement in the drafting process – no matter what their advertising may claim. Brazil's weak parties and lack of institutionalization in the party system demonstrates the powerful voice that individuals and organized groups can have when a constitution is drafted in such a context. Finally, the Icelandic case may be unique in that the drafting body excluded participation from political parties, leaving the drafters both unfettered by party, and with comparatively less support in developing their constitutional proposals.

The claims made in this dissertation are based on analysis of primary docu-

ments generated in the three constitution-making processes under study, including internal documents from the constituent assemblies, minutes and transcripts of committee meetings, intermediate and final drafts of the constitutions, and written submissions from the public. The analysis also draws upon 67 semi-structured interviews, conducted in person in South Africa, Brazil, and Iceland, or via videoconferencing, and in three cases via email.

The methods of analysis vary according to the types of data. Much of the analysis is of a qualitative nature. Where appropriate, computational methods of textual analysis are used. In the chapter on Iceland, an original dataset of submissions from the public is used to create a statistical model predicting the likelihood that these submissions would be included in the final draft of the constitution. A lack of sufficient data precludes anything beyond descriptive statistics in the other cases.

The four central chapters of the dissertation introduce a theory of party-mediated public impact, and then assess the veracity of this theory with reference to three cases of constitution making. The case studies are arranged in an order that follows the central argument of this dissertation. The first case study is South Africa, where we find strong parties and low impact from public participation. This is followed by the case of Brazil, where famously weak parties are associated with a middle level of impact. The final case is Iceland, where the constitution was drafted without the involvement of political parties, and the level of impact was high. The dissertation concludes with a chapter that more explicitly unites the three case studies, and discusses the findings in a synthetic fashion. The concluding chapter also addresses other issues not covered in the previous chapters, including some policy guidance that flows from the central findings of the dissertation.

Chapter 2

Theory

2.1 Introduction

This dissertation seeks primarily to establish the extent to which public participation in constitution-making processes results in changes to the text of the constitution, and to provide a theory that explains the variation in this impact. However, the research described here has much broader implications, including our understanding of the role of political parties, of the ability of average citizens to participate in lawmaking, and of the interactions between mass and elite. In this chapter, a theory of party-mediated public participation is described, and situated within broader debates in political science and law such as those described above.

The chapter begins with an exposition of the major argument of this dissertation, then moving on to a description of the major concepts that the theory implicates. The discussion of concepts is also used to situate the theory within the existing literature, and to show where this dissertation makes its contributions.

2.2 Theory

The evidence presented in the empirical chapters that follow suggests that the impact of public participation on the text of constitutions is minimal in almost all cases – at least in terms of the volume of text that has been added or removed as a result of public input. The cases considered here are among the most participatory, but even here, the likelihood that a letter from a concerned citizen will have an impact on the constitutional text is small. This should not be cause for immediate despair: even small and unlikely changes can be important both in shaping the institutions of government, and in giving citizens an important feeling of attachment and ownership of the constitutional text. Furthermore, I argue that there are systematic ways in which this impact varies.

The central claim in this chapter is that variation in the strength and nature of political parties in the constitution-making process is the most important factor in determining the effectiveness of direct public participation. To wit: in constitution-making bodies in which there are strong parties, there is very little room for public participation, even when significant resources of time and money are devoted to facilitating public engagement. Conversely, in constitution-making bodies with weak parties (or no parties), there will be a comparatively greater impact from public participation. This effect is consistent with understandings of political parties as mediating, competing with, or even supplanting other forms of political expression (Ceka, 2013; Richardson, 1995; Webb, 2005). I further argue that the informational challenges of assessing the impact of public participation prevent the majority of participants from estimating the effectiveness of their participation (either as individuals or as members of groups), and that public participation programs are effective in

increasing support for a constitution even when drafters do not make any changes to the content of the constitution in response to public input. Stronger and more effective parties might produce better constitutions, but they reduce the impact of public participation.

To be more specific, when the drafting body is dominated by disciplined, programmatic parties, the impact of public participation (to the extent that it exists), will primarily be indirect and work as an element of the agenda setting process within political parties; when there are direct effects, they will be idiosyncratic, such as in serendipitous meetings between a drafter's existing interests and those of a citizen-participant. This dynamic is exemplified by the South African case. In contrast, in cases in which the parties are comparatively weak, the impact will be of a more direct nature, that is to say creating concrete changes in the text, but in ways that are unsystematic, responding to particular interests. This sort of impact is observed in the Brazilian case. When representatives of political parties are not included in the drafting body, drafters may view public participation quite differently, and respond positively to public input that in their view has merit, regardless of its provenance. This was the case in Iceland.

An additional aspect of this theory concerns the relative impact of the participation of individuals versus that of organizations such as unions, business associations, and CSOs. Much like the argument about overall impact described above, this dynamic is influenced by the party system. When drafters are part of political parties with an inherent interest in re-election, they will be responsive to groups that form part of their base of support. In no case will a political party care very much about input from individuals. They will pay attention only to input from individuals

when that input is supportive of the party's position in the larger negotiation. Strong parties will pay attention to input from groups who they view as important for the implementation of their policy agenda. Weak parties will give attention to groups who are an important part of their base of support (either formally or extra-legally). In cases in which the constitution is drafted without active political party participation, individuals have a much better chance of having their input seriously considered.

This argument has left aside for the moment the issue of the overall level of democracy. There is some evidence to support the assertion that ostensibly participatory means of constitution making are used in autocratic states just as often as they are in democratic states. The dynamic of party-mediated impact is unlikely to be altered much by the level of democracy. To the extent that political parties exist in autocratic regimes (definitional specifics matter here), they are usually of the strong variety, and thus the low-impact hypothesis would agree with broader arguments about both democracy and the nature of the political parties in question.

This theory has its genesis in my observation of the variation in impact between the three case studies featured in this dissertation. It is my task in the chapters that follow to show that this is the best explanation of the variation in impact from public participation in these cases, and to demonstrate the applicability of this theory to a much larger set of cases.

2.3 Concepts and Literature

In the section that follows, the key issues and concepts that underlie the theory are described, and situated within the relevant literature. This focus on concepts is used

to motivate and organize a review of the relevant literature in several subfields of political science.

2.3.1 Constitutions and Constitution-Making Processes

The concept of a constitution perhaps needs no introduction, but it may serve us well to be clear about precisely what we are concerned with in this dissertation. Following Elkins et al. (2009, 36), this project is solely concerned with the text. In Kelsen's (1945) terms, we are concerned with the formal constitution, not the material constitution. The concept as used here is narrower still, referring only to the official text of the constitution as originally completed by a recognized drafting body. In the cases described here, we are free from concerns about whether the foundational laws of the United Kingdom, New Zealand or Israel should be considered a constitution. In each of the cases discussed in this dissertation, the participants in the constitution-making process had a clear understanding that what they were doing was constructing "codes of norms which aspire to regulate the allocation of powers, functions and duties among the various agencies and officers of government, and define the relationships between these and the public" (Finer et al., 1995, 1), to quote one classic definition of a constitution. Additionally, since we are concerned with the constitution as it was ratified, we need not concern ourselves so much with the constitution as it functions or has been amended.

The constitution-making process is a slightly more complicated issue, as it has been realized in a multitude of ways across cases. In this dissertation, the constitution-making process has a very narrow definition. We are not concerned with the larger political processes which may–across many decades–create the full body of consti-

tutional law as in the United Kingdom. Nor are we concerned with processes of constitutional revision, either through explicit means (as in formal amendments), or through implicit means (as in Ackerman's (1991) discussion of "higher lawmaking" in the USA). There are many useful applications of such a broad understanding of constitution making. However, in the cases discussed in this dissertation there was a clearly delimited time during which a new constitutional text was being drafted.

This narrow focus may concern some readers, so some justification at this point may be helpful. I certainly do not claim that if public participation has an impact on a constitution-making process, that this impact will be limited to the formal constitution, nor will it necessarily be limited in time to the period in which the formal constitution is being drafted. However, as described in the introduction to this dissertation, the promises made by political elites in participatory drafting processes are tied to the formal constitution, and not to some longer term perspective of what the material constitution may become. Thus, it makes sense at least in this dissertation to limit the scope of inquiry to the formal constitution as it was ratified. The research here suggests many interesting avenues for further research on the ways in which participatory drafting processes may impact the material constitution in a longer time-frame, but those issues are not addressed in any great depth here.

Scholars have long had an interest in how constitutions are made, even in the very narrow sense described above. However, foremost among the works of contemporary political scientists have been the writings of Elster. In a seminal article, Elster (1995) described a paucity of scholarly work on constitution-making processes, especially in a systematic and comparative approach. Elster proceeded by laying out the constraints that constitution makers face, their desires and beliefs (interests), and the

aggregation of their preferences into a consolidated text. Not wishing to provide a poorer approximation of Elster's broad review, I focus instead on the issue of the actors involved in the constitution-making process, seeking to systematize the variation between constitution-making processes in this regard.

It makes sense to first consider the stages of the process, then the arrangement of actors and institutions. This allows us to be systematic about the constraints and interests that Elster (1995) described. Scholars have divided the stages of the constitution-making process in different ways. The most elaborate division of the process is a five-part scheme devised by Widner (2008, 1522), in which the stages are: "negotiation of ground rules; development of interim documents or immutable principles; preparation of an initial text; deliberation and adoption of a final draft; and finally, ratification and promulgation." This categorization of the process describes the South African case quite well, but actually is too specific to be broadly applicable.

Banting and Simeon (1985, 18) propose two different ways of dividing the process. In both cases Banting and Simeon begin much earlier than Widner in their thinking. In a four-stage model, they describe the constitution-making process as proceeding "from mobilisation of interests, through the decision-making stage, to ratification and finally to the legitimation of any change agreed upon." In their simpler division they have three stages, which they call "'idea-generating', agreement reaching and legitimation." By describing upstream and downstream constraints, Elster also implicitly adopts a three-part division of the process. This division is essentially the same as that used by Eisenstadt et al. (2017a), who describe the three stages as being the convening, drafting, and ratifying stages. The three-part scheme is at a level of abstraction that is quite useful for broad comparative work, and is the

division used throughout this dissertation.[1]

Within the convening stage, a number of events could take place, making it much more difficult in some cases to say when the constitution-making process began than to know when it formally ended. In the South African case we might understand the convening stage to have gone on for at least seven years, and perhaps longer. Leaving aside Banting and Simeon's (1985) idea-generating stage (which has no real beginning point), the beginning of the convening stage of constitution-making in South Africa would be the negotiations between political parties that took place in several stages beginning in 1991. In Brazil, the convening stage might be understood to have begun with the "Diretas Já" protests in 1984, but certainly with the Congressional election in 1986. There is likely more commonality between cases in terms of the events that take place in the later stages, though the actors involved varies quite widely.

Ginsburg et al. (2009) collected data that describe in some detail the various possible arrangements of actors in the constitution-making process. Building on the conceptualization of Elster (2006), their data categorize constitution-making processes into one of 23 different possibilities as we move through the stages of the process, with 460 (out of a possible 806) observations between the years 1789 and 2005. Extending their work in time somewhat, I have added new observations to these data, adding coverage through 2014, and simplified the coding into (only) 18 categories. This date range matches the coverage of data used in some recent influential analyses of constitution-making processes (Eisenstadt et al., 2015, 2017a), Table 2.1 presents the frequency of each of these arrangements of actors in constitution-

[1]In this chapter both the Elster and Eisenstadt et al. terminology are used where appropriate.

Table 2.1: Institutional Arrangements 1974-2014 (N=254)

Actors	Number	Percent
Executive Only	14	5.51
Referendum Only	4	1.58
Constituent Assembly Only	11	4.33
Constituent Legislature Only	38	14.96
Constituent Legislating Assembly Only	3	1.18
Executive & Referendum	45	17.71
Constituent Assembly & Executive	12	4.72
Constituent Assembly & Legislature	1	0.39
Constituent Assembly & Referendum	17	6.69
Constituent Assembly & Executive & Legislature	3	1.18
Constituent Assembly & Executive & Referendum	0	0.00
Constituent Assembly & Legislature & Referendum	1	0.39
Constituent Assembly & Executive & Legislature & Referendum	1	0.39
Constituent Legislating Assembly & Executive	3	1.18
Constituent Legislating Assembly & Referendum	1	0.39
Constituent Legislating Assembly & Executive & Referendum	0	0.00
Constituent Legislature & Executive	32	12.60
Constituent Legislature & Referendum	3	1.18
Constituent Legislature & Executive & Referendum	13	5.11
Missing	38	14.96

making processes between 1974 and 2014.[2]

We can see from this table that the specially elected constitutional assemblies are very common, but certainly not dominant. There are also two variants of a constitutional assembly proper included in these data. First, in cases in which the sitting legislature took on a secondary function (either by design or happenstance) as the constitutional assembly, this is coded as a "constituent legislature." In cases in which a body that was elected as a constituent assembly continued in office as the regular legislature following the completion of its constitution-making work, this is coded as a "constituent legislating assembly" (Ginsburg et al., 2009, 212). In light of recent research in Latin America, it is not surprising to see that both executives and referenda are well represented (Elkins, 2017). In fact, both of these are particularly common in less-democratic environments, and when the two are found together, credible democracy is rarely involved.

The main lesson I wish to draw from this perhaps overly-complicated table is that there are multifarious institutional arrangements, and that even within the last four decades there has been a great deal of variation in what has been chosen. In the section on public participation to follow later in this chapter, some of these institutional choices are revisited in the context of the degrees of public participation at each of these three stages of the constitution-making process.

2.3.2 Political Parties

Though quite a departure in many ways from the constitutional issues discussed above, the scholarship on political parties is of great importance to this disserta-

[2]There are also many instances of missing data in earlier years.

tion, as it is necessary to describe the kinds of political parties that are in place in constitution-making bodies–whether they be sitting legislatures or specially selected bodies–and how the characteristics of these parties affect the level of impact from public participation in the constitution-making process. As described earlier in this chapter, the major distinction of interest for us here is between strong parties and weak parties. The quality of party strength makes some intuitive sense, and has long been described as a normative good in political systems (Weiner and LaPalombara, 1966; Cox, 1997). But it is necessary to carefully define how we can distinguish between these two ideal party types. Within any political system, there will be comparatively stronger and weaker parties, however, it tends to be the case that political systems have parties of one type or the other. Thus, there can be general agreement that Brazil has weak parties and South Africa has strong parties. This section will deal with several aspects of political parties, but the end goal is to be able to distinguish with some precision between strong parties and weak parties.

We should begin at the beginning with a definition of what is meant by a political party. At first glance this may seem unnecessarily pedantic, however, in some cases the distinction between political parties and other important groups in the political system is more complex. For example, in the South African case, the African National Congress (ANC) is a political party, but it also includes other groups (or parties) within its structures, including a major trade union and another political party. The ANC follows the model of other congress parties, forming a coalition of smaller groupings that "take the form of a single, unified party structure" (Diamond and Gunther, 2001, 24). Since long before the first democratic elections, the ANC has included the South African Communist Party (SACP) within its ranks. Thus, some individuals are both members of the SACP politburo, and members of the ANC's

Executive Committee (EC). The SACP calls itself a political party, but it does not run its own candidates in elections, and its members are not immediately distinguishable from the other members of the ANC when they sit or vote in parliament. For the purposes of our analysis then, we need to be able to say whether the SACP is a political party. This decision has some impact on our assessment of the strength of the ANC as a party within the legislature.

The most influential early works on political parties elided the definitional issue to varying degrees. Duverger's (1954) celebrated treatise on political parties neglected (or found it counterproductive) to provide any sort of definition of the central concept of the inquiry. In another classic work, Epstein (1967) was content to allow the common usage of the word to discriminate between what is and what is not a party. Similarly, Key in his study of parties in the USA provides a functional definition, suggesting that "political parties are basic institutions for the translation of mass preferences into public policy" (Key, 1961, 432). Other definitions associate the primary purpose of political parties with placing their members in government, either explicitly through elections (Lasswell and Kaplan, 1965; Riggs, 1970), or inclusive of other means of acquiring power (Janda, 1970). Seeking to formulate the concept in a way that would limit the number of groups that could be usefully considered to be political parties, Sartori (2005, 56) defined the concept as "any political group identified by an official label that presents at elections, and is capable of placing through elections (free or non-free), candidates for public office." The core definitional attributes here are (1) having an official label, and (2) presenting candidates for election (under that label). Sartori's careful conceptualization commends it to our attention, and is the definition adopted here. Under this definition, the SACP would not count as a political party since it does not contest elections under its own name. This serves to

simplify our analysis of the South African case. Similarly, although a group in the Brazilian Constitutional Assembly called the "Centrão" behaved much like a political party (and certainly exhibited more discipline than many Brazilian parties), it would not be considered a political party because it did not contest elections under that label.

There are certainly also some relevant aspects of the broader party system that are relevant for the inquiry here. Sartori's (2005) seminal work has its greatest impact in terms of describing the number of parties, and the degree of polarization in the system. The key connection between the number of parties and the impact of public participation concerns the way in which the number of parties affects the type of negotiation that takes place. On a broad level, the number of parties is an important determinant in the complexity of the negotiations. More specifically, the number of parties determines to some extent the opportunities for direct trades on particular issues, the opportunity for log-rolling, or other means by which parties make bargains over policy in more ordinary legislative processes. To this interest in the number of parties and the distance between them, we can add from Mainwaring (1999) the consideration of the level of institutionalization in the party system, who argued that this was particularly important in the third wave of democratization (as exemplified in the case of Brazil).

The central explanatory concept in this dissertation is the strength of the political parties involved in the drafting process. It behooves us at this point to establish the criteria that would enable an analyst to distinguish between strong and weak parties. As the concept is developed here, there are three interrelated qualities of political parties that relate to party strength: (1) centralized leadership,

(2) disciplined voting within the legislature (or constitutional assembly), and (3) consistent programmatic commitments. For analytical purposes the first two criteria can be collapsed into the single idea of party cohesion, but in a pratical sense these are different issues.

It is necessary also to differentiate this concept of strong parties from others that have been developed in the academic literature. While there is a great deal of commonality between the theory developed here and some of the work of Ginsburg (2003, 60), what is meant by strong parties here is different from the electoral sense used in that work on the development of judicial review, wherein party strength is the difference between the seat shares of the two largest parties in the legislature. Ginsburg's concept of party strength could also be described as dominant/threatened parties. Somewhat in contrast, Huntington (1968, 421) argued that party strength was unrelated to the number of political parties in a system. However, Huntington provides us with a useful start in conceptualizing party strength beyond inter-party competition. Huntington's short definition was that "A party, in turn, is strong to the extent that it has institutionalized mass support" (Huntington, 1968, 408). This definition was further developed with the following attributes: (1) the party's ability to survive the departure of a charismatic founder, (2) "organizational complexity and depth," (3) the desire of political actors to identify with the party, rather than using it as a vehicle (Huntington, 1968, 409-410). Thus, Huntington's concept of strong parties is deeply tied to what we might call today its "brand." This concept then has little to do with the functioning of the party in the legislature (or a constituent assembly).

The terms as used in this dissertation also differs somewhat from the concept

of strong parties used to describe the party system of Venezuela in the mid-late 20th century (Crisp, 1997). In Coppedge's (1997) book, he describes strong parties as dominating the political system, with deep linkages in civil society. This concept of "partyarchy" describes a political system in which "political parties monopolize the formal political process and politicize the society along party lines" (Coppedge, 1997, 18). There is much overlap between the concept of strong parties as developed in this disseration, and Coppedge's partyarchy. For example, in a line that seems to presage one of the findings in this disseration, Coppedge (1997, 39) writes that "In an extreme partyarchy, where political parties monopolize the formal political process, ordinary citizens have few channels for political participation." This dynamic likely holds even in states with something short of partyarchy, as other research suggests that there is a negative correlation between party strength and political trust (Uslaner, 2006; Ceka, 2013). Coppedge's concept of partyarchy also includes high levels of party cohesion, and disciplined voting in the legislature as being elements of partyarchy. However, the complete definition seems too strong, as it describes the pathology of strong parties, and not their effective function.

Moving toward a broader concept of strong parties, Gunther and Diamond's (2003) conceptualization of the possible variation in political parties includes a comprehensive description of the kinds of political parties that exist in almost all political systems. Very helpfully, Gunther and Diamond are clear about the three criteria of difference that feed into their categorization of political parties: (1) formal organization, (2) programmatic commitments, and (3) tolerance/pluralism (Gunther and Diamond, 2003, 171). Their purpose in defining these elements is to create an extensive typology of political parties (with fifteen types). However, the first two criteria seem amenable to the conceptual project in this section. Formal organization is an

essential element of party strength, being a necessary condition for both programmatic commitments and for party discipline. Gunther and Diamond suggest that the variation on the second dimension includes parties that: "derive programmatic stands from well-articulated ideologies rooted in political philosophies, religious beliefs or nationalistic sentiments; others are either pragmatic or have no well-defined ideological or programmatic commitments; still others are committed to advance the interests of a particular ethnic, religious or socio-economic group, or geographically defined constituency, in contrast to those that are heterogeneous if not promiscuously eclectic in their electoral appeals to groups in society" (Gunther and Diamond, 2003, 171). This is the key application of their conceptualization to the present inquiry. Other scholars less carefully conflate the idea of programmatic commitments and strong parties, treating the two words as part of a single concept, as in Hale's (2005) work on political parties in post-Soviet states. Hale consistently refers to "strong programmatic parties."

The closest analog to the definition of strong parties I wish to employ here is the concept of strong parties developed by Carey and Reynolds (2007) in their work on accountable government in new democracies. Carey and Reynolds' concept has some commonality with the theorizing of Gunther and Diamond (2003), and is built with two components: legislative discipline and programmatic commitments. Carey and Reynolds argue that the combination of these two qualities is what makes a strong party a positive contributor to democratic accountability, and that disciplined parties that lack programmatic commitments are actually harmful to democratic consolidation. They also note that the tendency in new democracies tends to be that discipline is easier to establish than programmatic consistency. For the purposes of this dissertation we can take these two criteria as being the necessary definitional

elements of strong parties, and stipulate that parties lacking one or the other should be classified as weak. Here, party discipline is evidenced by formal organization as described by Gunther and Diamond (2003), and even more so by disciplined voting from party members in plenary sessions of the constitutional assembly. On the programmatic front, we are primarily interested in whether the political party approaches the constitution-making process with a clear vision of what the constitution should accomplish, or whether the party is more open to engaging in a quid pro quo with other groups inside and outside the process over constitutional content. On this basis, it seems reasonable to assert that South Africa has strong parties, and Brazil has weak parties – though there has been some controversy on this latter judgment (Mainwaring, 1992, 1997; Figueiredo and Limongi, 2000).

Moving from a conceptual discussion toward application of the concepts to the research interests advanced in this dissertation, Schattschneider's (1942) description of the competition between interest groups and political parties for dominance in the development of public policy is very helpful. Schattschneider (1942, 193) writes: "The real choice is between a strong party system on the one hand and a system of politics in which congressmen are subjected to minority pressures. The assumption made here is that party government is better than government by irresponsible organized minorities and special interests." This might be extended from the original context to both an argument to the effect that strong parties produce better constitutions, and that strong parties are less likely to include the submissions of content from the general public in those constitutions. Schattschneider (1942, 196) further helps us with the theoretical argument advanced in this dissertation, as he describes the weakness of US political parties as exposing them to influence from pressure groups:

> Congressmen succumb to pressure by organized minorities, not because the pressure groups are strong, but because the congressmen see no reason for fighting at all; the party neither disciplines them nor supports them. On the one hand, a congressman is thrown upon his own resources by his party; the party makes no demands on him, does not punish him for desertion, but it also does not fight for him. On the other hand, the pressure group makes a noise like the uprising of a great mass of people, it tries to alarm him and threatens him with defeat. Because the congressman is neither punished nor protected by the party, and because in addition he is in doubt about the power of the pressure group to defeat him for re-election, he decides to play safe. This calculation reverses the normal rules of democratic government completely.

Thus, Schattschneider's argument about pressure groups and the US Congress maps very well onto the argument advanced in this dissertation about the effects of party strength in mediating the impact of public participation in constitution-making processes. Schattschneider's argument presents the negative side of the phenomenon in its focus on the lack of incentives for members of weak parties to hold the party line. They are tempted to defect, and in this case give pressure groups what they want in the constitution. With slightly less power (and perhaps in a more positive sense), the same dynamic applies to input from individuals: in the absence of party discipline and central organization, the members of a drafting body have (1) no disincentive to listen to input from individuals, and (2) no incentive to dismiss the same.

The counterpoint to the weak parties described in the quotation from Schattschneider might be the case in which strong parties have already done the good work of interest aggregation and articulation, and that further appeals from the public would be superfluous and distracting. This invokes the functionalist literature on political

parties that has for the most part been neglected in this chapter. As most famously described by Almond (1958) and Scarrow (1967), one of the major functions of political parties is to aggregate and articulate the interests of voters. Strong parties are likely to be better equipped to accomplish this task than weak ones. If that is so, it would accord to some degree with the unresponsive picture of weak parties that is painted by Schattschneider (1942). With respect to the larger theoretical and conceptual goals of this chapter, much of the literature on parties would agree with the assertion I have made here that strong parties are less likely to pay attention to input from the public during the drafting stage of a constitution-making process. On the surface, this seems like a pejorative argument about strong political parties, but it is not necessarily so. This says nothing about the larger issue of how much genuine public input goes into a party's decision on a particular issue or aspect of a constitution. The normative question that this dynamic raises is whether it is better in a democratic sense to pay attention to the objectively unrepresentative people who take the time to actively participate in a constitution-making process, or to the masses of voters who have elected members of the political party to office. This tension is addressed in some of the interviews that are described in the empirical chapters.

Of course, more is said about the political parties in each of the cases in the chapters devoted to them, but we can note here that there is little doubt that Brazil has historically had weak parties (Ames, 2002b; Lamounier and Meneguello, 1985; Mainwaring, 1991, 1992, 1999), while South Africa has strong parties (Gouws and Mitchell, 2005; Lodge, 2004). That said, there is some variation within the party system, at least in the Brazilian case. Notably, during the period of Brazil's constituent assembly the parties of the left exhibited much greater discipline than those in the center or right (Mainwaring and Pérez-Liñán, 1997). There are also some

indications that Brazil's parties have been moving toward greater discipline within the legislature, though other areas of weakness remain (Figueiredo and Limongi, 2000). The Icelandic case may be unique in the world in that the rules for electing a special assembly to draft the new constitution essentially excluded representative of political parties from participation (Hudson, 2018).

2.3.3 Public Participation

Building on the theoretical and empirical works of the mid-late 20th century (Almond and Verba, 1963; Pateman, 1970; Dahl, 1971), the literature on public participation has added a great deal of empirical work over the past couple of decades. In contrast with the battle between "classical" and "contemporary" views of participation described by Pateman (1970), the majority of this more recent work has been balanced in its appraisal of the benefits and drawbacks of public participation in policy making. I find it helpful to divide the relevant literature in this area into three groups. First, there are influential articles in political theory (Mansbridge, 2003, 2014; Pateman, 2012). Second, there is a significant literature in empirical political science that considers political participation both in broad terms (Verba et al., 1993; Brady et al., 1995), and in case studies (Fung, 2006; Wampler, 2007, 2008; Heller, 2012). A third group is situated within the literature on public administration. A number of authors in this third area describe something like an inexorable trend toward greater levels of public participation in policy making (Cobb and Elder, 1983; Bishop and Davis, 2002; Papadopoulos and Warin, 2007). The majority of this literature has an orientation toward evaluating when public consultation is likely to be successful, particularly from the perspective of the policy maker, and does not go on to consider when public participation is likely to be most influential from the perspective of the

citizen participant. Moving toward the specific research interest in this dissertation, there is also a fourth group of works that should be considered. This dissertation is in part motivated as a response to the prescriptions made in the more practitioner-oriented literature published by think tanks and NGOs like the United States Institute of Peace, and International IDEA (Brandt et al., 2011; Dann et al., 2011; Ebrahim et al., 1999; Gluck and Brandt, 2015; Hart, 2003). While by nature less empirically rigorous, these works are also influential, and make bold claims about the value of public participation in constitution making that demand critical evaluation.

Many scholars (particularly in this fourth group) assert that there is a clear trend toward greater public participation in the process of constitution making, and that constitutional processes that neglect this will be inherently less legitimate (Banks, 2007; Benomar, 2004; Hart, 2003). This view is certainly not universally held, and some of the most influential works on the process of constitution making are much more skeptical about the value of an open or participatory process (Bannon, 2007; Elster, 1997, 2012; Tushnet, 2012). Whatever the normative justifications, there is certainly an observable trend toward greater public participation from the 1990s to the present, perhaps reaching its zenith in the recent constitution making enterprise in Iceland (Tushnet, 2012; Landemore, 2015). The experience of Iceland is not substantively different from earlier cases, and could be seen as a more technologically enabled update on previous constitutional processes that sought out public input on the constitution, notably Brazil in 1988, Uganda in 1995, South Africa in 1996, and Kenya in 2001. These examples of participatory constitution making included public engagement in the constitution making endeavor through popular consultations, and the opportunity for citizens to submit written proposals of ideas that they would like to see included in the text of the constitution.

Perhaps foundational to this trend is growing awareness of a legal right to participate in constitution making. Scholars like Hart (2003, 2010), Franck and Thiruvengadam (2010), and Ebrahim, Fayemi, and Loomis (1999) have persuasively argued this point on the basis of statements in the UN Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (especially articles 1 and 25). This right has also been confirmed in international jurisprudence, notably the landmark decision in *Marshall v. Canada* (1991), in which the United Nations Committee on Human Rights (UNCHR) applied the provisions about participation in the ICCPR specifically to the area of constitution-making. We might also note, however, that many works in legal theory are silent on issues of constitutional drafting, and the legal rights claimed by the authors above are by no means accepted by all observers (Landau, 2011, 612).

Much of the literature in this field also advances more normative and nuanced arguments for public participation. One of the most convincing arguments asserts the value of having as many diverse viewpoints as possible represented in the process. This normative claim is made by a number of authors who have been influential in how we think about what a constitution-making process should include. The widely cited 1999 report on constitution making produced by the Commonwealth Human Rights Initiative (CHRI) (Ebrahim et al., 1999), stresses the importance of inclusive participation. These authors argue that enabling broad participation adds value to the constitutional text, and encourages buy-in and support for the constitution from across the population. Hart (2010, 40) also argues this point, stating that even benevolent elites cannot adequately represent the views of disadvantaged and marginal groups within a society. One could certainly expand on these points with appeals to theories of deliberative democracy (Fishkin, 2009; Landemore, 2012) or

new forms of representation (Mansbridge, 2003). However, the actual motivation of constitutional drafters in creating opportunities for public consultation is an empirical question that has yet to be addressed.

A related argument advanced by Widner (2005), also deserving of further empirical analysis, is the suggestion that, "Devices to ensure high levels of popular consultation may be more influential in areas without much history of electoral politics and where the legitimacy of delegates may be in question" (Widner, 2005, 507). This claim is echoed in a recent Interpeace guide to constitution making, authored by some of the most influential authors and practitioners in this literature (Brandt et al., 2011, 80). Where there is less of an established tradition of representative democracy, it seems reasonable that citizens may have a lower degree of trust in their elected representatives, and consequently wish to have a more direct role in constitution making. However, this perspective does not account for the demands for participation made by citizens of mature democracies such as Canada and Iceland. As the experience of Canada shows, even in mature democracies citizens may not trust their elected representatives enough to allow them to negotiate over the constitution while ignoring popular demands (Cairns, 1988). Describing the division among scholars on the merits of participatory processes, Moehler (2008, 27) notes that the group in favor of participation has been much louder than participation's critics in recent years. Moehler (2008, 31) further asserts that "Faith in the new participatory model is so strong that policymakers and scholars encourage mass participation even where conditions seem prohibitive, such as in Iraq." The conclusion for now seems to be that even though the majority of the hypotheses about the effects of participation are untested (Moehler, 2008; Ginsburg et al., 2009), this model is very influential, and increasingly widely implemented.

In a piece investigating the role of citizens in ratifying constitutions, Elkins, Ginsburg, and Blount noted that "scholars have been far better at generating hypotheses than at testing them" (Elkins et al., 2008, 381). To the extent that participatory modes of constitution making have been subjected to empirical research, the focus has been on the effects of such a process on the quality of democracy in the resulting political system (Eisenstadt et al., 2015, 2017a; Saati, 2015), or on the attitudes of those who have participated in the process (Moehler, 2008). In a review article, Ginsburg et al. (2009) reported that participatory drafting processes were more likely to create constitutions with more democratic institutions, and greater protections of rights. Similarly, Carey found that constitution-making processes that were more inclusive led to political systems that were more democratic, had greater constraints on governmental authority, and were more stable over time (Carey, 2009). Moehler's (2008) well-known study of Uganda focused on the outcomes of this process in terms of the attitudes of citizens, and did not devote a great deal of attention to the constitutional text the process created, or to the system of government the constitution established. In a similar vein to Moehler's work, Wallis's (2014) research evaluates the effects of a participatory constitution making process in creating unity within a post-conflict state, finding that more participatory drafting processes are more effective in creating a unified national political identity.

Moving beyond the cases study approach that has characterized much of the research on this subject, Eisenstadt et al. (2015, 2017a) find that participatory drafting processes are associated with higher levels of democracy post-drafting, and that this effect is stronger when the participation takes place in the upstream part of the process. Their finding to some degree contradicts Saati's (2015) medium-N study of participatory constitution-making in post-conflict states and states transitioning

to democracy, which found that higher levels of participation were associated with declines in democratic performance. While these works have advanced our understanding of the effects of participatory constitutional drafting on the political system, none of them significantly address the issue of how much the *text* changed in response to public input.

To be more systematic about the effects of public participation, we must take some care to describe the means of participation with which we are concerned. The extent of public participation in the process of constitution making has been described as having in practice the shape of an hourglass (Russell, 2004; Elster, 2012). We observe that at the top end of the process (what Elster would refer to as upstream), there is often a great deal of public participation through consultations and other mechanisms of ascertaining the views of the mass public. The degree of participation becomes more constrained as the process goes on. At the constituent assembly (or other drafting body) there are obviously fewer people involved in determining what will end up in the constitution. Due to the demands of the actual work of drafting, this work is usually completed by just a few people. This can be seen as the narrowest point of the hourglass. It has been a common practice in the modern era to open up the process of ratification to some sort of plebiscitary mechanism, often a binding referendum (Ginsburg et al., 2009). But even when ratification takes place through such indirectly democratic mechanisms as the state conventions that ratified the US constitution, this is a significant widening of the level of participation from the narrow point of drafting. When there is a referendum, we can see this as being an even wider basis of participation than even the consultation at the beginning.

Peter Russell was the first to make the comparison to the hourglass, using

this metaphor in his discussion of how public participation was incorporated into the Canadian attempt at constitutional revision in 1992. His analysis of the flaws of this attempt at constitutional renewal reads as follows:

> The top part of the glass was fairly wide, representing the public consultation stage of the process when most of the proposals contained in the Charlottetown Accord were discussed and debated. When these proposals were handed over to political leaders and government officials for negotiation and refinement, the glass narrowed. It came to its narrowest point in the summer of 1992 when the final terms of the Charlottetown Accord were hammered out in a process dominated by first ministers. From that narrow neck the process widened out again in the referendum campaign. This bottom part of the glass, though much shorter, was much wider than the upper half (Russell, 2004, 191).

Other constitution-making processes have had differently shaped hourglasses, in some cases missing the top, and in others missing the bottom. However, the idea of a flow of ideas is a helpful way of describing the various forms of public participation that we observe.

Reverting to Elster's preferred metaphor, in the upstream portion of the constitution-making process, public participation has traditionally played a smaller role, but is more likely to generate changes to the constitutional text than any downstream constraint. The most common downstream possibility for public participation is in ratifying referenda. In some forthcoming research, Elkins and Hudson show that such referenda are increasingly common. In the first two decades of the 21st century, more than half of new constitutions were approved through a referendum. And as of 2018, more than a third (35.6%) of constitutions currently in force were approved

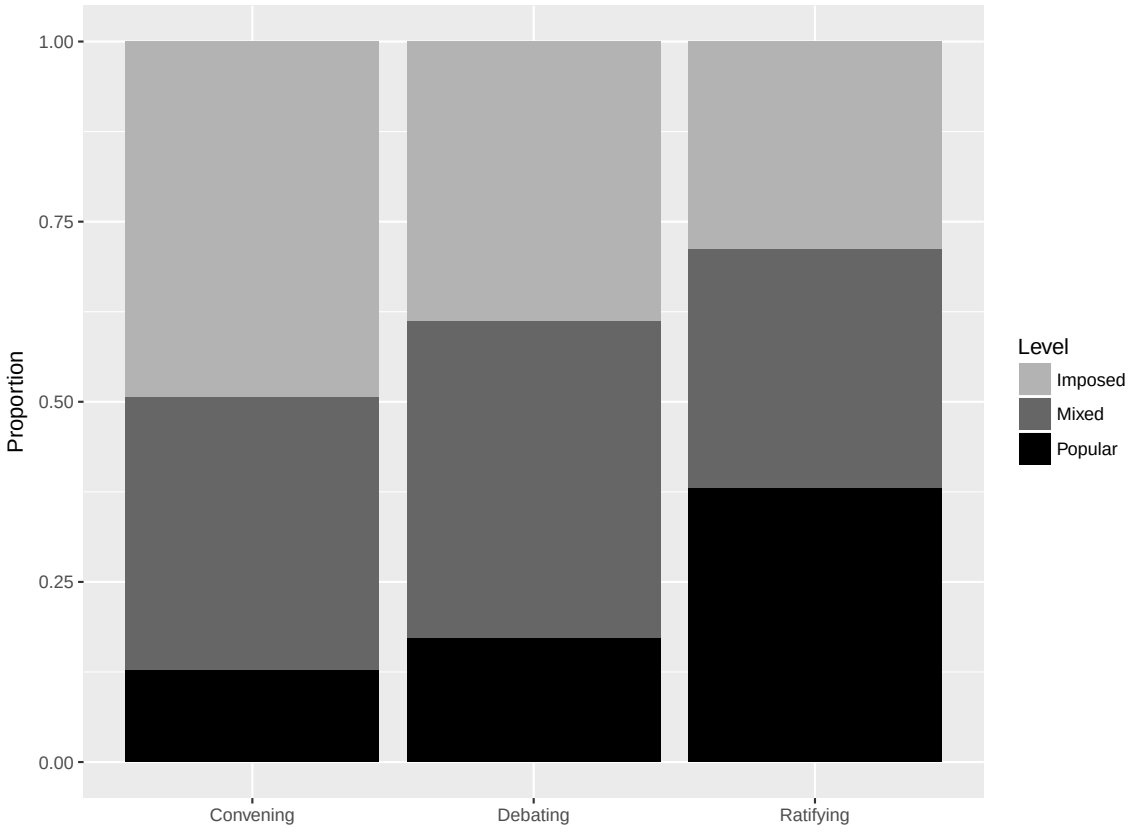
through a referendum. Yet, it is unlikely that the possibility of such a downstream check on their power influences drafters' choices to any great degree. In the same project, Elkins and Hudson find that ratifying referenda have passed 94% of the time in the period 1789-2016. This suggests that there is little reason for a constitution maker to worry that their text will be rejected by the voters, and thus little reason to alter the draft in any way to forestall such a rejection.

The most important opportunities for public participation then are likely to be in the upstream portion of the drafting process, and to some extent in that restricted middle where the details of the text are decided. Here we can draw upon the work of Eisenstadt et al. (2017a,b), who have created a dataset of constitution-making process, including 144 cases from 1974-2014. Eisenstadt et al. code the level of public participation at the three stages of the constitution-making process as an ordinal variable with three possible values: imposed, mixed, or popular.[3] Their measurement of the prevalence of each level of participation at each of these stages is graphically represented in Figure 2.1. Of most note for the purposes of the theory advanced here, they classify the convening (or upstream) part of the process as having been "popular" if it included "Systematic civil society input OR strong transparency OR specially-elected drafters 'freely and fairly' elected" (Eisenstadt et al., 2017b). This is a reasonable coding rule for the vast majority of cases, but it is also a very broad condition. The rarity of a "popular" coding in their data actually confirms the status of the three cases considered in this dissertation as exhibiting a remarkably high level of public input. Of the 144 cases they coded, only 18 were coded as having the highest

[3]Note that Eisenstadt et al. describe the three stages as being the convening stage, drafting stage, and ratifying stage. While this terminology is more substantively meaningful, the idea of a flow as described by Elster and Russell seems more useful in the context of this dissertation.

level of public participation at the convening (upstream) stage, whereas 53 included the highest level of public participation at the ratifying (downstream) stage.

Figure 2.1: Levels of Public Participation (1974-2014)



Merging the Eisenstadt et al. (2017b) dataset with the Ginsburg et al. (2009) data described earlier can shed some light on the relationship between the actors involved in the constitution-making process and the level of public participation. Keeping only the observations included in the Eisenstadt et al. data drops 108 observations from the combined dataset, as Eisenstadt et al. excluded countries with populations below 500,000. As noted above, in the Eisenstadt et al. data, the constitution-making process was broken down into three stages, and the level of participation was coded

as either "imposed," "mixed," or "popular." In Table 2.2, these levels are recoded as 1 for imposed, 2 for mixed, and 3 for popular. In the third, fourth, and fifth columns, the mean level of participation in each stage of the constitution-making process is presented for each of the combinations of actors described in the Ginsburg et al. data. While the data are quite sparse, we can see that among the classes with more than a couple of observations, constitution-making processes that utilized only a constituent assembly had the highest levels of public participation in the convening and drafting stages as coded by Eisenstadt et al. As expected, cases that are coded by Ginsburg et al. as using a referendum for ratification do quite well in Eisenstadt et al. coding of the level of participation in the ratifying stage. However, the cases that used a combination of the executive and a referendum average on 2.2 in the coding of participation in ratification. This accords with the assessment earlier in the chapter that this particular institutional arrangement is most associated with authoritarian constitutions.

It is worth revisiting the central argument of Eisenstadt et al. (2017a), as their work relates closely to the argument advanced here. They summarize their argument as follows: "We claim that participatory constitution-making – which we understand as transparent, substantive, and often direct citizen involvement – has a lasting and systematic effect on subsequent democratization" (Eisenstadt et al., 2017a, 3). Their statistical analysis establishes a causal link between the levels of democracy in a state at several intervals after the ratification of a new constitution, and the level of public participation in the constitution-making process, particularly at the upstream (or convening) stage. Their analysis shows that while there is a relationship between authoritarianism and imposed constitutions, popular constitution-making processes are equally likely across all levels of democracy. Furthermore, many of the

Table 2.2: Institutional Arrangements and Participation 1974-2014 (N=146)

Actors	Number	Participation in Convening	Participation in Drafting	Participation in Ratifying
Exec. Only	4	1.0	1.3	1.0
Refer. Only	2	1.0	2.0	3.0
CA Only	10	2.5	2.5	1.9
CL Only	17	1.8	1.8	1.8
CLA Only	2	3.0	2.0	1.5
Exec. & Refer.	21	1.3	1.4	2.2
CA & Exec.	7	1.4	1.7	1.3
CA & Leg.	0			
CA & Refer.	13	1.5	1.7	2.6
CA & Legis. & Refer.	1	1.0	2.0	3.0
CA & Exec. & Leg.	0			
CA & Exec. & Refer.	0			
CA & Exec. & Leg. & Refer.	1	2.0	2.0	3.0
CLA & Exec.	2	2.0	2.0	1.5
CLA & Refer.	1	1.0	2.0	3.0
CLA & Exec. & Refer.	0			
CL & Exec.	19	1.7	1.9	1.8
CL & Refer.	5	1.6	2.3	2.6
CL & Exec. & Refer.	7	2.1	2.3	3.0
Missing	29			

non-democracies that drafted a new constitution in a participatory way saw marked improvements in their levels of democracy. They then use the occurrence of labor unrest as an instrumental variable to control for the the potential endogeneity in their casual story, finding that strikes only impact the level of democracy through their relationship with a participatory constitution-making process (Eisenstadt et al., 2017a, 39). Clearly, there are a great many other factors that may determine both the level of participation in the constitution-making process, and the level of democracy in the years following ratification. However, Eisenstadt et al. have taken reasonable steps to control for endogeneity, and demonstrate a statistically significant effect. Their finding that the convening stage is the most important also buttresses the choice made in this dissertation to focus the analysis on public participation at that stage of the process.

An even closer parallel to the type of analysis undertaken here was a study of Egypt's constitution-making process in 2012. There, as in Iceland, drafts of the constitution were posted online, and citizens were given the opportunity to comment upon, and "like" or "dislike" individual articles through thumbs-up and thumbs-down buttons. The study by Maboudi and Nadi (2016) found that draft articles that were given more "likes" on this website were less likely to be changed in later drafts, while those with more "dislikes" were altered at a higher rate. Maboudi and Nadi's work is particularly notable, as it was one of the first attempts to measure the impact of public participation on the development of the constitutional text. Another work that addresses the impact of the process on the text is Landemore's (2017) recent study of Icelandic case. Landemore used the constitutional proposals drafted by an expert panel and the constitution drafted by the Constitutional Council, to set up a quasi-experimental study of the effects of the process on the text dealing with

religious rights. Her finding was that the text drafted by the Constitutional Council was slightly more liberal than the expert draft, and attributed this to the open and inclusive drafting process.

In addition to the literature on constitutional drafting, this project also speaks to the growing literature on public participation in government. Most recent research on the effects of public participation has dealt with politics on a relatively small scale, investigating local government decisions on budgets or development (Innes and Booher, 2004; Lowndes et al., 2001; Wampler, 2007, 2008). Other research more closely tied to my goals here has sought to evaluate the impact of public comments on changes to administrative law in the United States (Naughton et al., 2009; Yackee and Yackee, 2006, 2012).

2.3.4 Types of Impact

In this work, I distinguish between direct and indirect impacts of public participation on the constitutional text. Direct impacts are defined here as concrete changes in the text that respond to input from the public. This impact may range from a change in the wording of an existing provision,[4] to the addition of a completely new right to a constitution.[5] Indirect impacts are defined here as cases in which submissions from the public bring new issues or insights onto the agenda for the constitution drafting

[4]See for example the addition of the word "degradation" in Section 28(1)(d) in the Constitution of the Republic of South Africa (Author's Interview with "RGBS," 25 April 2016). This section deals with the rights of children. An NGO advocating for the rights of children asked that "degradation" be added to the existing provision that sought to protect children from "maltreatment, neglect, abuse." In response to this request, a member of the committee drafting that section of the constitution made the requested wording change.

[5]See for example the addition of the right to access the Internet in the 2011 draft constitution of Iceland.

body. These indirect impacts are difficult to fully trace as they may occur outside of the formal constitution-making process.

For our purposes here, indirect impact is nearly synonymous with agenda setting, whereas direct impacts are those cases in which there is a clear alteration, addition, or subtraction, to the text of the constitution that comes in response to a submission from the public. Direct impacts become clear where one can chart the evolution of the language of the constitutional text between subsequent drafts. Indirect impact can be observed when submissions from the public raise a new issue, or increase the salience of an issue.

To the extent that there are *direct* impacts in constitution-making processes with strong parties, they will be of one of two types. First, there may be direct impacts that follow the more usual pattern of electoral politics, wherein established interest groups may gain the ear of politicians. For example, in the South Africa case, representatives of large corporations central to the national economy were able to make their views known to both parties and to individual drafters, and see that their concerns were reflected in the final text (Author's Interviews with "RGBS" 25 April 2016, and "PNTO" 17 May 2016). The sections of the South African constitution that deal with labor relations were to some degree influenced by these discussions between drafters, business groups, and unions. In the second type, we also observe some limited direct impacts in which there is an apparently stochastic occurrence wherein a drafter plucks something they like from among the thousands pages of submissions from the public (as in the scenario described in footnote 4).

When interviewed for this project, some constitutional drafters provided recollections of a particular instance in which they responded to input from the public

in a concrete way, and many could point to a particular word or phrase in the constitution as an example of this. I argue that these instances are, while perhaps not rare, sort of serendipitous. That is to say, these cases in which a drafter inserts language in response to a particular input from the public are the result of a special meeting of the interests of the individual drafter and a timely input from the public. The evidence from these interviews seems to suggest that drafters do not consider the balance of public input (or the majority view of the population as determined by opinion polls) to be crucial guidance for what they should put into the constitution. Instead, they filter input from the public through their already formed understanding of what the constitution should do. They selectively choose input from the public that relates to their interests. This should not be read as a cynical unveiling of the interaction of drafters with public input. Rather, this is a function of a confirmation bias (Ross et al., 1977; Lord et al., 1979; Nickerson, 1998), wherein drafters perceive comments that are in agreement with their own preferences to be representative of a larger consensus in society about the issues in question. Or to express this phenomenon in language that has less of a normative valence, a comment from a member of the public may concretize a previously inchoate preference on the part of a drafter. Beyond this aspect, in some cases drafters assume ownership of particular themes within their designated section of the constitution, and understand their role in part to be one of championing those interests. In this case, they may be more likely to find language they would like to incorporate from the public comments.

Direct impacts in cases with weak parties, will be dispersed, disunited, and responding much more to the pattern of lobbying impact that we observe in normal law-making in these contexts. However, I also argue that there will be many more instances of direct impacts in these cases. In drafting bodies with weak parties, the

lack of centralized party control, party discipline, and programmatic commitments creates greater space for policy entrepreneurs to move particular causes into the constitutional text.

2.4 The Argument Revisited

The bulk of this chapter has discussed concepts that are at the center of the research project, in an effort to both establish clarity about the subjects examined, and to situate the work within the broader scholarly context. The argument advanced in this dissertation can be seen as an attempt to correct the popular mythology of constitution making, and to some extent an attempt to improve our understanding of the importance of constitution-making processes. The work builds on and also engages with some of the more thematically proximate works described above, in particular the recent work of Eisenstadt et al. (2017a), Maboudi and Nadi (2016), and Saati (2015). While the dependent variables are very different (extent of impact rather than level of democracy), the research presented here should serve to give readers a more skeptical view of how much participation actually goes on in "participatory constitution making."

The theory presented here also has much in common with other arguments that have been made about the decisions of elites in constitution-making processes and constitutional revolutions. My argument about the reduced impact of public participation in cases with strong parties could be seen as a specific realization of the concept of hegemonic preservation as described by Hirschl (2004). In this application, the political parties act in the constitution-making process to preserve the interests of their constituencies against the possible policy choices of later administrations. In-

deed, South Africa was one of the major cases considered by Hirschl in *Juristocracy*. The major point of overlap with Hirschl's work is the interests of the major parties in protecting the economic interests of the most powerful businesses in the country. The process that Hirschl describes, negatively impacted the ability of the South African public to influence the constitution-making process by locking in certain aspects of the text–specifically the protection of private property. The aspects of the constitution that deal with group and cultural rights certainly protect the interests of the descendant political group, but are not quite in line with the idea of hegemonic preservation. In Hirschl's interpretation, South Africa's Bill of Rights represented an attempt at legally protecting the privileges of the white minority who knew that their time in power was coming to an end. (Hirschl, 2004, 95) This may oversimplify the history to some degree, as the ANC seems to have decided to support the idea of a bill of rights for both political and principled reasons before beginning negotiations with the National Party (NP). Nevertheless, the story of a limited impact from public participation fits very neatly within the larger argument that Hirschl makes about the entrenchment of rights in constitutions as a means of protecting the material and cultural interests of elites. However, in my account, the lack of popular impact is less about the ability of a powerful elite to protect their interests at the expense of the majority of the population, and more about the way in which the elite-level negotiations between the African National Congress and the National Party forestalled the possibility of effective public input at the drafting stage.

Another theory that bears close relation to that advanced here is the insurance model of constitution making described by Ginsburg (2003) in his work on *Judicial Review in New Democracies*. In that work, Ginsburg shifted the narrative of justiciable human rights from a demand side story (wherein citizens demand a legal

regime with justiciable rights), to a supply side story that sought to explain why political elites would consent to having their powers limited by a court with broad power of review. As with Hirschl's work, Ginsburg's theory is most applicable to the South African case, where Ginsburg's description of the way elite political calculus influences the extension of justiciable rights fits the strategy pursued by the South African National Party perfectly: "if they foresee themselves losing in postconstitutional elections, they may seek to entrench judicial review as a form of political insurance" (Ginsburg, 2003, 18). To apply this theoretical insight to the effects of popular participation in constitution-making processes, we might question whether the expansion of justiciable rights in the constitution reflects the impact of public pressure, or the self-interested calculations of political elites. Of even more direct application to the theory advanced in this dissertation, Ginsburg also applies something like the concept of strong and weak parties used here, suggesting that a context of diffuse political power allows for greater powers of judicial review, while strong (dominant) parties are able to constrain this. The application there differs somewhat however, in that Ginsburg's interest was in effect of diffuse power centers in the political system creating greater uncertainty about who would have power after some future election (Ginsburg, 2003, 25). The effect is the same, in that strong parties essentially preclude strong judicial review, but the causal mechanism is quite different.

Having just seen how the argument advanced here has much in common with other work on the relationships between mass and elite in constitution-making processes, it may be asked, "What does this dissertation argue against?" There are several answers to this, while acknowledging that the dissertation does not challenge much of the recent work on constitutionalism and the ways in which political elites have

used constitutions to protect their interests. As noted above, the principal targets of the argument presented here have been the mythology of constitution making, and the rhetoric that politicians and international organizations deploy to support public participation in constitution-making processes. Specifically, as was described in the first chapter of this dissertation, public participation is encouraged in terms of the vital role of the people as *authors* of the constitution. Not merely as advisors to the drafters, or persons who are represented by the politicians who draft the constitution, but as people who have real power and agency in making a constitution. The research presented here will demonstrate that this is not the case, and that is very likely is not what those who design these programs really intend. And yet the language that is used to sell public participation programs and by deliberate extension to legitimize the constitution creates this picture of popular authorship.

2.5 Conclusion

This chapter has advanced an argument about political parties and public participation in constitution-making processes, asserting that where there are strong parties, we will find low impact from public input, and that where there are weak parties, we will find comparatively greater impact from public input. The following three chapters assess the impact of public participation in the constitution-making exercises of South Africa, Brazil, and Iceland. While the case studies cannot present a picture of the full universe of constitution-making processes, they do present the full variation possible in terms of party strength. The three cases demonstrate a causal relationship between the strength of political parties (as defined in this chapter) and the level of impact from the public. The issue is then taken up again in a more holistic way in

the concluding chapter.

Chapter 3

South Africa: Constitution Making with Strong Parties

3.1 Introduction

The South African case facilitates an insightful comparison with the Brazilian case described in the following chapter on the logic of most-similar systems. Both cases involved constitution making in a context of transition to democracy in which the political party associated with the non-democratic regime continued to play a role. As described in the theory chapter, the principal difference of interest for us is the nature of the political parties and the electoral system. Whereas the Brazilian political system has almost always featured very weak parties, South Africa's political system has featured very strong parties. According to the theory described in this dissertation, constitution-making processes in political systems with strong parties have much lower impacts from public participation than those that take place in systems with weak parties. In the South African case, the two most important parties, the African National Congress (ANC) and the National Party (NP) had clear goals for the constitution-making process, and were able to structure the drafting process

in such a way as to maintain control over the development of the text.

It is notable that discussions of the South African constitution (at least among scholars) focus so much on the context of constitution-making process. While it is not uncommon in many countries to begin constitutional law textbooks with a brief section on the drafting of the constitution, this is much more pronounced in the South African case. At least three of the most widely used constitutional law texts in South African begin with a rather involved history of the constitution, in one case going back to the origins of South African constitutional law in pre-contact indigenous traditional law, and especially focusing on the drafting process in the transitional period of the early 1990s. This approach is justified with reference to an approach to interpreting South African constitutional law that requires a consideration of the political and social context in which the law was written, and in which it is applied. In one widely-used text, de Vos and Freedman write: "Constitutions are often said to represent a snapshot of the hopes and dreams of a nation at the time of its writing or – more cynically – to represent a snapshot of the relative political power and influence of various political formations involved in the drafting of that constitution. However, constitutions are also living documents that judges have to interpret and apply in an ever-changing political, economic, and social environment" (de Vos and Freedman, 2014, 4). De Vos and Freedman go on to detail both the legal and political aspects of the drafting process that unfolded between 1991 and 1996. In another case, the brief history of the drafting process provided in the textbook by de Waal and Currie has been cited as a useful reference to the constitutional history of South Africa by other scholars (Rapatsa, 2014; van Heerden, 2007), and even a justice of South Africa's constitutional court (Ackerman, 2004). For the purposes of the research conducted here, the important point is that the history of the drafting of the constitution is a

matter of some legal and political importance in South Africa today. Understanding the degree to which the public participation process impacted the development of the text is then both important for political science, and to the practice of law in South Africa today.

One important example of the importance of the drafting process in terms of both the present status of the constitution and of its broader impacts on politics in South Africa is the move to amend the property clause of the 1996 constitution that dominated South African politics in mid-late 2018. The property clause (Section 25) of the 1996 constitution was one of the most difficult aspects of the text to decide, and as originally drafted it created a fine balance between the interests of the two major parties. In the intervening two decades, it has come to be seen in some quarters as being a pernicious compromise on the part of the ANC that has set back the possibility of effective reform of land tenure. A party to the ANC's left, the Economic Freedom Fighters (EFF), has pushed the governing ANC to consider changing this clause to more explicitly provide for expropriation without compensation. The ANC launched a process for amending this section of the constitution in early 2018, including a period of public consultation on the proposed change. The difficulties attending a public consultation on such a vital issue (an area in which public input certainly mattered little in 1994-1996), recall the inherent problems in the attempt to give the public a meaningful voice in such a difficult political decision. The level of public input on this change to the constitution was extraordinarily high, easily eclipsing the total number of submissions received in 1995-1996, with 140,000 written submissions sent to the parliamentary committee considering the change (Corrigan, 2018). The likely impact of these submissions is minimal, given President Ramaphosa's firm decision to proceed with a constitutional amendment. This episode demonstrates that the participatory

constitution-making process of 1994-1996 set in place both a public expectation for consultation, and a practice among politicians of making their decisions without much regard for the content of these consultations.

This chapter seeks to carefully evaluate the level of impact that public participation had on the drafting of the final constitution of South Africa between 1994 and 1996. While the drafting of the interim constitution in 1992 and 1993 is important to the background of this research, it has been very well addressed by a number of prominent works (Spitz and Chaskalson, 2000; Waldmeir, 1997). There are at least two books that present a widely accepted history of the drafting of the final constitution, including one by the director of the Constitutional Assembly (Ebrahim, 1998; Segal and Cort, 2011). This chapter takes a much narrower focus than even these works. The contribution to the historical record made here is in carefully examining the space between the claims made about the role of the public in the drafting process (especially at the time), and the actual impact that public participation had. I begin with a few notes on the relevant history of South Africa, and continue with empirical research on this issue of public participation.

3.2 Historical Background

3.2.1 Apartheid and Constitutional Law

It is not my purpose here to provide a deep description of how the system of apartheid was created and sustained. However, the history of how this system of racial exclusion was developed and how it ultimately came to an end are vital to understanding the dynamics between the political parties during the constitution-making process in 1994-1996. One of the most important aspects of apartheid with relation to this

research project is the explicitly legal basis of apartheid. In a speech to the International Criminal Court, a senior member of the ANC and former professor of human rights, Kader Asmal, described apartheid as being "underpinned by the legal system - it raised socio-economic pillage based on race to a constitutional principle" (Asmal, 2006, 11). As apartheid was constitutionally enabled, the constitution that destroyed apartheid must be understood within this context of lawless constitutionalism.

The origins of Apartheid date back in some ways to the earliest history of European colonization of South Africa, beginning with the Dutch East India's Company's colony at the Cape of Good Hope in the 17th century. However, the more proximate root was a system of economic and social exclusion on a racial basis that began during the British colonial period. The two mining booms, first with diamonds in Kimberley and then with gold on the Rand, created an opportunity for economic development that was perverted to enrich Europeans, while leaving Africans in poverty. As can be learned quite viscerally at the Apartheid Museum in Johannesburg, it was the gold rush in the Rand (a prominent ridge in the plateau that makes up the center of the country) that brought large numbers of Africans and Europeans into close proximity. In this context, the Europeans and Euro-descendant Africans attempted to create a system in which they would assume positions of power, while keeping Africans in conditions of poverty and economic subservience. The mining booms brought about a rapid urbanization, and increased disruption of African tribal relations and family life (Meredith, 2007). This disruption of traditional indigenous patterns of life was taken even further with the redistribution of land and relocation of indigenous people following the Natives Land Act (No. 27 of 1913).

Systematic racial discrimination was well established during the period of

British colonial rule, but became firmly entrenched in law in 1948 when the Nationalists first took power. The NP began to implement grand apartheid with a series of bills during its first term in government. Chief among these were the Group Areas Act (1950), Population Registration Act (1950), Prohibition of Mixed Marriages Act (1949), and the Immorality Act (1950). Though much of the racially based maldistribution of land was accomplished before the NP took power, they furthered this program of racial separation through the creation of ostensibly self-governing territories for indigenous Africans. The creation of these "homelands" served the interests of the apartheid state by giving it a legal excuse to exclude indigenous Africans from any rights of citizenship outside the homelands. This was taken even further through the Bantu Homelands Constitution Act of 1971, which established a legal process through which the homelands (known as Bantustans) could become independent states, thus depriving their inhabitants of South African citizenship (Thompson, 2001, 191).

Facing increasing increasing censure from the international community over its policies of racial exclusion, South Africa left the British Commonwealth and declared itself to be a republic in 1961. As part of this process, South Africa created its first written constitution.[1] The 1961 Constitution advanced apartheid by creating a system of government in which only Whites could hold public office or vote. This constitution entrenched a system of parliamentary supremacy, which in practice meant the supremacy of the cabinet (Devenish, 2012), and included no rights whatsoever. The NP leadership explicitly rejected the idea of including rights in the constitution, as this would in their view undermine the principle of parliamentary sovereignty. Under this constitution, apartheid was legally and politically protected

[1]The previous constitution was the South Africa Act of 1909, passed by the British parliament.

in spite of increasingly organized opposition from the Black majority.

As the increasing political and legal weakness of the White minority became clear to the NP government, it took steps to strengthen its position through more institutional engineering in a new constitution in 1983. This new constitution created parallel representative institutions for Indians and Coloureds, while continuing to leave the Black majority without political rights outside the Bantustan governments. This was an extremely strange system of government, and it is hard to believe that the NP thought this would be a solution to its problems. Indeed, this new constitution did not function normally for much of its short life, as the continuing civil unrest led the NP government to proclaim several states of emergency in the 1980s, especially after 1986. However, the procedure for constitutional amendment in 1983 constitution was used in 1993 to replace this constitution with the interim (or transitional) constitution which enabled the first multiracial elections in South Africa in 1994. Thus the transformational constitutions of 1993 and 1996 were brought into being without any constitutional interregnum or violation of the existing constitution – a process with ambiguous implications for perceptions of the legitimacy of the new constitutions (Arato, 2000, 144-145). Another lasting legacy of the 1983 constitution that should not be overlooked though is that it departed from the Westminster model of parliamentary government, and created a much more powerful president. This was a notable change in South Africa's political institutions that survived in the 1993 and 1996 constitutions.

3.2.2 Constitutional Progress Before the End of Apartheid

The Apartheid state excelled at constitutional engineering – a necessity as it sought to claim some sort of legitimacy even as the minority ruled the majority in an explicitly racist and often authoritarian way. Yet there were a number of actions taken during the period of apartheid that laid the foundation for a new constitution drafted during the transition to democracy. The first was the writing of the Freedom Charter in 1955. Responding to increasing levels of repression from the apartheid state, the ANC worked with a number of other organizations opposed to apartheid to work toward a peaceful political solution. In a gathering that included representatives from the major ethnic groups in South Africa, the ANC partnered with the South African Coloured People's Organisation, South African Indian Congress, the Congress of Democrats (a predominantly White group), and the South African Congress of Trade Unions, to hold a large rally in Kliptown (part of the Soweto township outside Johannesburg) (Thompson, 2001, 208). This "Congress of the People" was eventually broken up by the police, but not before the delegates from the various groups had agreed to the basic text of the Freedom Charter.

Had the Freedom Charter been a constitution, it would have been one of the most progressive documents of its time. It included broad protections of classic negative rights, as well as expansive social and economic rights. The freedom charter also had some rather socialist elements, including a provision that transferred ownership of natural resources, industry, and the banks to the people. It was this provision that was used by the apartheid government to charge 156 of the leaders of the Congress with treason (Southall, 2013, 34). While this Charter was in the first instance a reflection of the views of this broader group, it became the basic constitutional state-

ment of the ANC, and through that channel influenced the final text of the 1996 Constitution. In its more immediate context, the Congress and the Charter were shortly followed by the banning of the ANC and Pan Africanist Congress (PAC), and a few years later by the ANC's turn to violent resistance through the formation of its armed wing Umkhonto we Sizwe (MK). This period began the divide within the ANC leadership between those who were forced into exile, and those who led the resistance from within South Africa.

The ANC in exile spent many years preparing for an eventual role in a constitution-making process in South Africa. The most concrete steps toward a democratic constitution for South Africa's were taken in the 1980s as the ANC began to consider in some detail what the constitution of a multi-racial South African democracy should look like. To this end, in January 1986 the ANC established a Constitution Committee, working mainly in exile in Lusaka, Zambia (Brooks, 2015, 137). The committee produced one of the most influential documents of the period in 1989, the "Constitutional Guidelines for a Democratic South Africa," published that year in the *South African Journal on Human Rights* (African National Congress, 1989). This document made a number of important statements about the future of South Africa, most notably a commitment to multiparty democracy, and a constitution that would include a Bill of Rights. Neither of these ideas were completely accepted by ANC cadres at the time. A member of this committee, and later justice of the South African Constitutional Court, Albie Sachs, recounts concerns about the advisability of including a Bill of Rights in the constitution that was to come. He describes a committee of Black law students that formed at the University of Natal-Durban in the 1980s to oppose the idea of a Bill of Rights. Sachs writes that "Their fear was that the Bill of Rights would defend the unjust socio-economic situation created by apartheid, guar-

antee property rights in terms of which Whites owned 87% of the land and 95% of the productive capital, and impose extreme limits on the capacity of the democratic state to equalize access to wealth. Ultimately the poor would remain poor, albeit formally liberated, and the rich would get richer, though technically not advantaged" (Sachs, 2009, 165). Sachs argued against this idea at the time, suggesting that a Bill of Rights was necessary to "reassure Whites that they had a protected future in the country" (Sachs, 2009, 165). Sachs was instrumental in the ANC's Constitutional Committee's work in writing a draft Bill of Rights that served to inform the party's positions in the negotiations with the NP for the next decade.

Whether or not the current Bill of Rights has limited socio-economic transformation is a matter of current debate in South Africa (Sekhotho, 2018). Indeed, the fears expressed by the committee referenced by Sachs echo the criticisms of the judicialization of politics leveled by Hirschl and others. Decrying a form of politics that he titles "juristocracy," Hirschl summarizes the place of the Bill of Rights in South Africa's political system by saying that: "the white elite and its parliamentary representatives, faced with the inevitable prospect of an ANC-controlled parliament, endorsed a bill of rights as a means of fencing off certain aspects of their privilege from the reach of majoritarian politics" (Hirschl, 2004, 95). It is possible that Sachs would agree with this assessment, but still argue that it was a necessary price to pay for the support of the NP for the new constitution. Nevertheless, the acceptance of a Bill of Rights on the part of the ANC in exile in 1986 marks an important moment in the party's journey towards a negotiated settlement with the apartheid regime, and White South Africa as a whole. The ANC followed up their initial sketch of a Bill of Rights from 1986 with the Constitutional Guidelines mentioned earlier in 1989, and then with a revised Bill of Rights proposal in 1992. As is the case with national

constitutions, these proposed Bills of Rights grew more capacious over time. Notably, the right to private property did not show up in ANC drafts until 1992 (Mutua, 1997, 77-78).

Following the un-banning of the ANC in 1990, and the beginning of negotiations between the apartheid regime led by the NP, and the ANC, constitution-making began in earnest as a necessary precursor to the first democratic elections. Through a long series of off-and-on negotiations between most of the political parties in South Africa, an interim constitution was agreed to in 1993. This constitution (which provided for a government of national unity that incorporated both the NP and ANC in a power sharing agreement) was in effect during the 1994 election. The newly elected parliament also sat as the Constitutional Assembly, and worked on the constitution between 1994 and 1996. The text was finally certified by the nascent Constitutional Court in December 1996, and took effect at the beginning of 1997. In the sections that follow, I describe in more detail the historical context that shaped the constitution-making process, and the key elements of the drafting process itself.

3.2.3 Looking Toward a Majoritarian Future

The rapidly approaching end of the system of apartheid became clear to some elements of the National Party some time before the leadership endorsed this view. The combination of domestic economic stagnation, international pariahdom, and increasing violence eventually drove the National Party leadership to begin negotiations with the ANC leadership, and Nelson Mandela in particular. These negotiations played out in several stages over a period of about eight years – beginning in 1985 while Mandela was still in prison, and continuing through the early months of 1993. These

vital negotiations have been well documented by other scholars, particularly in books by Waldmeier (1997) and Spitz and Chaskalson (2000). Since the focus of this project is on the later constitutional negotiations in parliament between 1994 and 1996, this important part of South Africa's constitutional history is not addressed in much depth here. It should be noted however, that the negotiations began as a project to bring together all the major political parties in South Africa, including the Azanian People's Organization (AZAPO), Pan African Congress (PAC), the Inkatha Freedom Party (IFP), the Democratic Party (DP), the Conservative Party (CP), and others. The two major stages of the negotiation process were the Convention for a Democratic South Africa (Codesa) which met from December 1991 until May 1992, and the Multiparty Negotiating Process (MPNP) which met between April and November 1993. The interim constitution was negotiated in the last stages of the MPNP. By the end of the negotiations, it was clear that the only significant action was between the NP and the ANC, particularly through "the channel" between Roelf Meyer (Minister of Constitutional Affairs and Communication) and Cyril Ramaphosa (Secretary General of the ANC).

The negotiating positions of the parties during this time were clearly driven by their assessment of their relative political power in the years to come. There are several aspects of this that bear special mention, though these issues obviously informed a great deal of the negotiation of the constitutional texts (both 1993 and 1996). First, the issue of federalism has had an intensely partisan valence in South Africa. The ANC adamantly opposed federalism in the beginning of the negotiations, preferring a unitary state where its overwhelming advantage in the national popular vote would increase its power(Thompson, 2001, 253). The IFP strongly favored federalism due to its regional base of power in KwaZulu-Natal. The NP also favored federalism, partly

for similar reasons to the IFP, but also as part of its broader interest in empowering groups rather than individuals. This leads to a second issue, which is the disagreement between the ANC and NP over group rights. Perhaps partially informed by the work of the apartheid state (and colonial governments before) in dividing Black Africans into legally described groups and empowering traditional leaders as agents of state control, the ANC opposed group rights as a matter of principle. For obvious reasons, the NP and its Afrikaner base wanted to establish group rights to protect their political power and cultural heritage. The ANC's views on this point were long established, dating back to their original constitutional considerations under the leadership of Oliver Tambo in Lusaka, Zambia (Sachs, 2016). This issue of group rights versus individual rights was one of the major factors that led to the breakdown of Codesa in 1992. The resolution of these issues was a compromise in the 1993 constitution, where individual rights are protected (rather than group rights), but seven provinces were created.[2]

A point of commonality between the constitution-making processes in South Africa and Brazil is the legal continuity of the constitutional order. While this was perhaps assumed in Brazil, where the constitution-drafting process was developed by the elected legislature through a period of negotiations within the Congress, this was a more open question in South Africa at least in the beginning of the negotiations. What actually transpired was, at least regarding the legal procedures involved, a smooth and normal process, but one with interesting implications regarding the legitimacy of the constitutions produced. As noted above, the interim (or transitional) constitution was

[2]South Africans generally prefer to avoid describing this as a federal system of government. One ANC MP described the system as a "unitary system with federal features" (Author's Interview with"ZNGC", 23 March 2016).

drafted by a mix of the elected representative of the White minority (elected in racially exclusionary elections), the leaders of the Bantustans and associated parties, and the leadership of the recently unbanned liberation movements such as the ANC and PAC. In 1993, the ANC had no electorally demonstrated claim to represent the interests of the Black majority, but had through long practice and careful political maneuvering established itself as the preeminent representatives of Black South Africans (at least outside of KwaZulu-Natal where the IFP dominated). Thus the democratic legitimacy of both the NP and ANC was suspect at this point. However, the constitution negotiated in this process was a vital step between the end of grand apartheid and the holding of democratic elections under a constitution that provided for political and social equality for all South Africans.

Whatever the democratic bona fides of the interim constitution, it was duly passed as the new constitution of South Africa by the legislature as it was then constituted in 1993 (i.e. by the members of the racially based tricameral parliament). The interim constitutional text provided for the procedures through which it was the replaced by the new democratically elected legislature in 1996. Thus, while there was a great deal of important political change that occurred, the legal aspects of this constitutional revolution followed exactly the process laid out in each of the constitutions in force at the time. The process of using an authoritarian constitution's amendment process to replace it with a democratic constitution had a recent precedent at that time. As Arato's research on the democratic transitions in Eastern Europe demonstrated, there was a great deal to be gained (at least in the short run) from following this overtly legal path to radical constitutional change (Arato, 2000).

A vital issue in the transition process was the timing of the first multi-racial

elections. The NP appeared to be delaying a decision on this, perhaps as a means of maintaining leverage in the negotiations. However, their hand was forced by the assassination of the prominent activist Chris Hani in April 1993. Tensions had already been very high, as violence in the townships had been increasing, leading to fears of open conflict between the ANC and the PAC.[3] To his credit, de Klerk understood that this was a critical moment in the country's history, and quickly agreed to an election date of 27 April, 1994 (Waldmeir, 1997, 225). This gave the parties a de facto deadline to complete their work on the Interim Constitution (also called the Transitional Constitution by some participants in the process), and an election to begin campaigning for.

The election of 1994 was celebrated by many around the world, but it was not without its problems. The election had been agreed to take place on April 27th, but various logistical problems necessitated a continuation of voting for the next two days as well. The final balance of power between the parties in this election was vital since the new parliament would also sit as the constituent assembly. Most importantly, the new constitution would have to be passed by a supermajority of the members of the lower and upper chambers of the parliament sitting as the Constitutional Assembly. The NP leadership knew that they would not be in the majority in the new parliament, but they hoped to do well enough to have a significant say on the new constitution, and to have a voice in the government of national unity that was supposed to govern South Africa for the five years following the election.

There have long been rumors in parts of the South African political and aca-

[3]There has long been speculation that this was part of an intentional campaign on the part of right-wing agitators connected to the NP government.

demic community that the precise result of the 1994 election was the result of careful negotiation between the NP and the ANC, and not a factual accounting of the ballots. The newly created Independent Election Commission (IEC) faced an extraordinary task in preparing the ballots and polling stations, and in supervising the conduct of the election. As it transpired, there were more than 500 allegations of irregularities in the voting process (Szeftel, 1994). At one point, the computer system at the IEC was hacked, with votes added to the FF, IFP, and NP, forcing the counting process to begin anew (Harris, 2010). In the end, the IEC was unable to report vote totals for individual polling places or even regions, and resorted to a single number for each party as a national total. According to a contemporary academic account of the election, "the IEC met with party leaders and 'negotiated a result' as one IEC official put it... The IEC declared the election result to be a generally accurate picture of the wishes of the electorate... The alternative would have been to hold another election, probably producing even higher levels of violence than before" (Szeftel, 1994, 469-470). This is perhaps too sanguine an assessment of the election, given the fact that according to this agreed result, the ANC won 62.6% of the vote and 63% of the seats in the National Assembly.

This issue of a negotiated election was raised in several interviews conducted during field research for this project. First, in an interview with an individual who was very senior in the ANC at the time of the elections, the respondent stated that:

> There was such wide scale fraud particularly in [KwaZulu-Natal]... There was [sic] literally ballot boxes which when you opened them the ballot papers were all nicely stacked one of top of the other... But I think essentially Cyril [Ramaphosa] and Roelf [Meyer] and to some degree the IFP kind of came up with a formulation about how the vote should be split

> in a fair way... I mean you could get a sense of how the vote was going, but there was no way to get an accurate vote count... I think essentially the ANC agreed that it wouldn't be a good idea for it to have more than a two-thirds majority... But you know it really was a fair reflection of the vote, but I mean it really was not reconstitutable about what the vote should have been, or was. (Author's Interview with "TGRU," 23 May 2016)

In a later interview with a very senior member of the NP who would have had direct knowledge of these alleged negotiations, I summarized the claim made in the interview quoted above, and asked this individual to respond to the claim. The respondent stated that:

> None of us really has an idea as to what the outcome was. It was a little bit speculative... So what I'm saying is that there are a lot of facts that we cannot prove either this way or that way. And certainly not an agreed outcome. There was definitely not an agreed outcome that I'm aware of. I was not part of such negotiations. And neither was Mr. de Klerk. So that is I think an untruth. (Author's Interview with "RJFD", 30 May 2016)

Between these two major parties then there is agreement that the actual vote totals of the election were unknown and unknowable. The vote tallies that were printed at the time and continue to be reported in books today are an estimate of what the votes were. The key claim – with immense bearing on the constitution-drafting process – that the ANC and NP negotiated the numbers – was denied by the NP side, and by an account written by a senior official in the IEC (Harris, 2010), but upheld by the ANC member referenced above, and by a contemporary scholarly account (Szeftel, 1994). The key issue of course is that if the ANC had achieved greater than two-thirds of the

vote, it would have had the power to decide the constitution for itself. Whether the fact that the party fell just short of this is an intriguing act of fate or providence, or the result of some careful calculation or bargaining is unclear at this time. However that number came about, it meant that the ANC was firmly in the driver's seat but would need the support of at least one of the minor parties in the parliament to pass the constitution.

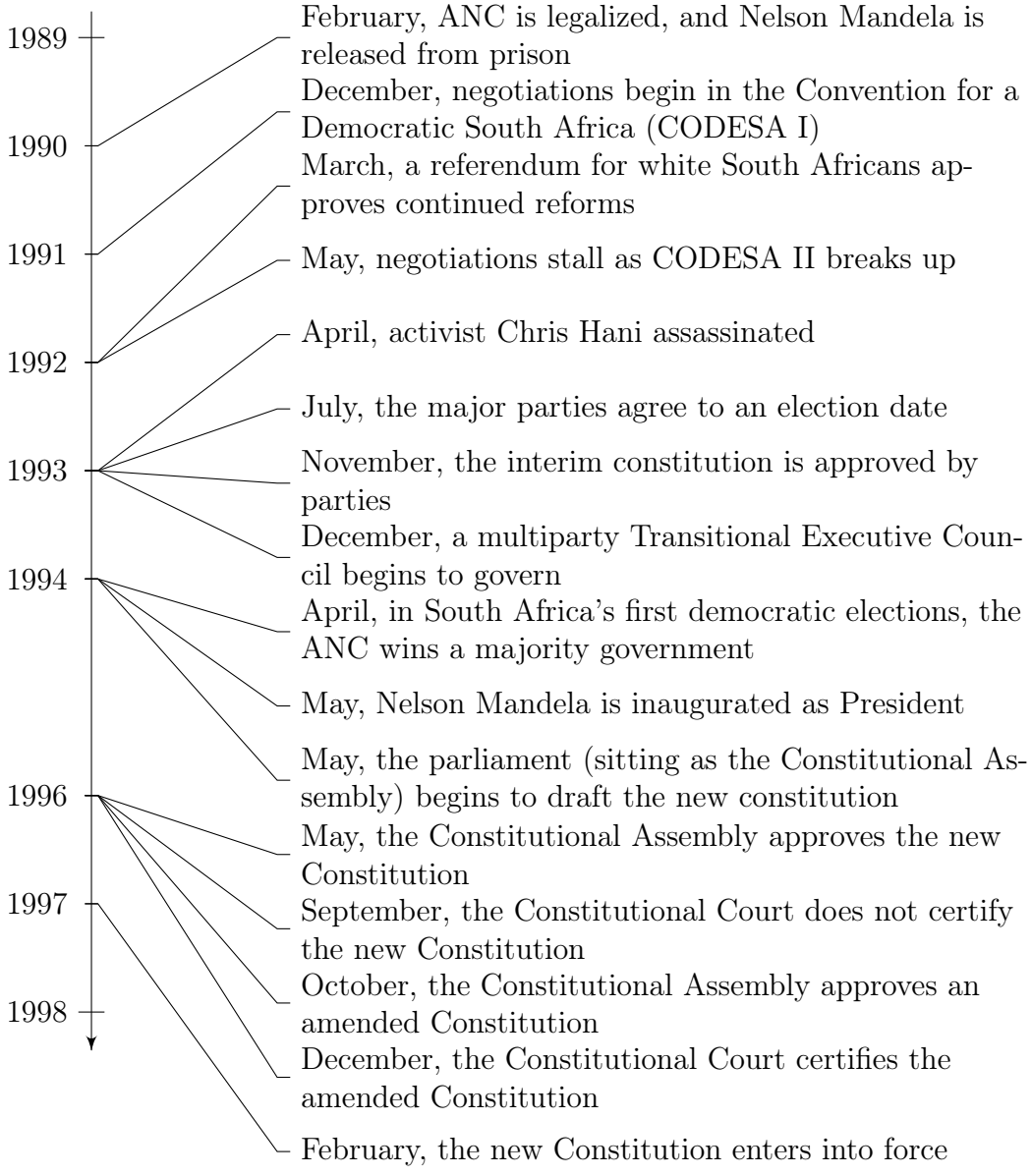
While the election for the lower house of parliament (the National Assembly) received most of the attention then and now, we also need to consider the membership of the reconstituted Senate, since the Constitutional Assembly was composed of the members of the two chambers sitting together.[4] Under the terms of the 1993 constitution, the members of the Senate were to be chosen by the new provincial legislatures.[5] In addition to voting for the members of the National Assembly through a system of closed list proportional representation, the voters of South Africa chose the members of their provincial legislatures through a similar system of party lists. The provincial legislatures (then and now) were seen as important consolation prizes for parties with strong regional support, but which could not compete with the ANC on a national level.[6] The members of the Senate were to be chosen by the provincial legislatures on a partisan basis, with the number of senators from each party being proportional to the number of seats each party held within the provincial legislature. This gave the ANC a solid majority in the Senate, but included a strong contingent from the National Party. Smaller parties tended to do quite poorly in the Senate.

[4]South Africa had a Senate beginning with the Union constitution in 1909. This Senate was abolished in 1981. The interim constitution recreated the Senate as a more federal institution. The upper chamber was renamed the National Council of the Provinces in 1997.

[5]The 1993 constitution also created new provinces and described their boundaries.

[6]The opportunity for the NP to win government in the Western Cape, and for the IFP to win in KwaZulu-Natal was an important factor in the peaceful conclusion of the election of 1994.

Figure 3.1: South Africa Timeline



3.3 Drafting the Final Constitution

3.3.1 The Constitutional Assembly

In South Africa as in Brazil, a newly elected representative assembly was given the dual task of ordinary legislation and drafting a new constitution. In the South African case, the hard work of negotiating the details of the process of constitution making had already been accomplished in the MPNP. Chapter 5 of the interim constitution laid out in some detail the form of the Constitutional Assembly, and the procedures it would follow in writing the new constitution. Having learned from their experiences in the earlier negotiations that deadlines had a wonderful power to sharpen minds and encourage compromise (Author's Interview with "RJFD", 30 May 2016), the interim constitution required the Constitutional Assembly to complete its work within two years of its first sitting (s 73(1)). In practice, this meant that the final constitution would have to be completed and approved by the Constitutional Assembly by 8 May 1996. Despite this firm deadline, the constitution-making task began slowly, and the early committee meetings have been memorably described by one party leader as "occupational therapy" for MPs (Leon, 2008, 306). This is perhaps understandable given the fact that many of the principal members of parliament had by that time been involved in several years of intense negotiations, and had recently concluded a tense electoral campaign. Nevertheless, there was a great deal of wasted time in the beginning of the drafting process, and a mad rush to finish in late April 1996 (Author's Interview with"ZCGI", 5 May 2016).

The leadership of the Constitutional Assembly reflected the balance of power in the parliament. As mandated in the interim constitution, the Constitutional Assembly elected a Chairperson and Deputy Chairperson at their first meeting. The

Table 3.1: Partisan Composition of the Constitutional Assembly

Party	Assembly	Senate	Total	% of CA
African National Congress	252	60	312	63.7
National Party	82	17	99	20.2
Inkatha Freedom Party	43	5	48	9.8
Freedom Front	9	5	14	2.9
Democratic Party	7	3	10	2.0
Pan Africanist Congress	5	0	5	1.0
African Christian Democratic Party	2	0	2	0.4

Chairperson was Cyril Ramaphosa of the ANC, and the Deputy Chairperson was Leon Wessels of the NP. The other constitutionally mandated body was an Independent Panel of Constitutional Experts (IPCE). The Constitutional Assembly chose seven South African academics to fill this committee, and they provided important guidance for the drafters throughout the process. Importantly, the interim constitution gave the IPCE the task of amending the text of the final constitution if it reached majority support but fell short of the supermajority required for ratification (s 73(3)).

The organization of the various committees is important for our analysis, as the strict hierarchy allowed leaders of the ANC and NP to continue to negotiate at an elite level on the language of the constitution, while involving junior MPs in the somewhat academic work of discussing potential provisions, and dealing with the demands from citizens through public meetings and written submissions. The large number of Committees creates a rather frustrating layer-cake of bureaucracy, but the hierarchies demonstrate how the process was run.[7]

The largest real negotiating body was the Constitutional Committee, which

[7]While it might be appealing for reasons of space and the stamina of the reader to abbreviate these committee names, that would also likely create additional confusion about which committee was being spoken of. For that reason, the committee names are written out in full in this chapter.

was composed of 44 members of the Constitutional Assembly, again in proportion to their overall number of seats. It was discovered that this group was too large to actually decide the finer points of controversy, and was eventually functionally replaced by a subcommittee of twenty members of the full Constitutional Committee. The subcommittee was not empowered to make final decisions, but rather reported its decisions to the full Constitutional Committee for a vote. The members of the subcommittee varied according to the issues being dealt with, further adding to its efficiency (Ebrahim, 1998, 181). Alongside the Constitutional Committee sat a management committee made up of dozen members of the Constitutional Assembly, which dealt with procedural and logistical rather than substantive issues.

Much of the work of roughing out the substance of the various chapters of the constitution was to be done by six Theme Committees. The Theme Committees were the main point of contact for members of the public and representatives of interest groups who wished to deliver a written submission or presentation. The original intention for the Theme Committees was to process the information thus received and then send reports up the Constitutional Committee for the actual drafting of the text (Constitution Committee, 1994). In the end, the Theme Committees did more than this, and provided drafts of their assigned chapters to the Constitutional Committee. The subject matter for these committees was divided as follows: (1) character of the democratic state, (2) structure of government, (3) relationships between levels of government, (4) fundamental rights, (5) judicial and legal issues, (6) specialized structure of government (such as public administration and security services). Much of the work of the Theme Committees was actually undertaken by a Core Group of each Committee. These Core Groups were agreed to have representatives of the major parties, though at this level proportionality was not possible. Thus each Core

Group had two members from the ANC, and one each from the NP, DP, PAC, and IFP (Constitution Committee, 1994). In both the Theme Committees and Core Groups, MPs from the smaller parties were assigned to multiple Committees, and were in some cases unable to attend meetings due to scheduling difficulties (Author's Interview with "GQOL," 26 May 2016).

The Theme Committees were each assisted in their work by a Technical Committee made up of a number of academics with expertise in the area of law that the Theme Committee was dealing with. There was some concern among the members of the Constitutional Committee that the Technical Committees not unduly influence the work of the Theme Committees (Constitution Committee, 1994). However, in at least some Theme Committees, the actual work of putting constitutional language together fell to these Technical Committees (Constitution Committee, 1995). In interviews, a number of both members of the Constitutional Assembly and the Technical Committees asserted that the experts had a great deal of impact on the development of the text.

3.3.2 Party Discipline in the Constitutional Assembly

The key explanatory variable in this analysis of public participation is the nature of the political parties. As noted earlier, in Brazil we observe notoriously weak parties. In South Africa we observe very strong parties. And in Iceland the constitution was drafted without the participation of political parties. In the Brazilian case, we can draw upon decades of empirical research that conclusively demonstrates the weakness of the political parties. Of particular interest for this research project is the analysis of voting in Brazil's National Constituent Assembly that was undertaken

by Mainwaring and Pérez-Liñán (1997). However, in the case of South Africa, the literature is not as well developed, and we are further limited by the unavailability of the equivalent of roll-call vote data that could be used to construct a measure of party unity in the Constitutional Assembly. There is some research on party discipline in the broader context of South Africa's parliamentary system. Taking a long view of the development of political parties in South Africa, Thiel and Mattes (1998) argued that the centralized and disciplined nature of the parties could be attributed (at least in some cases) to their genesis as hierarchical and quasi-Leninist liberation movements. Other parties were created in the Westminster tradition, and thus have strong discipline as part of their identity.

The tallies in the votes to ratify the 1996 constitution are not particularly instructive, as they were overwhelmingly in favor, nor were there a multitude of votes in the plenary of Constitutional Assembly on amendments of procedural issues. In the first ratification vote on 8 May 1996, only the African Christian Democratic Party (ACDP) voted against the Constitution, while the IFP and Freedom Front (FF) abstained or were absent. This is a picture of complete party line voting, but it does not tell us much. In the second ratification vote (after the text was amended to meet with the Constitutional Court's approval), the party lines were essentially the same, with continued opposition from the ACDP, and boycotts and abstentions from the IFP and FF. No member of the Constitutional Assembly voted against their party.

Party discipline was in fact supported by the text of the interim constitution, with a section that was carried over into the final constitution. In the section of the 1993 Constitution that deals with the vacation of seats (s 43(b)), a member of the National Assembly is required to vacate their seat if they cease "to be a member of

the party which nominated his or her as a member of the National Assembly." This is not an indefensible provision in a constitution that establishes an electoral system of closed-list proportional representation. However, it serves to increase the power of the political party at the expense of the individual member of parliament. So, during the drafting of the final constitution between 1994 and 1996, members of the Constitutional Assembly depended on the good graces of their party leadership for the normal hierarchical appointments in parliament, appointment to their preferred Theme Committees and higher Committees, and for the continuance of their seat in parliament more generally. Such strong party discipline was in fact ANC party policy. The 1994 Code of Conduct for ANC MPs required members to be subject to the authority of the party leadership, and forbade them from using parliamentary procedures to undermine that leadership (Lodge, 2004; Boraine, 2014). This is certainly not an institutional context that would encourage anything other than fealty to the party. Although most of the focus in researching parties in South Africa has been on the ANC, some research has suggested that the "ethos of strong party discipline" pertains "across the political spectrum" (Steytler, 2005). The ANC's united front demands a similar approach from its opponents in parliament.

There is also evidence to suggest that party discipline was paramount in the negotiations in the Theme Committees. The documentary record focuses on the submissions from the parties, which seem to have been the main points of discussion as documented in the minutes of meetings. In many of the interviews conducted for this project, respondents indicated that the party's position on a particular issue was the most important factor – certainly above input from the public. One respondent described the situation within the ANC as follows: "So, once a decision has been taken at a conference, whether you are comfortable or not with that decision, when it has

to be discussed in a public forum, like in parliament, or in portfolio committees, or in these Theme Committees in the course of the formulation of the constitution, then you have to abide by the position of the party" (Author's interview with "DLSR," 15 March 2016). This statement certainly includes the idea of voting with the party, but even more than that a requirement that in the negotiations in the Theme Committees, party members would follow the party line even if they did not share the party's decision. Other accounts bear this out, suggesting for example that although the ANC's official position in the constitutional negotiations was to include a prohibition on discrimination on the basis of sexual orientation in the constitution, this was not the view held by the majority of the party members (Oswin, 2007; Thoreson, 2008). In the post-constitution-making era, the ANC has continued to rely on party discipline to carry through policies that are unpopular among its membership and even its MPs (Davis, 1996; Beall et al., 2005).

3.3.3 Genesis and Scope of the Popular Participation Program

In contrast with what we will see in the Brazilian case, where the opportunities for public input (the popular amendments in particular) were the results of demand from the public and civil society groups, the formal public participation program in South Africa came about through the decisions of the Constitutional Assembly, and not in response to demands from the public. Although the opportunities for participation were extended from the top down, there was a significant volume of public input at both stages of the constitution-making process. The leadership of Codesa had extended an invitation to members of the public to contribute to the negotiating process by sending letters with what they would like to see in the new constitution.

In response, there was a grassroots movement to send letters to Codesa and later to the MPNP, however these received relatively scant attention from the negotiators representing the political parties. Included in the National Archives of South Africa are hundreds of letters to the parties at Codesa, including letters from school children (who in some cases seem to have been directed to write by their teachers), racist postcards, and letters from civil society groups and concerned citizens.

It is difficult to say whether or not the majority of the writers of these letters had a sense of how much attention their submissions received, or whether they had an impact on the interim constitution. However, there is one interesting series of letters in the archive from a concerned citizen who wrote five letters to the negotiators at Codesa and the MPNP. This gentleman's third letter includes a line of the sort that might be expected from someone in his position: "My letter of 30th March 1992 was written in response to an invitation for the members of the public to address Codesa on issues relation to the Constitution and Bill of Rights. Unfortunately, whilst I asked that copies of my letter be circulated to all the delegations, I never received confirmation that this was, in fact, done. If it was done, then I was studiously ignored by all the delegations... I trust that the man on the street is not going to be ignored when deliberations on these issues recommence..." (McLoughlin, 1993a) His last dogged letter states: "I enclose herewith copies of my letters of the 30th March 1992, 16th October 1992, 26th March 1993, and 20th April 1993 to which I have not yet had a reply. Kindly let me hear from you by return" (McLoughlin, 1993b). Clearly, this was an individual who was paying attention, and not seeing the fruit of his labors. It is likely that this person's assiduous campaign was unique, but these quotations reflect the broader disaffection that a participating citizen might feel if they were following events closely enough to determine whether or not their

submissions had an effect on the text produced by the negotiators.

The experiences of drafters, civil society groups, and members of the public at Codesa and the MPNP informed their approach to popular participation in the drafting of the final constitution several years later. One of the striking aspects of the genesis of the public participation program for the final constitution-making process is that it does not seem to have been a contentious decision or the result of much careful thinking. On the contrary, according to an individual who was in the leadership of the Constitutional Assembly, the public participation program was created because of public statements made by members of the Assembly to the effect that there would be public consultations about the content of the constitution (Author's Interview with "GQOL," 26 May 2016). The Executive Director of the Constitutional Assembly, Hassen Ebrahim described the situation following the meeting as, "Essentially the task that we had was to ensure that we had a constitution drafted by more than 40 million people" (Segal and Cort, 2011, 146) This sort of appeal to the public was in line with the ANC's practice of politics (Brooks, 2018). However, the public participation process was not a partisan project. According to one member of the Management Committee, there were no objections to starting this large program of public consultation (Author's Interview with "ULTY," 5 May 2016).

Even if the project was essentially non-partisan, the utility of a centrally managed system for public participation is a matter that should receive more debate. The parties certainly differed in the size and diversity of their constituency, and thus in their ability to represent the interests of South Africans in general. The ANC in particular made claims that suggest it relied far more on other sources of information about the views of the people than on those created by the Constitutional Assembly.

In one interview, an ANC member of the Constitutional Assembly described a dialogic process through which the leaders of the ANC shaped the views of the people about the constitution, but also sought their input (Author's Interview with "CEQW," 10 March 2016). The ANC's own party structures were seen as a key to understanding the views of the people. Even leaders of other parties were willing to concede that the ANC had a "significant tradition of popular participation" (Author's Interview with "PNTO," 10 March 2016). However, responding to a question about the impact of participation, an ANC member stated that, "The heart of what we wanted to achieve was to make sure that every South African is able to follow the constitutional process, and be able to be part of that process. So we did everything to facilitate them getting involved in that process" (Author's Interview with "CEQW," 10 March 2016). This sounds less like direct impact, and more like a process designed to increase perceptions of legitimacy and ownership, but also reflects an interest in moving beyond those party structures to be as inclusive as possible. Another ANC member asserted that the party had always wanted a large participatory process (Author's Interview with "JJVA," 3 May 2016). On balance, then, it seems that the public participation process was most in line with the traditions and desires of the ANC, but was not in practice a partisan project.

As the staff of the Constitutional Assembly planned the public participation process, they had very little to work with. There was no budget for public consultations, a media campaign or for the processing of letters from the public. Additionally, those planning this process were unaware of any previous examples of public participation in constitution making, thus depriving them of the opportunity to learn from how the process was implemented in Brazil a decade earlier for example. In the end, the staff of the Constitutional Assembly developed an ambitious plan to hold public

consultations in many locations around the country, create broadcast and print media campaigns, and solicit written comments from members of the public. This effort was financed with donations from foreign governments, particularly those in Scandinavia (Author's Interview with "GQOL," 26 May 2016). The Public Participation Programme launched with a large public meeting near Cape Town in February 1995, and continued until about February 1996 (Salazar, 2002, 69). Given the rather haphazard nature of the beginning of the process its eventual scope and accomplishments are all the more impressive.

It is important to make a correction at this point concerning the volume of public participation in the South African constitution-making process. The number of submissions from the public is often described as being slightly over or under two million (de Vos and Freedman, 2014, 24). One well-researched book on the constitution-making process provides the number of submissions from the public as 1,753,424 (Segal and Cort, 2011, 148). However, this number actually includes both signatures on petitions and substantive written submissions. The number of written submissions from individuals and civil society groups (which were not usually separated by the technical staff), actually stands at 15,292 (Gloppen, 1997, 257-261). Of these, 8,409 were made available for public viewing on the Constitutional Assembly's website (described below), and are now accessible to researchers through the University of Cape Town's library.

The public outreach aspects of this program eventually involved a website where documents demonstrating the progress of the Constitutional Assembly were regularly posted. This was quite a groundbreaking attempt at transparency for its time. Additionally, the Constitutional Assembly accepted submissions from the public

via email to an easily remembered address at submit@constitution.org.za. Few South Africans would have been able to use either the website or the email, but those who did were quite pleased with it. One submission begins with "First of all, let me congratulate you on this wonderful method of communicating with our government!" (de Klerk, 1995). Members of the public could also contribute through a phone call to the Constitutional Assembly's "Talk-line." All of these channels for public input were advertised in the popular press (Segal and Cort, 2011, 155-156).

One of the great things about this initially ad hoc process of public consultation in South Africa is that the management of the Constitutional Assembly hired a research firm to conduct an empirical analysis of the effectiveness of the program in two waves in 1995 and 1996. The agency hired to undertake this research, Community Agency for Social Enquiry (CASE), then hired another firm (Research Surveys Pty) to conduct face-to-face interviews with an astonishing representative sample of 3,801 South Africans. The results of this research were then presented to the Management Committee in the form of a 38 page report. The results of that study do not cover the primary interest in the present project – whether or not the public participation program impacted the text – but do give us some excellent information about how effective the Constitutional Assembly had been in reaching the South African public.

In terms of basic knowledge of the constitution-making process, the survey researchers found that approximately two-thirds of South Africans had heard of the Constitutional Assembly, and of these three-fifths knew that its role was to draft a constitution or make law (Everatt et al., 1996, 5). At the time that the second survey was conducted, the public draft of the of the constitution had been in circulation for about three months. At this point 8% of respondents had seen the draft, and 5% had

read at least part of it, though 84% expressed a desire to read the constitution once it was ratified (Everatt et al., 1996, 23-24). The best opportunity for personal contact with the constitution-making process was through local meetings with members of the Constitutional Assembly. CASE found that in 1995, 18% of respondents had heard of such meetings, and of these 62% had attended one. In 1996, only 13% of respondents had heard about a meeting, and of those only 11% had attended. Of those who attended, almost half reported that they participated by asking a question or making a comment (Everatt et al., 1996, 15-16).

Of especial interest considering the data analyzed later in this chapter is the fact that 29% of respondents knew that the Constitutional Assembly was accepting written comments from the public. Among those who knew this was possible, 10% said that they had written to the Constitutional Assembly. Looking at the full survey sample, only 1% said that they had contacted the Constitutional Assembly (Everatt et al., 1996, 18-19). Feelings of ownership are thought to be important in building the legitimacy of a new constitution (Hart, 2003; Chambers, 2004), and in this survey it was found that 48% of respondents felt that they had been a part of the constitution-making process, and around the same number reported that they thought that the Constitutional Assembly genuinely desired the participation of the public (Everatt et al., 1996, 19-22). An optimistic 41% of respondents reported that they thought the Constitutional Assembly would give their input serious consideration (Everatt et al., 1996, 22). On the related question of whether the final text of the constitution would reflect their views, 35% responded in the affirmative (Everatt et al., 1996, 27). Even those who had not heard that it was possible to contribute to the constitution-making process believed that it was important for the Constitutional Assembly to consult the public (83% of respondents). The authors of the CASE report summarized

the situation this way: "In short, regardless of whether individuals feel that their own submissions would be treated seriously if they sent them in or not, the overwhelming majority believe that the Assembly is right in consulting the public" (Everatt et al., 1996, 23).

Despite the statistics on the reach of the public participation program collected by the CASE researchers, some members of the Constitutional Assembly remained unconvinced. One ANC member stated that "the ordinary people have never really been represented in these interactions with parliament" (Author's Interview with "DLSR," 15 March 2016). This respondent lamented the fact that the public consultations took place in towns in the countryside, but not in small villages. This is true, but the Constitutional Assembly did go to great lengths to hold public meetings in very remote parts of South Africa, including the sparsely inhabited Northern Cape. The transcripts of the public meetings describe well planned and orderly engagements between members of the public and members of the Theme Committees. Even if some members of the Constitutional Assembly describe these meetings as having had no effect on the text (Author's Interviews with "DLSR," 15 March 2016; "RGBS," 25 April 2016), they did produce interesting engagements between the people and their representatives.

At one meeting at the National Assembly in August 1995, Hassen Ebrahim (Executive Director of the Constitutional Assembly) responded to some criticism of the deals being made in the constitution-making process with the following impassioned (and somewhat humorous) statement:

> Chairperson, Mr. Vincent from NADEL [National Association of Democratic Lawyers], perhaps gave me the most important opening when he

dealt with the question of anxiety of civil society and the question of smoke filled rooms where the horse trading is supposedly taking place... Chairperson, we are now moving towards the end of our first phase of Constitution making. During this phase we have invited all of society to present their views on what they felt the Constitution should contain. In this regard, we have identified three particular role players. The first role player would be those political parties represented in the Constitutional Assembly and those political representatives who were elected in April precisely to draft the Constitution. But the second role player is that of civil society. I wish to explain a bit of civil society as well. But thirdly, the third role player is perhaps the most important role player, and that is the ordinary individual on the street who has also a voice... I can also confirm that we have had more than 300 attendances from politicians in these 25 constitutional public meetings throughout the country in very, very difficult areas which are not even listed on the maps... What happens to your submissions and your views and are they compromised in smoke filled rooms?.. In fact if you talk of real horse trading, then horse trading took place this week. It took place on Monday in the very committee you referred to. It took place in full view of the public and the media. It did not take place in smoke filled rooms. In fact, smoking is banned in our meetings. (Constitutional Assembly, 1995)

3.4 Analysis of the Drafting Process

3.4.1 Process of Textual Development

Tracking the development of the text of the constitution over time and between persons is a key interest in this research project, but it is at this point somewhat

limited by the availability of the documentary evidence. The National Archives of South Africa contain many documents relating to the constitution-making process, but some of the specific items mentioned in the minutes of meetings of the various committees do not seem to have been kept. Preliminary drafts prepared by the Technical Committees and in most cases the Theme Committees are among the missing items. A senior member of the Management Committee expressed some frustration at how these documents were handled at the end of the constitution-making process (Author's Interview with "GQOL," 26 May 2016). In correspondence with the author, a member of the technical staff suggested that documents not created for publication had been carelessly dumped into the National Archive, and not cataloged. This makes retrieval by researchers next to impossible.

Nevertheless, we can sketch out the general progress of the text based on other sources. Obviously, there were a number of documents created prior to the 1994 - 1996 drafting process that had important influences on the final constitution. Several of these have been described already, including the Freedom Charter, and the ANC's draft Bill of Rights, and Constitutional Guidelines for a Democratic South Africa. The constitutions of 1909, 1961, and 1983 also have some influence on the style of constitution writing, and the form of some of the major institutions. Much more important is the 1993 interim constitution, which established the constitutional principles, but also contributed a great deal of language to the final Bill of Rights, and to the sections on the parliament, cabinet, and provincial governments.

Beyond these various historical antecedents, the development of the text began in the Theme Committees. Here, the various political parties presented submission with both proposed language and arguments about that language. The committee

Table 3.2: Shared Text with the 1996 Constitution

Document	Shared Words	% of 1996 Text
1909 Constitution	140	0
1961 Constitution	473	0
1983 Constitution	1031	2
1993 Constitution	6866	15
November 1995 Draft	9840	22
May 1996 Draft	38050	86

meetings featured debate between the parties over the text in specific and general terms. Most importantly for the purposes of this research project, it was also in the Theme Committees that the submissions from the public were supposed to be given attention.

The actual process of how those submissions came to have any bearing on the text of the constitution depended very heavily on the work of both the broader panel of experts, and the Technical Committees that assisted the Theme Committees. The technical staff received the often handwritten submissions from the public, and made them consumable by the drafters. This involved transcribing the submissions and translating them in to English. The processed submissions were compiled in a number of large volumes that were printed at regular intervals as more submissions were ready for the drafters. These phone-book-like collections of submissions included in most cases a summary of content at the beginning that listed how many submissions had been received on various topics, but were less specific than the Brazilian database that will be described later, and as no demographic data were associated with the letters that had been received, this could not be passed on to the drafters. As we will see later, the amount of attention that these volumes received varied between drafters, but was in general not a systematic analysis.

Having considered the positions of the various parties, the views of the public, and representations from industry and civil society groups, the Theme Committees sent their reports to the Constitutional Committee. It was the role of the Constitutional Committee to negotiate the finer points of the text, and to consolidate the work of the various Committees into one final constitution. As in the earlier MPNP, the channel between the leaderships of the ANC and the NP was vital to seeing the project to its completion. In this way, there were important elements of both publicity (as in the Theme Committee meetings and plenary sessions of the Constitutional Assembly), and secrecy in the private meetings between leaders.

At the end of the process, the panel of experts integrated the drafts from the various committees into one final text. After this, Philip Knight – a Canadian legal scholar who was an advocate for "plain language" in the drafting of legal statutes – revised the language of the constitution to make sure it was understandable to laymen. One of the Technical Committee members described him as the "principal drafter," and the "owner of the draft" (Author's Interview with "ZCGI", 30 May 2016). But this role (and the goal of using plain language more generally) was certainly not without some controversy. One prominent South African lawyer described this final cleansing of the language of the constitution as the "Canadian Laundromat," while a member of the Constitutional Assembly referred to this process as the "plain language laundromat" (James, 1997; Murray, 2001a). However, that member of the Technical Committee noted that there has been no confusion over the interpretation of the 1996 Constitution, so the plain language program must have been successful (Author's Interview with "ZCGI", 30 May 2016).

3.4.2 Copied Text from Submissions from the Public

In the South African documents there are 189 instances in which there is shared text between the constitution and the submissions. In most of these cases, the submissions quote from the interim constitution or the highly publicized draft constitution of November 1995 (on which comment was requested), using language that was carried over into the final constitution. Many of these submissions go through a section of the constitution line-by-line, noting areas where changes could be made. Some of these submissions made very clear marks (for example with bold or underlined type) denoting what the author thought should be added or removed from the draft published in November 1995. Despite this careful work on the part of the authors of these submissions, there does not appear to be any impact on the final text from these interventions. It is relatively straightforward to look for edits in the final text of the constitution that respond to this type of feedback, and there is no evidence that these submissions had an impact. This is rather surprising, given that this kind of detailed and clear comment on the language of the constitution would seem to be of the most use to drafters – at least if we understand the constitution drafters as authors who have asked for feedback on their work. It is perhaps naive to think that there would be any instance where the words of a submission from the public were taken verbatim and added to the constitutional text. Nevertheless, after a thorough investigation we can conclude that this type of impact is completely absent in the South African case.

It is particularly notable that the very detailed submissions of this type from organizations such as the South African Agricultural Union (representing the majority of commercial farmers in the country), and the Chamber of Mines, do not appear to

have generated any concrete changes in the constitutional text. Even where there is no impact on the final text, these submissions are substantively interesting in that they show that many South Africans were sufficiently engaged in the constitution-making process to thoughtfully consider the published draft and suggest revisions. In comparison with the Brazilian case considered in the next chapter, this seems to be a step forward.

There are however a few cases where the final constitutional text lines up with the requested change. Perhaps most notably, a number of the social and economic rights proposed in a letter from Archbishop Desmond Tutu (writing to report on a meeting with a group of lawyers in the Western Cape) were added to the draft constitution within a couple of months of his letter. One member of the technical staff mused in an interview that there may have been some impact from submissions in the area of socio-economic rights, but they then reversed themselves saying that socio-economic rights were going to be included in the constitution regardless of what the public had to say on the issue (Author's Interview with"EAKX", 25 April 2016)

Among the South African written submissions, there are many submissions that share text with other submissions–though to a far lesser extent than what we will observe in Brazil. The most notable campaigns appear to have been organized by Christian groups. The largest campaign, with at least 61 submissions that appear to have originated from the same basic text, is an objection to the legalization of pornography. This group of texts claim to the speak for the "silent majority" of South Africans. The second-most numerous set of submissions (with 22 copies) object to the legalization of homosexuality, and demand that the words "sexual orientation" be struck from the clause on equal protection in the interim constitution. In this second

case, the language about sexual orientation is often included in a larger discussion surrounding issues of concern for conservative Christians. The third-most copied group of text (only 11), makes essentially the same demand as the second group, but the wording is very different. Going down the list we find very few copies in each group, suggesting that the majority of the submissions in the South Africa case were not organized, but rather the work of individuals, or at most small groups of people. Organized groups were involved in making in-person presentations to the Theme Committees, however. It is likely that they had some agenda setting impact through that channel (Author's Interview with"ZCGI", 25 April 2016), but none of the campaigns described here were successful.

3.4.3 Topic Models

Topic models are something of a blunt instrument for this type of analysis, so the discussion here will be fairly brief. Topic models are particularly useful for determining what documents are about, as a corpus of documents, and as individual members of that corpus. I have applied an unsupervised form of topic modeling (latent dirichlet allocation) to each of the corpora of submission from the public in the three cases studied in this dissertation.[8] This allows us to do several things: (1) understand broadly what topics were covered in the submissions, (2) determine which topics were more popular in the submissions, (3) see how closely the topics are related to each other, and most importantly (4) determine how many of these topics are included in the final draft of the constitution.

The method of latent dirichlet allocation (LDA) applies Bayesian statistics to

[8]This was implemented with the "lda" package in R.

the problem of uncovering the relationships between words and between documents. LDA assumes that each document in the corpus contains a mixture of latent topics, and uses an iterative process of "walking" through the documents to update both the topics and the probability that a given document contains each topic (Blei et al., 2003). The analysis begins with random assignments of words to a specified number of topics (in this case 50),[9] and then proceeds by updating the words in each topic, and the probable mixture of topics that each document contains. This is repeated many times (in this case 1000) to achieve stability in the assignments, and thus certainty in the model. Each topic then is a list of words that are regularly found together in the documents that make up the corpus. It is up to the analyst to carefully look at the list of words, and determine whether or not the list of words can be understood to represent a coherent and substantively meaningful topic. A common way to consume these topics is by reading the top 20 or 50 words that are the most common indicators that a document contains the topic.

When the South African constitution is analyzed this way, I find that the constitution (as a document within this corpus) is a mixture of only seven of the fifty topics from the submissions. Most of the content of the constitution (0.678) is captured by just one topic that contains words we would associate with the division of powers in both vertical and horizontal ways.[10] At the very least, this suggests a significant disconnect between the content of the constitution, and the content of the

[9]There is no clear rule about how many topics should be included in an LDA topic model. One approach to this problem is to re-run the model a number of times with different numbers of topics, and see which number returns the most coherent and differentiated topics. I took this approach with these corpora, and found that specifying 50 topics returned the most sensible lists of words for each topic.

[10]The top twenty words in this topic are: "government, national, provincial, local, constitution, shall, powers, provinces, commission, parliament, functions, public, section, executive, constitutional, president, legislation, members, province, service."

submissions. It may not be reasonable to expect that the majority of the topics will be included in the constitution, but this is a strikingly low proportion. As a point of comparison, the Brazilian constitution contains a mixture of thirteen of the fifty topics from the corpus of submissions. These are spread much more evenly than the South African case. In the sparser data of the Icelandic case, nine of fifteen topics are found in the final draft of the constitution.

3.4.4 Opinion Polls

South Africa's polling firms were founded relatively later than those in many countries, but had gained a great deal of experience in the last years of the apartheid regime. During the negotiations that ended apartheid and brought about the first fully democratic elections, polling data was used by the major parties to make calculations about how the deals being reached would affect their chances to hold onto, or gain, power. One scholar of South African politics invoked Rawls (1971) to describe the impact of polling in the negotiations over the constitution, stating that: "the widespread availability of survey data shredded the 'veil of ignorance', radically reducing the amount of uncertainty about the present and future interests, and thus enabled what Rawls called 'present position', that is, self-interested bargaining which ultimately helped to produce a constitutional agreement that was largely in the interests of the strongest political parties" (Biroli et al., 2012, 179). In more contemporary South African politics, there are few incentives for politicians to pay any attention to polls, as the party line is the only thing that matters in deciding how to vote in parliament (Biroli et al., 2012, 193).

Reports on polling data from this period in South Africa are less available

than in the Brazilian case, but there is no doubt among South African political elites about what the people wanted the constitution to say in several key areas – and the constitution did not deliver. Although it is certainly much different from polling random samples of voters, the South African process included millions of signatures on petitions that were sent to the constituent assembly. Summing up the impact of public opinion on a few controversial parts of the constitution (in particular through petitions), one participant in the process said "The three or four biggest petitions were not given effect... There was a massive petition in favor of continuing to privilege Afrikaans as an official language. That was not heard. There was a massive petition to ensure that the death penalty remained. That was not heard... There was a big petition about the right to bear arms. It had hundreds of thousands of signatures. I think that was just a non-starter from the start." (Author's interview with "EAKX" 23 March 2016).

3.5 In the Words of the Drafters

3.5.1 Evidence from Interviews

An important place to turn in understanding how these popular inputs influenced the constitutional text is the drafters themselves. I spent the first four months of 2016 in South Africa, combing through archives and conducting interviews. I was able to complete twenty interviews with members of the Constitutional Assembly. These were semi-structured interviews, conducted in person, either in the home of the respondent or in their office. The respondents include people who were at the highest levels of the ANC and NP at the time, and some who remain in government. I also had interviews with members of the other parties represented in the Constitutional

Assembly. Given the sensitive nature of some of these issues in South African politics today, all respondents were guaranteed anonymity, and they are identified here by a randomly generated four-letter label. In general, the South African politicians I interviewed were remarkably straightforward and candid about their experiences in drafting the constitution.

In interviews with the author, drafters of the South African constitution all but denied the possibility that the submissions from the public significantly impacted the text of the constitution. Many of the drafters who were interviewed for this project provided rather negative assessments of the impact of public participation on their work. One individual who played a very important role in organizing the campaign for public participation even suggested that impact on the text was not the point of the process for public engagement (Author's interview with "GQOL," 26 May 2016). Rather, the process for public engagement was designed to create a sense of attachment between the people and the constitution.

In another interview, a negotiator for the ANC suggested that the process was a "party driven negotiation," and that what mattered was the substance of the constitution, not its source (Author's interview with "CEQW" 10 March 2016). In a statement that closely aligns with the theory described in this paper, another ANC member asserted that decisions on the content of the constitution were made at the party conference, and that members would abide by the party position. To the extent that comments from the public were heard, this respondent argued that they confirmed the ANC's positions (Author's interview with "DLSR," 15 March 2016). One opposition MP referred to the whole process of public consultation as a "sham" (Author's interview with "LCWS," 24 March 2016). Another member of the constitu-

tional assembly described the impact of public submissions on the constitutional text as "close to zero," and "mere window dressing" (Author's interview with "HTWP," 26 April 2016).

Even in their published works, some of the members of the CA are rather dismissive of the impact of public participation. For example, Tony Leon (then leader of the DP) wrote in his memoirs that "Whether a single clause or section was altered as a consequence of public input or pressure is doubtful" (Leon, 2008, 306). On the same page, Leon writes that "The [Theme] Committees had no mandate to conclude agreements; and I quickly realized that they were little more than a form of political occupational therapy"(Leon, 2008, 306).

On the related issue of whether the views of individual citizens are valuable to drafters, a similar negativity reigned. One member of an opposition party suggested that:

> You do get a lot of single-issue lunatics... The brutal truth is you know, short of being some major figure in the world, or in this country, so if Desmond Tutu said something that would have got a lot of attention... It's unfair this, but it's the way of the world. You did not give much attention to what one individual said, because in the nature of things it would then have been an endless process... So you did tend to pay more attention to organized inputs... It's very hard for an individual how ever meritorious or serious minded to influence a process like that. But I think that a reflection of reality, not an anti-individual bias (Author's interview with "PNTO," 17 May 2016).

Reflecting the views of many of the interview respondents in a rather colorful description, another opposition member of the Constitutional Assembly stated:

> If random Mr. X says something, how do you begin to process it? How much weight do you attach to it? It's, you know, like Stalin said of the Pope: 'How many battalions does the Pope command?'... The views of, in a sense, organized public, chambers of commerce, traditional leadership, the Volkstaat Council, organized agriculture, were far more seriously taken than random comments by random individuals. I think it served a completely different purpose, and the purpose was legitimating the constitution... The South African public felt like they'd been part of the process, and therefore made the end product more legitimate (Author's interview with "LCWS," 24 March 2016).

However, this view was not universally held, one ANC member suggested that:

> I don't think what we do is to be guided more by the numbers than by the cogency of the reasoning behind a particular submission... We know that the majority is not necessarily correct at all times... So, there could be one individual who could come and convince a committee of parliament on a particular issue, while hundreds and thousands of others say something different, I mean see it differently. So, as leaders, as representatives of the people, we are required to use something like a strainer, to see which can go through and which need not go through (Author's interview with "DLSR," 15 March 2016).

Across party lines, the South African drafters were broadly appreciative of the public participation process as a means of building public confidence in the legitimacy of the constitution, but were quite certain that there had been almost no impact on the text from these public inputs.

3.5.2 Evidence from Transcripts

In the South African case, there are minutes for each committee and plenary meeting, but these do not contain much detail. Audio recordings and transcriptions were made for a few meetings of Theme Committee 4 (which dealt with the Bill of Rights), but the rest appear to be unrecorded, or at least any record made at the time was not included in the National Archive.

Despite the relative scarcity of the documentary records in the South African case, there are two passages that illustrate both a problem with submissions from the public, and their possible usefulness for drafters. During one of the first meetings of Theme Committee 4, the leader of the DP (Tony Leon) reminded the committee of the difficulties of incorporating the submissions from the public in the interim constitution that had been completed at Kempton Park in 1993. Discussing the need for an advertising campaign to encourage participation, Mr. Leon said that it should be:

> Not Kempton Park style where you had Humanity for Hens[11] and everyone else who wrote in – just their stuff arrived and straight into the dustbin because of the problems of time... I mean the other factor we've got to ask ourselves political parties here represent the voters, the citizens of South Africa, all of them. How do you weigh up I mean you know we get a representation from an interest group or whatever it is, Humanity for Hens is the one that sticks in my mind for example. I mean you know what weight do we give it, I mean because the point is, it's very necessary but we going to be festooned with paper. I mean when people start you

[11] An NGO concerned about the treatment of fowl, particularly advocating for keeping laying hens in a free-range environment.

> know writing in they write in and the people who don't write in, who gets submissions from another way, it – we also got to take them seriously. But we also got to take ourself [sic] seriously as political representatives and it's also going to be an evaluation exercise perhaps we sort of just have to feel our way (Hon. Anthony Leon, 7 November 1994, Theme Committee 4, Constitutional Assembly, Cape Town).

Mr. Leon's comments shed light on three key themes: (1) the vast amount of time required to give reasonable attention to submissions from the public, (2) the question of how representative the submissions are, and (3) the tension between representing the voters who placed these representative in parliament, and giving effect to the perhaps contradictory demands in the submissions.

The issue did not really come up again in the transcripts from the Theme Committee until almost a year later, when the lead negotiator from the NP (Sheila Camerer) attempted to prevent the committee from submitting a report to the main coordinating committee that went against the NP's position on the right to life and the death penalty. Camerer argued:

> Isn't it a little premature perhaps to sort of finalise this report to the CC [Constitutional Committee] before we've actually had an opportunity here in this committee to discuss the public submissions... Because if you read the papers, there is an – you can be in no doubt as to what a lot of members of the public think about the right to life and limitations on that right and the way it should be qualified perhaps in relation to a possible death sentence... in my two previous experiences of Constitution – Constitutional negotiations... The public always came aboard and sent in a lot of submissions which were never really taken into account properly... but

> I mean anybody looking at those submissions, would be left with a clearer impression that the public is very concerned about certain issues in this Bill of Rights (Hon. Sheila Camerer, 7 August 1995, Theme Committee 4, Constitutional Assembly, Cape Town).

The members of the African National Congress and Democratic Party on the committee quickly pointed out that Camerer only brought the submissions up as a way to support her party's position, and that there had been ample time up to that point for all concerned to deal with the content of the submissions – perhaps most appropriately by including this input in their party submission to the committee. Further, one of the ANC members questioned whether the National Party would be willing to accept the majority view on other topics – the unstated rhetorical answer being a clear no. Here, one of the main possibilities for parties to make use of the submissions – as support for their position–was quickly shut down by the other parties. These two vignettes from the South African case amply illustrate the primacy of party in the constitutional negotiations, and the difficulty drafters had in bringing the submissions from the public into the discussions in a meaningful way. The transcripts more broadly certainly do not lend any support for the idea that the submissions from the public had an impact on the constitutional text.

3.6 The Constitutional Principles as a Limiting Factor

As discussed above, the 1993 constitution was the product of negotiations between a non-democratic government, and the as-yet unelected leadership of the ANC. While winning a free and fair election is certainly not the only way that a political party can

establish legitimate claims to political power, it is still important to note that the two major players in the negotiations over the 1993 constitution lacked this credential. It is of further note that while much of the negotiation over the 1993 constitution and other issues discussed at Codesa and the MPNP took place in the open, it was well known then and now that a great deal was decided in private, and often just between Meyer and Ramaphosa. All of this matters because the constitution that was written by the elected representatives of the people between 1994 and 1996 was limited in its possible content by the constitutional principles contained in the 1993 constitution. Mutua (1997, 81) describes the constitutional principles as an "iron box" for the ANC, and a "shield" for the White minority. Presenting a view that undermines the legitimacy of the 1996 constitution, Mutua (1997, 81) goes on to suggest that "In a sense, the validity of the 1996 Constitution rests on the all-white Parliament that approved the Interim Constitution, and the Constitutional Court, which is an appointed body. The Constitutional Assembly, the body actually representing the will of all South Africans, essentially rubber-stamped prior political choices, despite projecting the perception that it was making a new constitution." In this argument, Mutua contests the legitimacy of a process that sought to ensure the continuity of constitutional law, rather than establish a break with the apartheid past.

Other scholars have focused more on the problems inherent in the two-stage process. Summarizing arguments against the democratic bona fides of the 1996 constitution (which is not his own argument), South African legal scholar Botha (2010) writes:

> One line of argument which might interrogate the manner in which the sovereignty of the people, in whose name the Constitution was adopted,

> was systematically weakened by a two-stage process that bound the people's elected representatives to prior agreements between political elites. As a result, it might be argued, the voice of 'the people' was drowned out by the buzz of elite bargaining, the noisy arguments of lawyers and the pronouncements of judges. Sovereignty was splintered by a political deal which fragmented the constitution-making process and turned it into the preserve of lawyers, judges and technocrats. Constituent power was effectively reduced to constituted power, which had to comply not only with the procedural requirements entrenched in the interim Constitution, but also had to heed the 'solemn pact' represented in the Constitutional Principles.

Botha goes on to present his own argument, which holds that the two-stage process was both the best that could have been done, and an idea that came from the ANC, and so was not a problematic as the quotation above would suggest.

However, it is a vitally important critique of the process from the perspective of the research questions advanced in this project. The analysis above has shown that public participation had very little impact on the text of the constitution, either in broad terms of agenda setting, or in the specific words that are found in the completed text. This lack of impact has been argued to have been a result of the fiercely partisan nature of the negotiations, but this low-impact outcome was to some degree fore-ordained by the fact of that the 1996 constitution would have to be in compliance with the constitutional principles. On this basis, even if the whole of the population of South Africa had demonstrated their steadfast opposition to federalism, the drafters of the constitution would still have been required to create an essentially federal vertical separation of powers (see Constitutional Principles XVII

- XXVII). The interim constitution was even less open to popular input that the final constitution, having been negotiated in a much less transparent way, and with a constant threat of violence hanging over the proceedings. We should not forget that in the early 1990s South Africa's townships were wracked by violence, the right wing extremist Afrikaner Weerstandsbeweging (AWB) actually launched a violent assault on the Codesa proceedings, and fears of a military coup were also very real. In this context, there was not much room for public input on the interim constitution. By the time the drafters arrived at the negotiations over the final text, they were significantly bound by the constitutional principles, and by deeply entrenched party positions.

3.7 Conclusion

The South African case allows us to examine the impact of public participation in a political system with strong parties. The constitution-making process was dominated to a large extent by the key conflict between the NP and the ANC over a number of issues, including group rights and economic concerns. As described above, the conflict in this case was between two strong parties with very different electoral bases. Added to this was the very real possibility of the outbreak of large-scale violence if the process had not been properly managed. The NP entered into this process with the knowledge that they could not win control of parliament (and thus the presidency) for the foreseeable future, and needed to protect their interests against future actions of the ANC through the constitutional text wherever possible. Beyond these immediate and very pressing concerns for economic stability and preventing bloodshed, both parties had been considering how the constitution would have to change to accommodate multi-racial democracy for many years – decades in the case of the ANC. The practical

import of these various factors was that in the constitutional negotiations (which unfolded over a period of six years in various forms and stages) the positions of these two main parties were in many areas very clear and firmly entrenched. Both parties understood their prerogatives and the necessity of getting to a text that would to the greatest extent possible protect the interests of their constituencies.

In this context, it was never likely that public participation could have a real impact on the text. And, in stark contrast with the views and recollections of the Brazilian and Icelandic drafter that are discussed in later chapters, the South African drafters were on the whole very pessimistic in their assessment of the impact of public participation on the development of the constitutional text. The South African public participation program may not have been quite as efficiently managed as the Brazilian process, but it did reach a broad swath of the population. The failure of this process to influence the text demonstrates that a willing public and a well-financed program are insufficient supports for effective public participation. Even the best arguments and suggestions from citizen-participants are unlikely to have an impact when the text of the constitution is a battleground between well-prepared and highly-disciplined political parties.

Yet there is reason to believe that the public participation process was successful in generating legitimacy for the constitution and the process that created it. The survey research conducted by CASE that was described earlier in the chapter certainly lends credence to the idea that the members of the South African public both overestimated the effectiveness of their participation, and that their participation increased their feelings of ownership of the constitution. Summarizing the participatory process from the perspective of rhetorical analysis, Salazar writes: "The

[Constitutional] Assembly establishes its own legitimacy by stimulating the existence of popular 'collective wisdom' and by projecting the fiction that the Constitutional Assembly, beyond its legislative frame, realizes – makes real – the voices of that collective will. The operation is neither fully credible nor fully completed nor entirely successful" (Salazar, 2002, 74). This connection between a fiction of participatory constitution making as a realization of the collective will, and the legitimacy of the constitution is important in all the cases considered in this dissertation, but perhaps most important in South Africa. The public participation program was a success insofar as it enhanced the legitimacy of the constitution. However, this advantage may be based on a false assessment of the effectiveness of popular involvement.

Chapter 4

Brazil: Constitution Making with Weak Parties

4.1 Introduction

The popular mythology of the Brazilian constitution-making process gives pride of place to the role of the public in shaping the text. Indeed the constitution of 1988 is often referred to as the "constituição cidadã" (citizen constitution), using the evocative title given to the constitution by the president of the constitutional assembly, Ulysses Guimarães, in his speech promulgating the new constitution.[1] In the same speech, Guimarães claimed that the constitution was created by the "breath of people, of the street, of the square, of the favela, of the factory, of workers, cooks, underprivileged people, indigenous people, squatters, businessmen, retirees, civil servants and military personnel, testifying to the contemporaneity and social authenticity of the text that now comes into force."[2] The members of the Constituent Assembly who the author

[1] Ulysses Guimarães, 5 October 1988, Ata da 341a. Sessão, Assembleia Nacional Constituinte, Brasília.

[2] "Há, portanto, representativo e oxigenado sopro de gente, de rua, de praça, de favela, de fábrica, de trabalhadores, de cozinheiros, de menores carentes, de índios, de posseiros, de empresários, de

interviewed in 2015 were effusive in their description of the role and influence of the citizens of Brazil in the making of the constitution. As one respondent stated: "What we had during the constitutional assembly was a nearly permanent dialogue with society, many meetings and hearings to make the constitution compatible with what Brazilians hoped for in that new political moment" (Interview with "AOTK," 20 November 2015).[3] Public statements by Brazilian politicians consistently give the impression that the public participation in the drafting process was vital and effective.

This chapter interrogates this popular mythology, seeking to empirically test the claim that this was the citizen's constitution. There could be a range of meanings behind the label of the citizens' constitution. This could be a claim that in contradistinction to the constitution under the military regime, this new constitution was drafted to serve the interests of the people. It could also imply a sense that the people of Brazil had moved for this constitution in some meaningful way. However the approach that is taken in this research is to suggest that if the opportunity for public participation is pitched in terms such as "you too are a member of the constituent assembly" (as the public participation process was advertised in Brazil), then it would follow that the text of the constitution should show some impact from public participation. If, as Guimarães claimed, the constitution was infused with or born from the breath of the people, then we should see evidence throughout the text that this popular participation had an impact.

The constitution-making process in Brazil began 30 years ago, and is not well-

estudantes, de aposentados, de servidores civis e militares, atestando a contemporaneidade e autenticidade social do texto que ora passa a vigorar."

[3]"Mas o que tivemos durante a constituinte foi um diálogo quase que permanente com a sociedade, muitas reuniões e audiências para compatibilizar o que os brasileiros esperavam daquele novo momento político."

known to scholars who do not specialize in Latin American politics. A few sentences to briefly justify the decision to make Brazil's experience of constitution-making one of the primary foci of this dissertation are therefore helpful at this point. Beyond the analytical advantages of the most-similar systems comparison between Brazil and South Africa, Brazil on its own presents an important case for the research questions tackled in this dissertation for several reasons. First, Brazil was one of the first countries to draft a constitution in a process that included significant levels of direct public participation. Second, the various means of popular participation in Brazil were highly innovative, and featured the best technology then available. Third, some of these avenues for public input were created by government offices without apparent popular (or necessarily elite) demand, while others were demanded by social groups. Fourth, the political context in Brazil, featuring a democratic transition amid a chaotic party system, pushed drafters to think about the immediate political implications of decisions on constitutional content, and raised the stakes of these decisions for many actors. These factors make the Brazilian case an excellent source of empirical data on the impact of public participation, and a good case to explore in the interests of learning what might be successful in other cases.

The Brazilian constitution as ratified in 1988 ended up being a very long, unwieldy, and perhaps unworkable document. Then-President Sarney was blunt in his judgment of the penultimate draft in a famous televised speech on 26 July 1988, saying that the constitution would make the country ungovernable. He further argued that the constitution also posed risks to businesses, labor relations, families, and Brazilian society itself. (Folha de São Paulo, 1988). In an interview with the author in 2015, Sarney was perhaps more positive in his outlook, but repeated his skepticism about the text as it was initially ratified in 1988, suggesting that many amendments

to the initial text were required to achieve governability (Interview with the author, 19 November 2015). Sarney lost the argument in 1988, as his televised address was followed a speech in the same format a day later in which Guimarães responded with a forceful endorsement of the constitution. Guimarães argued that the draft would be the constitution of the people, and would be the guardian of governability (Bonavides and Andrade, 1989, 495).[4] The Congress sitting as the constitutional assembly sided with Guimarães, and overwhelmingly approved the draft.

Certainly, the comparative rate of amendments to the Brazilian constitution suggests the unfinished or perhaps problematic nature of the constitutional text. Brazil's constitution stands out in a comparative analysis, averaging more than three amendments per year since 1988. The threshold to pass a constitutional amendment in Brazil is not especially low, but this does not seem to matter much in this case. As President Sarney remarked to the author, it is in practice easier to pass a constitutional amendment than regular legislation (Interview with the author, 19 November 2015).[5] Passing a constitutional amendment is a relatively unremarkable occurrence in contemporary Brazilian political life. The chief of staff of a prominent senator suggested to the author that the constitution remains somewhat dysfunctional, and requires constant amendment to get things done in government–even necessities like making minor alterations to the tax code (Author's Interview with MHKR, 18 November 2015). However, the core principles of the 1988 constitution

[4]"A Constituição, com as correcções que faremos, será a guardiã de governabilidade... Esta Constituição, o povo brasileiro me autoriza a proclamá-la, não ficará como bela estátua inacabada, mutilada ou profanada. O povo nos mandou aqui para fazê-la, não para ter medo." Quoted in Bonavides and Andrade (1989, 495).

[5]Constitutional amendments require a 3/5 majority in both chambers of the Congress (rather than the simple majority required for ordinary legislation), but do not offer the President the opportunity for approval or veto.

have remained unchanged by these myriad amendments (Zaiden Benvindo, 2016).

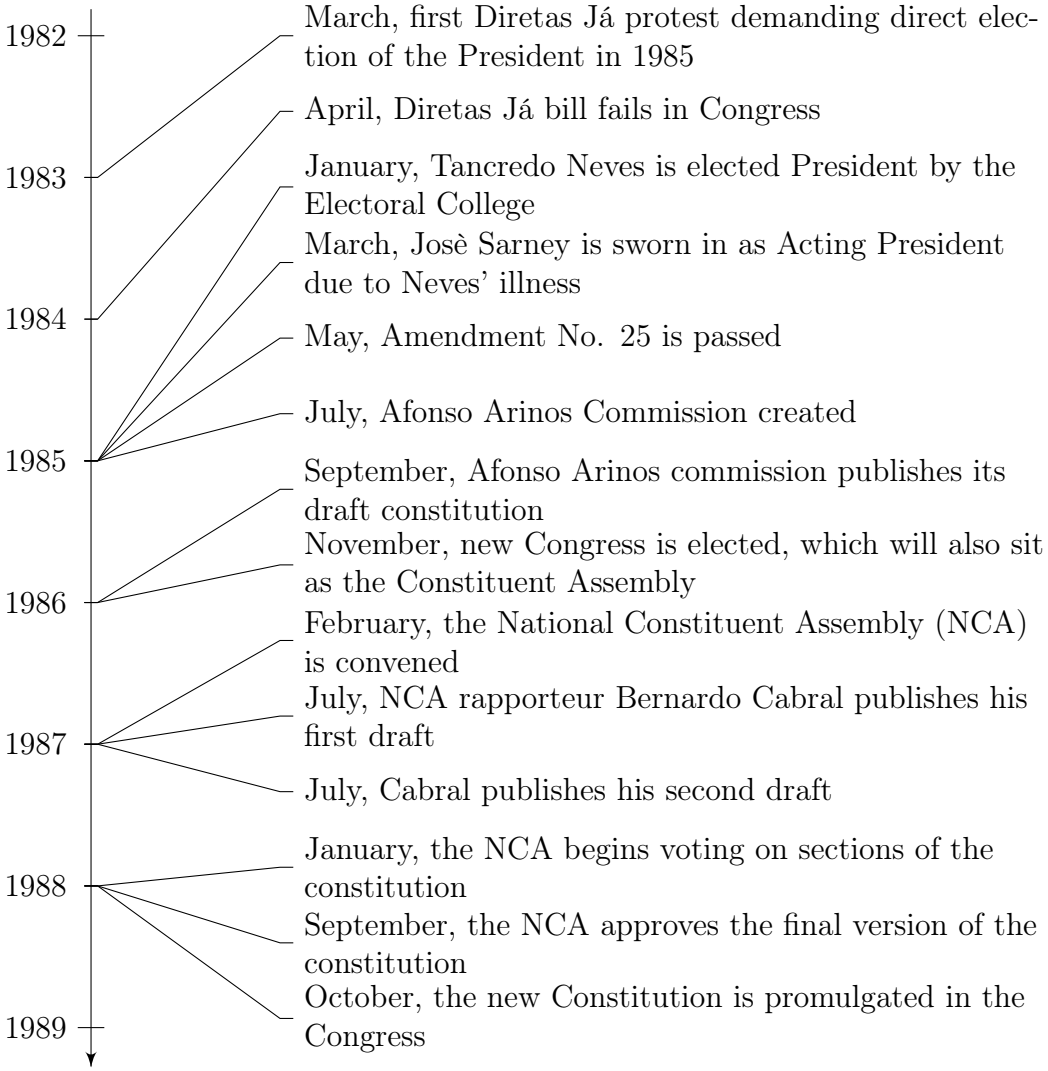
This lengthy, complex, and perhaps yet unfinished constitution is a product of a lengthy, complex, and participatory process. The Brazilian case is the anchor for this comparative study, with the cases of South Africa and Iceland providing us with cases that feature variation on the key independent variable: the strength of the political parties. In this chapter, we will consider the various elements of the drafting process that contributed to the constitution of Brazil, with particular emphasis on the political parties and the various mechanisms for public participation.

4.2 Context and Design of the Drafting Process

In each of the cases considered in this dissertation, I argue that the political context is one of the keys to understanding how public participation was or was not effective in producing changes to the text of the constitution. Brazil's process of transition from a civil-military authoritarian regime to democracy in the 1980s has been thoroughly examined by political scientists, including the influential works by Stepan (1989), Mainwaring (1999) and Ames (2002a). The elements of that transition that are most important for our present inquiry are the enduring weakness of the political parties, the continued strong role for the president, the active participation of interest groups at various levels of politics, and the repertoires of political action that were learned during the protest movement for direct election of the president (known as Diretas Já).

Brazil experienced elements of a liberal political system late in the Imperial period, but did not achieve full democracy until the end of Getulio Vargas' "Estado Novo" dictatorship in 1945. That first period of democracy was marked by political

Figure 4.1: Brazil Timeline



instability and a post-war economic decline. This democratic interlude ended with a military coup in 1964. The military regime ruled Brazil under a system of limited political competition until liberalization began in 1985. Many of the political parties and social movements that contributed to the 1988 constitution had their roots in the opposition to this military regime. The ratification of the new constitution in 1988 signaled the completion of the formal aspects of the return to democracy. More than this, many Brazilians associated the return to procedural democracy with improvements in social and economic conditions. These broader hopes for what the return to democracy would accomplish are the reason that the constitution of 1988 became such a long and all-encompassing text.

Within this broader political context, it is vital to note the effects of the choice of drafting body. Perhaps as a compromise with the still-powerful military leadership, the choice was made to have the Congress both exercise its normal powers, and also sit as a constituent assembly (Martínez-Lara, 1996, 57). This decision invoked both concerns about self-dealing on the part of the legislature (Elster, 1995; Ginsburg et al., 2009), and brought the problems created by weak and clientelistic political parties directly into the constitution-making process. It was also an early defeat for the popular movements that had formed to support public involvement in the drafting process (Michiles et al., 1989, 45). Following agreement on the broad outlines of the drafting process, the Assembléia Nacional Constituinte (National Constituent Assembly–NCA)[6] began its work on 1 February 1987.

The 559 members of the NCA were divided into eight committees, each tasked

[6]The more natural abbreviation would be ANC. However, since the ANC is a political party in another chapter, the English letter order will be used instead.

with a specific area of the constitution to debate. The committees' work included holding between five and eight hearings where they were to listen to presentations from members of the public and representatives of interest groups with a stake in that part of the constitution. Though some have criticized this aspect of the process as a distraction (Rosenn, 1990), contemporary accounts suggested that these hearings were not well attended by members of the NCA (Jornal da Tarde, 1987). The text developed in eight mostly distinct stages. The development of the constitutional text was as tortuous as one might expect in a process that involved such a large and undisciplined drafting body. To aid the reader in understanding the order of the drafts, and how much the text changed between them, those data are summarized in Table 4.1. The most infamous of these various drafts was Draft A, compiled by the powerful Systematization Commission in November 1987. This draft sought to bring together the disparate sections prepared by many authors into one document. Its failure in this pursuit was immortalized with the nickname of "Frankenstein" (Gomes, 2006). The move from Draft D to the final text involved individual votes on each of the 245 articles – requiring majority approval in both of two rounds of voting. Finally, the text was lightly edited for style.

4.3 Parties in the Constituent Assembly

During the period when the constitution was drafted, the chronically unstable Brazilian party system was in a period of greater than normal flux. As Mainwaring (1999) argues in his book on the Brazilian party system, various aspects of Brazil's political history had prevented the natural emergence of an institutionalized party system. Beyond this, the party system had been purposefully re-engineered by the Brazilian

Table 4.1: The Constitutional Drafts

Draft	Date	Words	Articles	Similarity to Final
1967 Constitution	Jan 1967	21,808	189	22%
Afonso Arinos	Sept 1986	38,545	436	27%
Preliminary Draft	Jun 1987	56,770	501	37%
Cabral I	Jul 1987	52,310	496	37%
Cabral II	Sept 1987	42,234	264	54%
Draft A	Nov 1987	43,558	271	59%
Draft B	Jun 1988	46,362	245	84%
Draft C	Sept 1988	47,486	244	88%
Draft D	Sept 1988	46,924	245	90%
Final Draft	Oct 1988	39,903	245	–
Constitution in 2016	Dec 2016	71,235	250	51%

government twice during the 20th century: first by the authoritarian Getulio Vargas in 1945, and then by the military regime in 1979. The renovation post 1979 was particularly important in its effect of splintering the opposition to the slowly retrenching military regime into numerous political parties. Between the coup in 1964 and the new law governing political parties in 1979, there were only two parties: Aliança Renovadora Nacional (ARENA) which represented the military regime in the Congress, and the sanctioned opposition party, the Movimento Democrático Brasileiro (MDB). The "reform" of 1979 was designed to weaken the ability of the MDB to be successful in the election of 1982 by creating an environment in which the MDB was likely to split into a number of new parties. Thus, when the Congress (also sitting as the NCA) was elected in 1986, the political parties were still either new or recently renamed.

The members of the Congress were an interesting mix of individuals who had supported the military regime as members of ARENA, others who had been members of Congress under the MDB or one of the new parties, and a large number of people

with minimal experience in the federal Congress. One group within the NCA also deserves special notice. Because the terms of senators under the 1967 Constitution were eight years in duration, there were 23 senators in the Congress that was seated in 1986 who were holdovers from the electoral system as it existed under the military dictatorship. This led to an underrepresentation of more liberal interests in the NCA (Rosenn, 1990).

After the election of 1986, 10 parties were represented in the Congress (and thus the NCA).[7] The immediate successor to the MDB, the Partido do Movimento Democrático Brasileiro (PMDB) fared even better than expected in the 1986 election, capturing more than 50% of the seats in both the Chamber of Deputies and the Senate. With this commanding position in the NCA, the PMDB should have been able to pass its agenda for the constitution. This did not happen for two reasons. First, like almost all of the Brazilian political parties, the PMDB was almost entirely lacking in party discipline. Second, with the exception of the Partido dos Trabalhadores (PT), none of the political parties put forward proposals for the constitution either during the 1986 election, or even during the main portion of the constitution-drafting process.

Mainwaring (1997) has shown that these parties were remarkably undisciplined in their voting behavior during the constitution-making process. The combination of low ideological identity within the parties, legacies of clientelistic behavior, and low party discipline, created both a very fluid party system within the Constituent Assembly, and a context in which individuals and groups outside the legislature could

[7]This was the first election after the return to civilian rule, and also the first election in which illiterate citizens had the right to vote.

Table 4.2: Parties in the Brazilian Constituent Assembly (Feb. 1987)

Party	Number	Percent
Party of the Brazilian Democratic Movement (PMDB)	303	54.2
Liberal Front Party (PFL)	135	24.2
Democratic Social Party (PDS)	38	6.8
Democratic Labour Party (PDT)	26	4.7
Brazilian Labour Party (PTB)	18	3.2
Workers' Party (PT)	16	2.9
Liberator Party (PL)	7	1.3
Christian Democratic Party (PDC)	6	1.1
Brazilian Communist Party (PCB)	3	0.5
Communist Party of Brazil (PCdoB)	3	0.5
Brazilian Socialist Party (PSB)	2	0.4
Social Christian Party (PSC)	1	0.2
Party of the Brazilian Women (PMB)	1	0.2
Total	559	

have influence. The lack of party unity was so severe, that the PMDB actually split late in the constitution-making process, as the left wing of the party departed to form the new Partido da Social Democracia Brasileira (PSDB) in June 1988.

Later in the constitution-making process, it became apparent that some sort of discipline would be necessary to carry the project to completion. In this context, a coalition of members of various parties formed, called the Centrão. The Centrão was able to form a united front to pass changes to the procedural rules of the NCA, and eventually to pass a final draft of the constitution. The Centrão is thus an example of the difference between parties in the electorate and parties in the legislature. This dynamic has echoes in Brazil's contemporary political system, as there is evidence to suggest that the parties are now more disciplined in their voting, but the individualistic nature of the electoral campaigns remains (Figueiredo and Limongi, 2000).

There is also debate about whether the Centrão was a procedural coalition solely, or whether there was a more significant ideological aspect to the coalition. In an interview, one prominent member of the Centrão described his view of the group as a necessary coalition to stop the leftists in the NCA (Author's Interview with KPUE, Brasilía, 19 November 2015). In Ames's (2002a) account, it was both. The Centrão was created to make it easier to amend the draft constitution that was published by the central committee that had integrated the drafts from the thematic committees (Commissão de Sistematização). But, the motivation for altering this draft was an objection to its content, which was seen by members of the Centrão as being far too progressive and perhaps even socialist.

Crucially for the argument advanced in this dissertation, the lack of party discipline (and overall systemic weakness) provided a space for effective public participation. In fact, activists for various constitutional causes paid more attention to constitutional issues over a longer period of time than any of the parties. The noted historian of the Brazilian constitution-making process, Martínez-Lara (1996, 196-197) writes:

> The weakness of political parties had its counterpart in the aggressive role played by organized interest groups in shaping the decisions of Congress. The process of constitutional renewal displayed the enormous strength and complexity of Brazil's civil society. A wide range of organized interest groups and professional lobbies of all imaginable variations mobilized to press the Constituent Congress. Among these, [was] the movement for popular participation which managed to persuade Congress to provide direct access to the constitutional deliberations, through the popular amendments, as well as the incorporation of some direct forms of par-

> ticipation in the constitutional text itself. In their attempts to influence the decision-making, these groups showed a high level of organizational sophistication, using all types of available methods: direct influence in the selection of candidates responsive to their demands, the use of all forms of media communication, as well as more direct methods, such as rallies and demonstrations.

As Martínez-Lara describes, many civil society organizations (CSOs) were better organized than the political parties. The weakness of the parties, and their lack of an agenda for constitutional reform, allowed outsize influence for these groups. To be sure, there were areas where the agenda of CSOs was blocked, most notably in the removal of provision on land tenure reform late in the drafting process. However, there were a number of victories for groups outside the NCA. In the balance of the chapter, we will examine in more detail the various forms of public participation that were used by individuals and groups, and assess the impact that these public interventions had on the development of the constitutional text.

4.4 Popular Participation – Individuals

Popular participation in the constitution-making process in Brazil took place in several ways, principally through: (1) written submissions, (2) public hearings, (3) direct lobbying of Constituent Assembly members, (4) public demonstrations. Both the state government of São Paulo, and the federal Senate organized opportunities for citizens to make written submissions to the Constituent Assembly. These are dealt with in separate sections below.

4.4.1 Letters

In addition to the more formal systems for citizens participation described in the following sections, many Brazilian citizens participated in the constitution-making process by sending letters and telegrams to their elected representatives. Most of these are lost, or preserved only in the personal records of the representatives. The staff at the Congressional archive report that there is no single, centralized repository of the correspondence received by members of Congress. However, one large collection of letters was preserved in the archives of the Museum of the Republic, and was the subject of a book and a museum exhibit that coincided with the twentieth anniversary of the ratification of the constitution (Santana, 2009). The letters (numbering 5,245 in this collection) were recognized as an historical resource when they began to arrive in the 1980s, and have since been professionally curated and digitized.

The letters were also well studied in a doctoral dissertation written by a Brazilian historian, Maria Helena Versiani. The collection that Versiani (2013) analyzed includes a large number of letters related to a campaign that began in 1985 for a participatory constituent assembly. That demand was ultimately refused, but the campaign led to the creation of more opportunities for citizen engagement than might otherwise have existed.[8] The letters also include a large number of requests for constitutional provisions that would make a difference in the day-to-day lives of Brazilians. One early group of these letters were sent to a commission of legal scholars and politicians (the Afonso Arinos Commission) who wrote a draft constitution in 1985 that was intended to be a basis for the later drafting process in the Congress. The majority of the letters were writtten during the time that the NCA was elected and installed,

[8] I discuss this issue more in the section on popular amendments.

in 1986 and 1987. Explaining the very few letters that arrived in 1988 (the year the constitution was promulgated), Versiani suggests that by that time more letters were irrelevant to the drafting process (Versiani, 2013, 147) Broadly, Versiani argues that these letters were an important form of political participation, and focuses on the letters in relation to their authors. She does not advance an argument about how these letters impacted the text of the constitution.

A large number of the letters (1,308, or 30%) were written by groups, but the vast majority are from individuals, mostly males. In addition to various idiosyncratic personal requests, many of the letters conformed to scripts created by the social movements that sprang up during the transition to democracy, especially in the Diretas Já movement. Also, many of the letters communicate a concrete and pressing physical need. These authors describe situations of hunger and deprivation, and direct their requests to the President or other political leaders (Versiani, 2013, 154-155). While the letters came from almost all states of Brazil, the vast majority were sent by residents of the more economically developed cities of the south and south-east (Versiani, 2013, 161). Versiani makes an effort to describe the various economic situations represented in the letters, but it is notable that more than half of the letters were typed on a word processor, and most of the remainder were composed on a typewriter, suggesting that the majority of the authors were educated and relatively prosperous (Versiani, 2013, 164), or were assisted by people who were.

4.4.2 "The Suggestions of the People of São Paulo"

One of the earliest government-organized systems to facilitate citizen participation in the constitution-making process came from the state government of São Paulo. The

newly formed Secretariat for Decentralization and Participation set up a system in 1986 that allowed citizens to contribute to the dialogue about the new constitution by calling a phone line, or sending in a letter (Mendonça, 1987). These contributions were then put together in a book that was presented to the Constituent Assembly by the governor of the state of São Paulo, Franco Montoro in May 1987. A summary of each of the nearly 5,000 suggestions in this book, along with the name, address, and occupation of the person who called or wrote, was published in the journal of the Constituent Assembly (Assembleia Nacional Constituinte, 1987, 408-498).

The content of the book, entitled *As Sugestões do Povo de São Paulo à Assembleia Nacional Constituinte* (Suggestions of São Paulo People to the National Constituent Assembly), was covered lightly by the press at the time. The observations of the journalists are interesting both for their vaguely elitist interpretation of what the people had to say, and their correspondence with what we find in the other principal source of written suggestions (covered below).

For example, one newspaper article notes that one of the subjects of concern for those who participated in this program was a suggestion that the selection of the manager (técnico/treinador) of the national soccer team should be the subject of a nation-wide plebiscite (Christiano, 1987). To most scholars, this would not seem like an important issue for the constitution to cover–and this was certainly the judgment of the journalist. A search of the larger set of suggestions collected by the federal senate (SAIC–detailed in the following section) shows that this individual was not unique. In the 72,719 suggestions in that database, "futebol" (soccer) is mentioned 506 times, while the national team (a seleção brasileira), is mentioned 30 times. At least five individuals proposed that the manager of the national team should be elected in some

fashion.[9] This particular issue is not surprising in the context of Brazil's obsession with soccer, but it serves to illustrate the fact that citizens were in some cases more eager to participate, than informed about what a constitution normally accomplishes.

Nevertheless, the majority of the suggestions in this volume addressed topics that were germane to the political discussions going on in the Constituent Assembly.

4.4.3 SAIC: A Cutting-Edge 1980s Database

One of the most fascinating pieces of documentary evidence from the constitution-making process in Brazil comes from an initiative to collect the views of Brazilian citizens via postcards. For some months in 1987, Brazilians could pick up one of a pre-printed card at a post office, and fill in some information about themselves in the spaces provided (such as age, sex, education, occupation, income, and place of residence), and write some suggestions for the constitution in a box that covered about half of this card (the full card being about half the size of an A4 page). The initiative was managed by the federal Senate's information technology office, known as Prodasen (Processamento de Dados do Senado Federal). The data included in the returned cards (72,719 were sent back to Prodasen), was then entered into an electronic database called the "Sistema de Apoio Informático à Constituinte" (SAIC),[10] and the information made available to the drafters of the new constitution.[11] The

[9]For example: "Sugiro que o treinador da seleção brasileira seja eleito (por prazo determinado) madiante todos os prefeitos municipais do Brasil. Sendo as grandes capitais poderia se dar um 'peso' maior de voto. Por exemplo, o prefeito de São Paulo ou do Rio de Janeiro, teria um peso de três votos Creio que uma escolha assim não deixaria motivo para queixas a ninguém, porque, afinal, o treinador da seleção brasileira de futebol seria eleito pelos mais legítimos representantes do povo" (Suggestion no. 43488, SAIC).

[10]System of Computer Support to the Constituent Assembly

[11]However, in my interviews (albeit 28 years later), the respondents were unable to specifically recall this database.

suggestions thus collected were manually coded according to subject (for example, "pro-presidentialism"). The Prodasen staff then created a massive book with tables detailing the levels of support and opposition for various possible constitutional provisions, often broken down by demographic and geographic categories (Monclaire et al., 1991). Beyond this postcard-based set of submissions, the Prodasen office was very active throughout the drafting process in preparing submissions from the public for the use of the members of the Constituent Assembly. A number of tables describing aspects of the SAIC database are found in the Appendix to this chapter.

The submissions included in the SAIC data show interesting patterns, especially patterns of text repetition. There appear to have been both large and small scale campaigns to send in specific text, or a specific submission to the Constituent Assembly. In some cases, it looks like a small group of neighbors got together to write the same suggestion on several cards, in others it appears that an individual or organization organized a small campaign for a particular provision. In addition to these small-scale attempts to influence the Constituent Assembly, there are some instances where a particular submission was copied many hundreds of times. I provide examples and details of some large and small campaigns later in this section.

To fully capture the patterns of text repetition, we can look look for matching pairs of texts. The idea of a pair of submissions matching in their content has a fairly intuitive meaning, but there are myriad ways in which this analysis could be conducted. In the analysis conducted here (using WCopyfind 4.1.5), a matching pair is found when two submissions contained identical strings of text of a length of at least six words (allowing for one imperfection per string), and the total number of matching words between the two texts was 30 words or more. Altering any of these

parameters would change the number of matching pairs that are found. Among the 72,719 suggestions, there are 845,040 matching pairs. To put this number of in some kind of perspective, if all of the 72,719 texts were essentially identical, this method of finding repeated text would return 2,643,990,121 matching pairs.[12] So, while the number of submissions that were part of a scheme of submitting identical submissions is very large, they did not completely dominate the database.

Interestingly, only six of the submissions have enough matching text with the 1988 constitution to show up as a match with these parameters. None of these six instances indicate that the constitution drafters directly incorporated the suggested text. Rather, the authors of those submissions quoted parts of either the 1967 constitution, or public drafts of the new constitution, to help illustrate their ideas.

I would not put too much importance on the specific numbers of repetitions of text here, but rather emphasize the broader point that even this most accessible form of public participation (at least for those who were literate and within walking distance of a post office), there was not a great deal of spontaneous participation. Rather, we can see that this means of participation was utilized by organized groups who sought to push forward very specific proposals. This strategy is particularly interesting given the fact that members of the NCA were most likely to consume these submissions as summary tables from the Prodasen database rather than as pieces of text. Thus, they would be unlikely to know that the information in the tables did not represent the work of isolated individuals, but instead represented verbatim copying of a prepared text.

When discussing something like constitutional reform, it is entirely possible

[12] 72,719(72,7219-1)/2

Table 4.3: Degrees of Pattern Matching

Percentage of Shared Text	Number of Pairs
Greater than 25%	838,239
Greater than 50%	750,844
Greater than 75%	378,632
Greater than 90%	194,038
Greater than 95%	143,386
Greater than 99%	89,476

for two texts to randomly share five, six-word strings, meeting the matching threshold. There are far too many matching pairs to examine them all manually, but my extensive investigation of these texts shows that matching pairs sharing a low overall percentage of matched text (let us say below 30%) are almost always about the same issue, but not actually copied from a single source. In cases where the overall percentage of matching text exceeds 50% it seems much more likely that the texts have a single motivating source. Obviously, as we go up to levels of matching text approaching 100%, we have certainty that the pair of texts were part of a well-organized campaign. Table 4.2 shows the numbers of matching texts at various levels of overall percentage of matched text contained in the recipient text. Table 4.3 lists some descriptive statistics that highlight the variation in the percentage of copied text within those submissions found to have been found to be part of a matching pair using the method described above.

Among the subset of matching pairs in which the recipient text shares greater than 50% of its text with the source text, the most shared text has 889 copies. The subject of this submission is quite peculiar. It dealt with the professional prestige of private detectives. Here is the text in full:

Table 4.4: Degree of Shared Text

Min.	0
1st Qu.	60
Median	73
Mean	73
3rd Qu.	90
Max.	100

> 1- In order for the private detective to be a participant as an auxiliary to the national security of the country. 2- That may be the free private investigation services and information for all purposes of social public interest. 3- We want autonomy for civil associations and their free or independent members to be considered as scientific-technicians and unhindered, self-employed professionals of the middle level (SAIC Submission no. 69992).[13]

This particular version of the submission is not likely to be the real genesis of the text, but it was the one that had the most in common with all the possible examples of this pattern. Yet it is still interesting to note that the postcard I have transcribed above was sent in by an urban resident of the city of Fortaleza (a state capital in the North-East region of Brazil), who had very little education (first grade), was married, in his thirties, and earned about minimum wage. This individual is typical of those who submitted this text, they all appear to be residents of Fortaleza, with low levels of education and income, and mostly males. It seems very unlikely that the people who submitted these postcards had any personal stake in the issue, and must have been motivated to participate in some other way.

[13] 1- Para que o detetive particular seja um ser participante como auxiliar para a segurança nacional do País. 2-Que sejam livres os serviços de investigações particulares e informações para todos os fins de interesse público social. 3-Queremos autonomia para as associações civis e seus filiados liberais ou autônomos que seja considerado como técnicos-científicos e liberais, os profissionais autônomos de nível médio.

The second most copied text in the SAIC database concerns religious education. The following text was copied at least 433 times: "Religious education is maintained in the new Brazilian constitution, guaranteed by the state, in all schools as part of the education system, respecting the religious plurality of the Brazilian people" (SAIC Submission no. 68196).[14] As with the first example, what is in some sense the most "perfect" text is probably not the source of the others, but this text was submitted by an unemployed, unmarried, poorly-educated woman in her mid-twenties, from the city of Paranavai (located in the southern state of Paraná). Based on key word searches related to this submission, I estimate the actual number of submissions related to this campaign to be closer to 1,000.[15] Most of these submissions came from residents of three municipalities in the prosperous north-western part of the state of Paraná.

The third most copied set of submissions is different from the first two. In this case, it appears that a survey made its way into the dataset, with at least 250 copies transcribed. Without examining the original cards, it is difficult to say whether these survey responses were written on the usual cards, or whether they arrived on their own pre-printed form. Whatever the manner of writing, the transcriptionists very nicely included all the marks to show how the senders responded to the questions. The fourth most copied submission, with at least 161 participants, was a request for the international language Esperanto to be taught in schools (SAIC Submission no. 51007).

[14] A educação religiosa seja mantida na nova constituição brasileira, garantida pelo Estado, em todas as escolas, como parte integrante do sistema de ensino, respeitando a pluralidade religiosa do povo brasileiro.

[15] This discrepancy is most likely a result of one of the parameters of the text matching search, which required that the minimum shared content must exceed thirty words. This submissions is quite short, and many of the copies probably dropped below that threshold.

There are also smaller scale patterns of copied text that are of interest. For example, in one case, a group of three neighbors got together to submit the same proposal, in this case a short request for public servants to have their salaries increased quarterly (SAIC Submission no. 2). In another case, a single individual submitted the same proposal ten times, with ten different members of the constituent assembly named as the intended recipient (SAIC Submission no. 12325). We could go on, but these examples serve to demonstrate that both individuals and organized groups worked on the belief that higher numbers of submissions would be more likely to produce a change in the constitutional text.

4.4.4 Following Up with the SAIC Participants

Another interesting aspect of these postcards is the inclusion of the writers' addresses, which could make it possible to track down some of the people who sent in suggestions, and interview them about their recollections of the constitution-making process in 1987-1988 and their opinions about the constitution as it stood in 2015-2016. I hired a research firm in Rio de Janeiro (Clave de Fá Pesquisas e Projetos) to locate and interview a random sample of twenty-five of these individuals who resided (then and now) within the Rio de Janeiro metropolitan area. We narrowed the sample to a randomly sorted list of 1,850 names on the basis of geography and age. In practice, locating these individuals some thirty years after they sent in their proposals was quite difficult. The research firm was able to locate and contact a large number of them (238), but most did not respond to messages or calls, many did not recall sending in the postcard, or were not willing to talk to researchers. By the time our resources were exhausted, they were able to complete twelve interviews with individuals who contributed to the SAIC database. These were semi-structured interviews conducted

Table 4.5: Profiles of SAIC Follow-up Respondents

Age	Gender	Education	Income	Occupation	CSO	Party
30-39	Male	2^{nd} complete	3 -5 MS	Communication	Yes	Yes
20-24	Male	3^{rd} complete	0	Agriculture	No	No
20-24	Male	3^{rd} incomplete	1-3 MS	Student	No	No
30-39	Male	3^{rd} complete	10-20 MS	Manufacturing		
30-39	Male	Post-Graduate	$>$ 20 MS	Service	Yes	No
30-39	Male	3^{rd} complete	$>$ 20 MS	Public Admin.	No	No
25-29	Male	3^{rd} complete	3-5 MS	Communication	Yes	Yes
40-49	Female	Post-Graduate	10-20 MS	Service	No	No
30-39	Male	3^{rd} complete	5-10 MS	Service	Yes	Yes
15-19	Male	2^{nd} incomplete	0	Student	Yes	No
15-19	Female	1^{st} complete	$<$ 1 MS	Service	No	No
30-39	Male	3^{rd} complete	5-10 MS	Education	Yes	Yes

in person (though one respondent chose to respond to questions via email). The local researchers then sent audio recordings of these interviews to the author.

We cannot claim too much on the basis of twelve interviews, especially since these individuals are not descriptively representative of the participants as a whole. The individuals who could be located, and who would agree to an interview, have today achieved a higher than average level of education and income. However, there are some common themes in the interviews that can help us understand what happened in the public participation campaigns in 1985-1988. Some characteristics of these individuals are related to how easy they were to locate three decades later. The majority were young men who went on to work in professional capacities within the city of Rio de Janeiro. With one exception, the individuals we were able to locate expressed ties to parties of the left, even if they had never joined a party. Six of them directed their suggestion to Jamil Haddad, one of the founders of the Socialist Party of Brazil (PSB), who was at that time a Senator. Several of these respondents

recalled that they had received some sort of advertising from an individual politician requesting submissions, and one was able to name Haddad as the sender of these advertisements. Surprisingly, given the patterns found in the copied texts described above, none of them contributed their suggestions as part of a larger campaign. Several had been part of the student movements, while others were members of trade unions.

There was variation between these respondents with regard to both their expectations of impact when they submitted the suggestions, and their assessment of how much their participation actually impacted the constitutional text. Interestingly, there was near-unanimity on the point that even if there was no impact, public consultations are a valuable and important part of the constitution-making process.

Their responses to questions about their current political beliefs and behavior were heavily colored by the political crisis that gripped Brazil during the period in which the interviews were conducted (2016-2017). Even so, the fact that they almost universally expressed distrust of politicians, and disappointment in the way that the constitution has functioned, is in line with the "distrusting democrats" that Moehler (2008) found among the participants in the constitution-making process in Uganda. When asked whether his political views were more on the left or the right, one respondent simply replied "disappointed." While voting is mandatory in Brazil, it is possible to vote with a blank ballot as a form of political protest. Two of the respondents reported that they vote with blank ballot because they do not trust the electronic voting machines used in Brazilian elections, indicating significant disenchantment with the political system.

4.5 Analysis of Individual Impact

Ultimately, what we want to know, is whether all of this public input resulted in changes in the text of the constitution. There are several layers to this question, or levels at which we could be satisfied that there was some impact from public participation. First, there could be a general correspondence between the topics covered in the submissions from the public, and the content of the constitution. Second, there could be pieces of text, phrases or even whole paragraphs, that are copied from the submissions from the public into the final draft of the constitution. Third, there could be cases where the drafters publicly discuss a submission, and decide whether or not it should be included in the constitution. I address these approaches in turn in the paragraphs below.

4.5.1 Automated Methods of Textual Analysis

We can apply the same method of topic modeling that was used in the chapter on South Africa to the submissions from the public that are found in the SAIC database. With the large number of submissions, we can fit a fifty-topic model with some confidence. When comparing the larger topic model to the text of the Brazilian constitution, I find that it contains a mixture of thirteen of the fifty topics from the corpus of submissions. The topic that accounts for the greatest proportion of the constitutional text (0.326) seems to concern the vertical distribution of power.[16] The second most common topic in the constitution by this measure actually contains language associ-

[16]The top twenty words in this topic are: "States, national, state, counties, unity, given, resources, social, district, entities, through, activities, territory, development, competence, taxes, additional, will be, tax, regime."

ated with the organization of the constitutional text. The most common substantive topic from the corpus of submissions that is reflected in the constitution deals with the justice system. This can be compared with the level of seven of the fifty topics from the submissions in South Africa, and nine of fifteen in Iceland.

One might hope to find a passage in the constitution that was directly copied from a submission from a member of public. While further investigation would be required to make sure that a piece of text was genuinely novel in the submission, it could be a strong piece of evidence for the impact of public participation on the text of the constitution. However, with regard to the texts from the SAIC database and the final draft of the 1988 constitution of Brazil, there are no instances where text from the submissions from the public was included in the Constitution. Even with fairly generous search terms (looking for a phrase of only six words, allowing for one imperfection within that phrase), I was unable to find any copied phrases that were original to the author of the submission. We can not draw firm conclusions from this, but I would argue that it at least suggests that drafters did not have the suggestions in front of them while they were writing the articles of the constitution. If they did, they did not consider them to be sources of text.

4.5.2 The Text and the Individual Submissions

This analysis of the submissions of individuals to the Constituent Assembly reveals interesting patterns of engagement, but does not show significant impact on the text of the constitution. Most remarkably, drafters almost never mentioned submissions from the public during their deliberations (I revisit this issue later in the chapter). Additionally, although the interviews reported here took place long after the constitution-

making process was completed, none of the interview subjects could specifically recall the SAIC database, suggesting that this was not a particularly impactful resource for them. The more likely path for effective input from outside the Constituent Assembly is through interest group lobbying and civil society activism. We turn our attention there in the rest of the chapter.

4.6 Popular Participation – Groups

4.6.1 Interest Groups in the Constituent Assembly

Probably the most important form of popular participation in the constitution-making process in Brazil was interest group activism. This took several forms, including the campaigns we see in the SAIC data, lobbying of individual members of the NCA, large rallies in Brasília, São Paulo, and Rio de Janeiro, and campaigns to support popular amendments. Among the interest groups were business organizations, trade unions, civil society organizations (CSOs) and non-governmental organizations (NGOs). Important sectors represented in this process included urban trade unions, unions of agricultural workers, and organizations representing rural landowners. We should expect that the demands of organized groups with large numbers of members will be more influential than comments from individuals–however interesting or information those submissions may be. Interest groups of course have resources unavailable to individuals. Additionally, they are often repeat players in the legislative process, and may have existing connections in the Congress to individual members and to parties. In some cases, interest groups also have expert knowledge of particular subject areas, and may be seen by legislators as providing more valuable information than the average citizen.

There are two elements of Brazil's political history that are important frames for this discussion. First, Brazil has a long history of corporatism, dating back to Getulio Vargas first period of power in the 1930s (French, 1991). Second, CSOs became increasingly important in the later years of the military dictatorship, and acquired a great deal of valuable experience in the Direitas Já protest movement in the mid 1980s. By the time of the constitution-making process in 1987-1988, CSOs and unions had well-developed and extensive repertoires of collective action (Tilly, 1978), including large-scale strikes, large demonstrations, petition campaigns, and lobbying members of Congress – many of which we see repeated in the constitution-making period.

Since the focus of the analysis here is on the constitutional text, rather than contentious politics, I use data collected by Brandão (2011) to connect the demands made in demonstrations and protests associated with the constituent process with changes in the text of the constitution. Brandão's dataset includes 250 events, including protests, strikes, meetings between CSOs and politicians, television advertisements, and even an art exhibition. My use of Brandão's data is limited to the identification of demonstrations, formal presentations of demands, and related activities that were designed to support changes in the text of the constitution, and is therefore limited to the period between January 1987 and October 1988. Most of these events were covered in the press at the time.

There were in fact fewer large demonstrations than some of the accounts of the process would imply. Throughout the entire country during the drafting period, Brandão (2011, 83-84) identifies only 40 protests or demonstrations, and many of these were directed at the quasi-constitutional end of having a direct election for the presi-

dency in 1988. Many groups were repeat players, holding in-person demonstrations in Brasília several times during the drafting process. The geography of Brazil created an interesting context for protest. Since the capital is in the interior, protesters (either from the industrial south or the less-developed north) had to travel long distances in order to present their claims in person. This led to the development of a form of political action know in Portuguese as a "caravana" (convoy). In a number of cases, a CSO (such as a labor organization or a rural workers association) hired a number of buses to transport hundreds or thousands of protesters to Brasília. In the most impressive case, the União Democrática Ruralista (UDR) hired 250 buses to transport 30,000 of its supporters from all over the country to the capital to lobby against the redistribution of agricultural land (Jornal do Brasil, 1987b). There they camped for three days. The group on the other side of that issue Confederação Nacional dos Trabalhadores na Agricultura (CONTAG) engaged in a similar protest some months later, in which 7,000 of it supportes (along with members of other labor organizations) camped in a park in the capital in an attempt to pressure the NCA to include language in the constitution that would facilitate the redistribution of agricultural land.

Other groups that staged protests in Brasília included associations representing the interests of labor, students, teachers, and indigenous peoples. In fact, the largest number of protests (10) in Brasília involved indigenous groups. Indigenous leaders lobbied members of the NCA both in large rallies and in personal meetings (Brandão, 2011, 110-111).

Especially in the last months of the constitution-making process, the large protests had very specific aims, tying this form of participation to the other means of

public input in an interesting way. One innovative aspect of the constitution-making process in Brazil that has remained unique to Brazil is the ability of the public to submit what were known as popular amendments (*emendas populares*) to the constituent assembly. The popular amendments were concrete proposals for changes (additions or deletions) to the constitutional text that were supported by signatures from thousands of Brazilian voters. This form of participation is discussed in some depth in the section that follows, but we should note here that several of the demonstrations were associated with individual popular amendments. In those cases, CSOs invested time in a process that involved (1) drafting a concrete proposal for a change in the draft constitution, (2) collecting at least 30,000 signatures, (3) presenting the petition to the NCA, and (4) holding a large rally to make sure that the NCA paid attention to their concerns.

4.6.2 Popular Amendments

The history of how the popular amendments came to be part of the constitution-making process in Brazil also reveals the way in which the organizers of the campaign for public participation understood the best means of making an impact. As noted earlier, the original demand from the organizations pushing for a more democratic constitution-making process was for the constituent assembly to be a separate body from the Congress. When this demand was unmet, some of the most influential of these organizations began to turn their attention to educating the public about the constitution-making process, and to demand an opportunity for the public to submit amendments to the constituent assembly. They were successful on both fronts, producing pamphlets on how to participate in impressive quantities, and made successful lobbying visits to Brasília, convincing the Congress to change the rules of procedure

for the NCA to include the popular amendment process (Michiles et al., 1989, 58-59). This avenue for public participation was approved by the NCA within the first month of its work, and received support from several political parties, especially those on the left (Backes and de Azevedo, 2008, 35).

It is interesting that the energies of these participation planning groups (Plenários pro Participação) were not directed toward capturing the postcard writing campaigns described above in the section on SAIC. Rather, these activists in particular thought that the best way to create popular impact was to collect signatures on petitions for additions or amendments to the text. Many established CSOs also directed their efforts to this part of the process, especially groups representing urban and rural labor, agricultural workers, and religious groups.

The legislation governing the process for the popular amendments limited each Brazilian citizen to signing only three popular amendments. Each amendment would need to receive at least 30,000 signatures from individuals, as well as formal endorsements from at least three recognized civil society groups or state and municipal governments in order to be added to the agenda of the NCA. While the collection of signatures was on one level more simple than the campaigns to submit identical text that we see in the SAIC data, it was likely more involved. Activist went door to door, especially in cities like São Paulo and Rio de Janeiro asking people to sign the petitions (Author's interview with "JWBS," 10 December 2015). The plenários also developed more creative means to collect signatures, including setting up booths on sidewalks to collect signatures from people walking by. In one classically Brazilian move, the plenários in Rio de Janeiro staged a giant parade assisted by the Samba schools, in which they celebrated the opportunity to contribute to the constitution

and collected more than 30,000 signatures on various popular amendments (Agência Estado, 1987).

In practice, neither the activists collecting signatures nor the bureaucrats who processed them were able to check how many amendments an individual had signed. The volume of paperwork created in this process was astounding. By July 1987, an entire wall of the offices of the Systemization Commission (where the popular amendments were received and verified) was lined with stacks of boxes filled with pages of signatures (Jornal do Brasil, 1987a). A month later, as the National Conference of Brazilian Bishops (CNBB) completed a campaign, they delivered their popular amendments to the NCA in eight cars carrying a total of 400 kilograms of paperwork (Veja, 1987). And yet, one of the chief organizers of these campaigns noted that citizens who were genuinely excited about this opportunity to participate in the process worried about signing their third petition, concerned that something even better would come up later and they would not be able to sign it (Author's interview with "JWBS," 10 December 2015).

In all, 12,265,854 signatures accompanied the 122 popular amendments that were sent to the NCA (Michiles et al., 1989, 104). Of these, 82 were determined by the NCA to have followed the required procedures (especially the number of signatures), and were added to the agenda for the NCA to consider. Given the rules described above, no fewer than 4 million Brazilians must have participated in this process, and the number is likely to be higher. With a voting-age population of 82,074,718 at the time, at least 5% of Brazilian voters must have signed a petition for a popular amendment to the constitution. The organizers of the campaign for popular amendments estimated the rate of participation (using the number of registered voters in the 1986

election) at between 6% and 18% of registered voters (Michiles et al., 1989, 104). That is a truly extraordinary level of public engagement in a constitution making process. Granted, placing one's signature on a petition for an amendment to a draft constitution is not the most intensive of political acts in either time or attention, but it is still a significant achievement on the part of the activists who envisioned and executed the campaign.

Of the 82 that were found to be procedurally valid, only 19 were accepted by the Systematization Commission, and thus recommended to be included in the final draft of the constitution (Mendes Cardoso, 2010, 75). In the course of research for a thesis in law, a Brazilian researcher (Rodrigo Mendes Cardoso) discovered a research note completed by a member of the legislative staff at the Chamber of Deputies (Ana Luiza Backes) in response to a query from one of the Deputies (Paulo Abi-Ackel). In that research note (reproduced in Mendes Cardoso's thesis appendix), Backes analyzed the popular amendments and identified which had been included in the final text of the constitution in whole or in part, although she also noted that while these were approved, the same subjects were covered in other forms of popular participation, and she could not say with certainty that the popular amendments were the sole cause.

Taking Backes' list of successful amendments, I compared the text of these popular amendments with the text of the constitution to identify precisely what the changes were. The successful amendments were in many cases those that had been supported by the largest and most well-organized CSOs, such as the CNBB, CONTAG, or the Central Única dos Trabalhadores (CUT). There does not seem to be any relationship between the number of signatures on the amendment and its

probability of success. The successful amendments run the gamut, from one which technically failed to reach the required number of signatures (only 14,717), to one of the largest with 418,052. The average number of signatures on these successful popular amendments was 114,402.

These successful popular amendments are quite easily assigned to the broad category of rights, and more specifically to one of two themes: family issues and labor issues. None of these amendments dealt with concerns about the electoral system or the powers of the president for example. There is only one that deals with an institutional issue (powers and divisions of municipalities). In general, they deal with the government's duty to support families, and to ensure that urban workers and landless agricultural workers would see an improvement in their quality of life. Looking at the final text of the constitution, Articles 5 (fundamental rights), 7 (workers' rights), 182 (urban development), 184 (agricultural reform), 220 (freedom of expression), 226 (family rights), 227 (duties of and toward families), and 231 (indigenous rights) respond at least in part to the popular amendments. In the clearest case, Article 18 §4 is a verbatim copy of the language of popular amendment number PE00029-6. Only one of the successful amendments asked for the removal of language. In response to PE00110-1, what was Article 13 §XXV (paid labor mediation) in the July 1987 draft (Cabral I) was removed from the final constitution.

One of the more controversial issues in the constitution that can be connected to these popular amendments is that the right to property is limited by the proviso that property must fulfill its social function. This is a common concept in Latin American constitutions, and was not new to Brazil (being found in the 1967 constitution). However, in the 1988 constitution, the social function of property was explicitly

applied to the expropriation of agricultural land in Article 184. This addition to the text is a response to popular amendment number PE00013-0, which was sponsored by the CNBB. Other issues, like the demand that religious marriages be recognized as having civil effects (PE00007-5, found in Article 226) were unlikely to be subjects of great controversy, but were important to some CSOs.

In all, I count 62 individual demands from these 19 popular amendments that are reflected in the final constitution.[17] This constitutes a significant degree of impact from public participation in the constitution-making process. The unique procedure through which this impact was achieved complicates the comparative analysis to some degree, but also produces an opportunity to reflect on how popular amendments might be useful in other constitution-making processes. While I argue that the political context, and in particular the weakness of the political parties created a space for effective public participation, the combination of a specific textual proposal, clear support from thousands of signatories, and public protests, is a powerful demonstration of popular will that would be difficult for any politician to ignore.

It is important to note that the entire process for popular amendments (from its initial approval as a change to the rules of procedure to the eventual success of some amendments) was highly dependent on support from members of the NCA. To begin with, unlike the informal petitions that have been part of many constitution-making processes (including South Africa), the popular amendment process was an official and regulated part of the constituent assembly process in Brazil. The opportunity to submit popular amendments was added to the internal rules of the NCA after

[17]Summary information about these successful amendments and the locations of their impacts in the constitution are found in the appendix to this chapter.

members of the popular organizing committees made a journey to Brasília to lobby in person. According to one of the organizers of the campaign in São Paulo, the chief supporters of the popular amendments within the NCA were Plínio Sampaio (deputy leader of the PT), Mario Covas (a founder of the PMDB), and José Carlos Brandão Monteiro (a founder of the PDT) (Author's interview with "JWBS," 10 December 2015). This demonstrates once again the relative unimportance of political parties in these decisions. While there are good reasons to associate the campaign for popular participation with the political left, the initiative received vital support from the leadership of at least three parties.

4.7 Polls

Although polls are not a form of public participation, they do merit some attention as we seek to determine the extent to which these constitutions reflect the demands of the people. The Brazilian media made extensive use of public opinion polling before and during the constitution-making process. Beginning in 1985, prior to the election of the Congress that simultaneously sat as the NCA, the press commissioned surveys about popular perceptions of the process. A number of the polls and surveys in this period revealed a significant lack of understanding of the process among average citizens. Eighteen months before the November 1986 election, only 9% of residents of Rio de Janeiro could correctly describe what the constituent assembly would be tasked with doing (Jornal do Brasil, 1985). Another poll taken in early 1987 demonstrated a high level of misinformation about the constitution-making process. This survey also revealed a familiar trend concerning what many people hope new constitutions can achieve for them: better economic conditions. Forty-eight percent of those surveyed

said that their greatest hope for the new constitution was the control of inflation (Chiaretti, 1987). At the same time, other polls also noted a very high level of interest in participating in the constitution-making process. A Gallup poll taken shortly after the election of the constituent assembly showed that the majority of Brazilians with a superior level of education wanted to participate in the constitution-making process, and that three quarters of all Brazilians wanted the constitution to be submitted to the people for approval (Globo, 1987a).

Perhaps most useful for the present research was a series of surveys conducted by Gallup Brasil in 1987. In the middle of the drafting process, Gallup partnered with the largest media conglomerate in Brazil (Globo) to produce a fairly comprehensive survey about the constitution, which *O Globo* published in a series of newspaper articles. This survey included a sample of 1,349 voters, randomly selected within specified geographic areas (within the cities of Rio de Janeiro and São Paulo), and designed to be representative in terms of age, sex, and class, and collected the data with in-person interviews. This series provides us with some good data for comparing what the majority of the population (at least those living in urban areas) wanted the constitution to say, and what the drafters actually produced. Additionally, these data provide a point of comparison for the database of letters described earlier, allowing us to see if the levels of support for various provisions are the same between the self-selected participants and the random sample.

One of the most important issues in the Brazilian constitution-making process was the choice between a parliamentary or a presidential system. This Gallup poll showed that only 21% of respondent could correctly describe the difference between these two systems, but that among those who could, presidentialism was favored

by 50%, with parliamentarism supported by 39%. This topic was coded slightly differently in the database of submissions from the public to the constituent assembly, but if we combine those against presidentialism with those for parliamentarism, and vice versa, we find that 80% (512) supported parliamentarism, and 20% (129) favored presidentialism. Although the outcome was unclear for the majority of the drafting period, presidentialism eventually won the day. Given President Sarney's activity to ensure that presidentialism would be continued in the new constitution, it is unlikely that either the poll or the letters in SAIC were influential on this point, but it is worth noting that both polls and newspaper editorial pages favored the presidential option (Martínez-Lara, 1996, 139-146). This is however an interesting insight into both how the Brazilian public understood the issue, and the difference of opinion between the self-selected participants and the poll sample.

In another article on the survey, *O Globo* reported that 56% of those polled supported the inclusion of the right to strike in the constitution (Globo, 1987b). The constitution does provide for this right. The same report showed that 75% of the sample thought that trade unions should be free of government control. The constitution does regulate trade unions to some degree, but probably not in ways that the poll respondents would object to. The poll also showed that the majority of respondents (59%) wanted an end to obligatory union contributions from workers' pay. The constitution does allow for obligatory contributions from professional workers, but makes union membership voluntary.

The Gallup data continued to receive feature reporting in *O Globo* for several weeks, covering a number of issues of importance in the constitution-making process and Brazilian politics more generally. Of particular interest were mandatory voting

(71% against), voting rights for illiterates (71% in favor), an internal security role for the military (75% in favor), conscription (62% in favor), constitutionalization of a forty hour work week (57% against), compulsory education until the age of 16 (72% in favor), some form of religious education in schools (76% in favor), retirement benefits for homemakers (91%), equal pay for men and women (95%), allowing the government to keep files on citizens' activities (63% in favor) but allowing citizens to access their file (58% in favor), and that the government should limit the number of political parties (71% in favor).[18] Many of the relevant provisions in the constitution are broadly in line with the desires of the populace as captured in this survey. Also notable for the present research project was the feeling among the vast majority of respondents that the individual characteristics of their elected representatives were much more important than the party, and their support for electoral systems that would make the party less important (Globo, 1987c).

4.8 In the Words of the Drafters

To more fully establish the linkages between public participation and the text of the constitution, we must ask the drafters themselves – either through interviews with them now, or in the records of what they had to say at the time. This section of the dissertation describes what the drafters said about public participation in their debates with each other in both plenary and committee meetings of the NCA. The section also includes some information from interviews that the author conducted in Brasil in the course of field research in 2015.

[18](Globo, 1987c,d,d,g,f,e,h)

4.8.1 Statements in the Constituent Assembly

A careful analysis of the transcripts of plenary, committee, and subcommittee meetings of the Constituent Assembly shows that the members of the Constituent Assembly very rarely referred to submissions from the public. A series of searches of the 9,748 pages of transcribed deliberations and speeches from the Brazilian constituent assembly using an exhaustive set of terms related to submissions from the public (including word proximity searches), yields only *29* such references. In the majority of these cases, submissions from the public are mentioned in passing–as one of many sources of information available to the drafters. In several other cases, the chair of a committee commended the SAIC database to the attention of the committee members. Surprisingly, among the thousands of speeches given during the drafting of the constitution, there were three occasions in which a member of the constituent assembly used the submissions from the public to buttress her argument.

In one of the most striking examples, Deputado Amaral Netto invoked the submissions from the public in an attempt to confer the authority of "o povo" (the people) on his position in the debate. During a meeting of the committee tasked with drafting provisions on human rights, Netto explicitly referred to the SAIC database described above as he sought to make a persuasive case for restoring the death penalty. Specifically, Netto described the difficulty of making concrete and credible claims about who "the people" are when politicians make a rhetorical appeal to the views of the people. Netto suggested that when he spoke of the views of "the people," he had an authoritative source for his claim: the SAIC database:

> When I speak of the people, I mean the people in general. Here is an example: the stack you see here... It contains a large number of popular

> suggestions favorable to the death penalty. There are 4,836 submissions, already recorded by Prodasen. Each page contains the name, the sex, the age, the profession, the origin, the neighborhood, finally, the social category of the author. This mountain of paper is surpassed only by one other, that on agrarian reform... This demonstrates the great public interest in the death penalty.[19]

Netto went on to address polling data from Gallup and *O Globo* that found that 72% of people in the metropolitan areas of Rio de Janeiro and São Paulo favored the use of the death penalty. An appeal to the voice of the people did not carry the day in this case. Article 5 of the constitution expressly prohibits the use of the death penalty.

In the another instance, Deputada Irma Passoni complained that the paragraph that described the people as the source of the government's powers had not been amended to democratize the distribution of power, in spite of the "dozens and dozens" of submissions on the subject.[20] It is quite surprising that the drafters of the Brazilian constitution did not make more use of the submissions from the public in their arguments, but perhaps their immediate audience was not as impressed by these appeals to popular authority.

However, it was not all vain references to unread letters. During one meeting of the committee dealing with human rights, Deputado Lysâneas Maciel brought attention to an individual submission from an indigenous Brazilian (not included in the SAIC database), then to a conversation he had with a janitor, and to the larger program of public consultations that the committee had undertaken. Speaking of

[19]Amaral Netto, 9 June 1987, Ata da 12a. Reunião, Commisão da Soberania e dos Direitos e Garantias do Homem e da Mulher, Assembleia Nacional Constituinte, Brasília.

[20]Irma Passoni, 23 September 1987, 22a Reunião Ordinária, Commisão de Sistematização, Assembleia Nacional Constituinte, Brasília.

the many representations made to the committee by individuals and members of organizations, Maciel said: "Why do we adopt this procedure? Because, in fact, we want to make it very clear in this new Constitution that the primary source of power is the people ... Secondly, [Article 2] says that the sovereignty of Brazil belongs to the people, and only through the manifestation of their will, provided for in the Constitution, is it lawful to assume and organize power."[21] Maciel in this speech made a general appeal to the importance of input from the public as a matter of principle: the authority to make the constitution had come from the people.

Maciel went on to say: "I am quoting these facts, Mr. President, to show that in the judgment of our Subcommittee, the people, who are for the most part absent, have been heard. Proposals written on bread packaging paper - I repeat - were forwarded to the Subcommittee and taken advantage of."[22] Maciel went on to list several provisions in the draft constitution which he characterized as being responsive to the demands of the public, including: popular initiatives, and immediate application of direct elections for the office of president, optional voting for those between 16 and 18, some technical changes in criminal procedure, and the right to information. Several of these demands were met in the 1988 constitution. Popular initiatives were created in Article 61. Article 14 creates a voting system much in line with what Maciel suggested. And Article 5 provides the right to habeas data, and some of the other legal issues Maciel mentioned. Clearly, much negotiation over many issues took place between May 1987 and the completion of the final draft in September 1988, but these issues (which may not have been very controversial) were

[21]Lysâneas Maciel, 26 May 1987, Ata da 3a. Reunião, Commisão da Soberania e dos Direitos e Garantias do Homem e da Mulher, Assembleia Nacional Constituinte, Brasília.

[22]Lysâneas Maciel, 26 May 1987, Ata da 3a. Reunião, Commisão da Soberania e dos Direitos e Garantias do Homem e da Mulher, Assembleia Nacional Constituinte, Brasília.

maintained is essentially the form that Maciel claimed met the demands of the people.

4.8.2 Statements in Interviews

I spent the better part of five months in Brazil in 2015, collecting data for this dissertation. One of the more challenging aspects of this research was locating and interviewing members of the NCA almost three decades after the constitution was drafted. Many of the most important actors in that process are now deceased, and many others have left public life. In the end, I was able to complete fourteen interviews with politicians and their advisors. These were semi-structured interviews, lasting between 20 and 90 minutes. As with South Africa, respondents were given full anonymity, and are identified here by a randomly generated four-letter alias. The respondents represent a reasonable representation of the partisan composition of the NCA, including people who had ties to the military regime and the President, and those on the far left.

In my interviews with former members of the NCA, respondents almost universally reported that popular participation was tremendously important in shaping the constitution. They were in general less able to provide specifics about how submissions from the public influenced the text, but continually came back to the quantity of participation from individuals who wrote letters, called the Congress, or made presentations in person. One member of Congress described a "carpet of letters" that inundated the drafters (Author's interview with "RCWK", 17 November 2015). Another respondent stated: "What we had during the constitutional assembly was a nearly permanent dialogue with society, many meetings and hearings to make the constitution compatible with what Brazilians hoped for in that new political moment"

(Author's interview with "AOTK," 20 November 2015).[23]

Some of the specific statements made by these drafters seem to present a much more democratic picture than other sources of information about the functioning of Brazil's political system would suggest. One respondent claimed to have consulted the people before voting in the NCA, and that they moved constantly between the capital and their constituency so that they would be able to properly represent what the people wanted the constitution to say (Author's interview with "MSTH," 18 November 2015). This respondent further suggested that there are many lines in the constitution that correspond to specific demands from the people.

Another respondent (this time from a more conservative background) was similarly effusive about the importance of participation and the interaction between civil society groups and the members of the NCA, but admitted to some flaws in the execution when pressed. This member of the NCA suggested that in reality, the middle and upper classes were much better able to participate in politics, and further suggested that the poor were manipulated by the parties of the left (Author's interview with "KPUE," 19 November 2015).

Even President Sarney (a noted critic of the constitution at various points in its development) expressed a positive assessment of the participation from the public. He stated that he was very proud of the fact that 10 million Brazilians participated in the drafting process, even though he worried that this broad participation could lead to an unwieldy (and thus short-lived) text (Interview with the author, 19 November, 2015).

[23]"Mas o que tivemos durante a constituinte foi um diálogo quase que permanente com a sociedade, muitas reuniões e audiências para compatibilizar o que os brasileiros esperavam daquele novo momento político."

Only one respondent in this series of interviews was dismissive of the role of the public, suggesting that "the people" did not really participate, but rather special interests (like labor unions), lobbied for their particular causes (Author's interview with "RLKN," 9 December 2015). Even this does not deny that there was effectual input from outside the constituent assembly, just that the impact came from organizations with experience, resources, and leverage. What is clear even before a systematic review of the documentary data is that there was a great deal of organized participation, but there is disagreement among the drafters about whether submissions from individuals were taken seriously.

4.9 A Natural Experiment in Brazil: The Afonso Arinos Draft

Finally, one aspect of the drafting process in Brazil offers analysts the opportunity for a natural experiment that potentially sheds some light on how the participation of political parties shaped the text of the constitution. As noted earlier in the chapter, one of the first formal moves toward the drafting of a new constitution for Brazil was the appointment of an expert commission to prepare a draft of the constitution. This commission had been proposed by Tancredo Neves, but after his death, it was President Sarney who appointed the commission, which is generally called the Arinos Commission after its chairman, Afonso Arinos. The commission set about its work in two stages, first holding public hearings around the country to hear from members of the public, and then writing a draft constitution in relative privacy.

While there was some overlap in the membership of the NCA and the Arinos Commission, the basis of selection for, and variation in membership provides us with

a something like a natural experiment in which we can test the effects of process on constitutional text. Whereas the NCA was comprised of 559 politicians elected in various means, the Arinos commission was comprised of 50 individuals who were selected because of their high level of professional achievement in law, business, and of course politics. Vitally for our research interests, the Arinos commission did involve a significant amount of public participation, but did not include any representatives of political parties as such. It thus has some similarity with the Icelandic case, in that the members of the drafting body were not closely associated with political parties, but were open to input from the general public.

However, there are some complications that prevent this from being a true natural experiment. One is the fact that the Arinos draft served to some degree as a model for the final constitution. The Arinos Commission was not well-liked by either politicians or the press, and President Sarney chose to bury their draft instead of moving for Congress to ratify it (as had most likely been Neves' intention). Even so, there is evidence that many members of the Congress were influenced by the draft. Arinos himself (as well as other members of the commission) also served in the NCA the next year. This semi-ancestral relationship complicates the analysis, but to the extent it creates bias, it does so in the direction of finding less effect, not more. The form of public participation also varied between the Arinos Commission and the NCA. As we've seen, the NCA process involved large-scale mobilization of members of CSOs, and the use of popular amendments. In contrast, the Arinos Commission set up locations where the public could interact with them, including at least one store front, and held special meetings in various parts of the country (Author's interview with "OMAY", 22 October 2015).

In a book on the method of using natural experiments, Dunning writes that natural experiments have the novel quality of being discovered, but also that the attractiveness of the method has led to a great deal of conceptual stretching (Dunning, 2012, 2-3). In a true natural experiment, the variation in the treatment variable must be near-random. In this case the treatment variable is the participation of political parties in the drafting process. Clearly, there is variation in our case, but it is not necessarily random. Randomness in this case would require that all other details of the drafting processes would be near identical, but that this element was different for reasons unconnected with other elements of the drafting process. Thus, the analysis here follows closely follows the methodology of Landemore's (2017) comparison of the expert-drafted and popularly-drafted constitutions for Iceland, but it is not a true natural experiment.

As a first pass comparing the final text of the 1988 Constitution with the Arinos draft, we can compare the two texts to see how much text overlaps. Surprisingly, the two documents do not differ greatly in length. The Arinos draft was over 38,000 words, while the 1988 constitution (as originally ratified) was just short of 40,000 words. Using strings of words with a length of four and allowing one imperfection per string, I find that 27% of the word count in the 1988 Constitution is composed of strings of text also found in the Arinos draft. While some of this is not of interest (how many ways can one write "everyone has the right to"), many of the copied phrases are substantively interesting, especially when there are slight variations in wording between them. For example, in Article 2, the Arinos draft states that "All power comes from the people, and in their name it will be exercised." In Article 1 of the 1988 Constitution, the language was changed to "All power comes from the people, who exercise it through their elected representatives or through direct

means, under the terms of this constitution." The legal implications of such a change are not immediately clear, but the style of drafting indicates much more concern with precision in the 1988 Constitution than in the Arinos draft, which is somewhat surprising given the larger and more chaotic drafting process in the NCA.

In terms of formal institutions, the Arinos draft creates a parliamentary system, whereas the 1988 Constitution maintains the presidential system. More specifically, the Arinos draft created a system of government in which the Congress (elected through proportional representation with 3% minimum threshold), would choose a prime minister. There would also be a directly elected president with essentially ceremonial functions. Much has been written about this important choice in Brazil's constitutional history (Afonso da Silva, 1990; Elkins, 2013; Cheibub et al., 2014). But for our specific purposes, it is helpful to note that 50% percent of the Brazilian public actually favored the presidential system during the constitution-making period (Globo, 1987a). In this case, it seems that the 1988 Constitution is more in line with public opinion than the Arinos draft was. The parliamentary issue may be one reason for Sarney's decision to bury the draft (Reich, 2007), but the draft was also seen by many as being far too progressive on economic issues (Prado, 1987; Rosenn, 1990). The commission was itself divided between those who wanted a presidential system and those who preferred the parliamentary option. One scholar posits that the fact that the Arinos draft includes an elected president as head of state (though with few powers) is a response to the fact that the drafting took place during the outpouring of popular protest for the direct election of the president in the Diretas Já movement (Reich, 2007).

Another controversial aspect of the Arinos draft was its broad grant of pow-

ers to the state to intervene in the economy. The 1988 Constitution is reasonably ambitious in this regard as well, but the lack of direct lobbying by business interests in the Arino draft may explain the greater willingness of at least the majority of the members of the commission to grant the state such a large role in planning national economic development. In a relatively broad grant of power that was then further defined in subsections, Article 319 stated that "State intervention in the economic domain may be direct or indirect, in the form of control, stimulus, direct management, supplementary action and participation in the financing of companies." The 1988 Constitution gives each level of government specific powers to take action relating to economic development, but does not include this broad grant of power. Additionally, while both the Arinos draft and the 1988 Constitution include language that privileges Brazilian owned companies, the Arinos draft's economic nationalism is much more pronounced. Both of these issues may reflect the influence of lobbying by business groups late in the NCA process, as leaders sought to ensure that what they saw as the excesses of the left would be excised from the final draft.

In sum, there are many substantive and important differences between the two constitutions. The overall nature of the constitutions has much in common. Both are unusually long and attempt to be comprehensive. The Arinos draft was criticized as being "utopian," and so is the 1988 Constitution (Prado, 1987; Rosenn, 1990). They were drafted by people of similar backgrounds and inclinations. Yet the Arinos draft was more in line with the preferences of Brazilian academics on institutional issues, and more in line with popular opinion on the economic ones.

4.10 Conclusion

It is difficult to say in absolute terms how great the impact of public participation was in the Brazilian case. On the one hand, there was an impressive record of success for groups that followed the process laid out earlier in this chapter of combining the popular amendments with public demonstrations. Interest groups that used the popular amendments achieved much of what they wanted. As noted in the section on popular amendments, 19 amendments, and 62 individual demands are included in the final constitution. Out of 122 possible popular amendments, that is an impressive record. However, the individual comments, either in SAIC or in letters, appear not to have an impact on their own. The demands made in the largest campaigns in SAIC fell on deaf ears. Certainly, in comparison with South Africa, the impact of public participation was far greater. As we will see, as a percentage of the total public input, there was a greater impact in Iceland. As with all of these cases, one's judgment of the efficacy of public participation depends on one's priors. If one's prior expectation is that public participation matters little, then the level of impact is Brazil may be surprisingly high. If one approaches the subject expecting that this massive investment in public participation (both on the part of the NCA and civil society) should have markedly impacted the content of the constitution, then the impact may be disappointingly small. We can at least be relatively certain that in the comparative terms of this dissertation, the impact in Brazil was higher than that in South Africa, and lower than that in Iceland.

Another question concerns how much of the credit for the impact that we find in the Brazilian case can be attributed to the weakness of the political parties, and how much should be attributed to the remarkable organizational capacity of

interest groups. The easy answer is that both were required – and this seems to be closest to the truth. It was necessary for this level of impact that the political parties were weak and thus less committed to a singular view of what the constitution should say. Members of the NCA were both less well instructed by their parties than the drafters were in South Africa, and also less well protected from public pressure (Schattschneider, 1942). At the same time, the constitution-making process unfolded in a moment in Brazil's history where civil society groups were flourishing as their long pent up energies were allowed to be manifested without fear of repression from the state. The deep inequalities of Brazilian society could be discussed openly, protested against, and hopefully rectified (at least in part) in the transformative constitution that was supposed to inaugurate a new era of democracy. The extent to which these hopes have been realized is another matter. Nonetheless, the Brazilian case demonstrates that in cases where there is systemic weakness in the political parties, and great energy and organizational capacity in civil society, we can see a significant impact from public participation.

Chapter 5

Iceland: Constitution Making Without Parties

The majority of this chapter was previously published as an article in the journal *Policy & Internet* in June 2018. Parts of that article have been removed to make the work fit better as a chapter of this dissertation. However, much of the material from the article is included without significant alteration.

5.1 Introduction

Following a groundswell of popular opposition to the existing political system in 2009, the people of Iceland embarked on a unique process of constitutional reform that prioritized transparency, openness, and public participation. By July 2011, the Icelanders had completed a new draft constitution through a process that has been rightly celebrated by both scholars and more casual observers the world over. It was reputed to be the world's first "crowdsourced" constitution (Morris, 2012), using internet communication technology (ICT) to involve the public directly in the drafting process. Iceland is almost uniquely suited for this kind of process with its tiny and

homogeneous population, high levels of education, high level of voter turnout (averaging 88% since 1946) and a remarkably high level of Internet access, at 96% (Kelly et al., 2013). One would think that if participatory constitution making using online tools can work anywhere, it would work here.

In terms of our broader understanding of public participation in constitution-making processes, Iceland is a crucial case for the argument that participation can have a meaningful impact on the development of the text. A finding of no impact from public participation in this case would cast doubt on the larger program of increasing public involvement in drafting processes. The combination of the case's relative simplicity and highly level of participation allow us to evaluate the impact of public participation on the drafting of a constitution without many other variables to consider (Gerring, 2007, 115-122).

There are already a number of excellent accounts of the Icelandic constitution-making process by Icelandic scholars (Ólafsson, 2016; Valtysson, 2014) foreign academics (Landemore, 2015, 2016; Suteu, 2015), and by the members of the Constitutional Council that drafted the new constitution themselves (Bergmann, 2016; Gylfason, 2011a, 2016b; Nordal, 2016; Oddsdottir, 2014). The unique contribution of the analysis undertaken here is the focus on the textual data generated in the drafting process, supplemented by interviews with participants in the drafting process. One of the key findings in this research project is that the Constitutional Council did in fact implement many of the changes to the constitution proposed by participants in the consultation process. The analysis shows that effects from this popular consultation were more pronounced in some areas of the constitution than in others, with rights being more affected by public participation than institutional design.

I argue that the level of impact in Iceland far exceeds that of any other constitution-making process, and was a result of the unique political context in which the drafting took place. This drafting context is also important for understanding the ultimate outcome of the process, as the constitution produced by the Constitutional Council in 2011 ultimately failed to be enacted by the parliament. While we should not overemphasize the break between political elites and masses, the disconnection between these groups was important to both the protests that began this constitutional-reform process and to its ultimate failure.

Building on the larger theory advanced in this dissertation, I argue that online public participation was highly likely to have a significant effect on the constitution-making process in Iceland. Here, there were no worries of partisan or ethnic divisions within the drafting body, and the constitution-making process was itself a response to public demand for political change. In all, Iceland was a much simpler and more propitious context for participatory constitution-making than many of the other places where this approach has been popularized, such as Kenya, Nepal, and Fiji (Brandt et al., 2011). Later in the chapter, I develop an argument that the high level of impact from public participation that we observe in Iceland is a result of the unique apolitical nature of the drafting process. The isolation of the drafters from both political parties and special interests made them more reliant upon and open to input from the public.

I further argue that this impact is conditional on a number of factors relating to the authorship and content of the submissions from the public. Regarding the authorship, I argue that submissions from individuals associated with interest groups, non-governmental organizations (NGOs) or civil society organizations (CSOs) would

be more likely to be implemented. Due to the greater resources and expertise that personnel from this kind of organization can bring to bear, their submissions are likely to include both more concrete proposals, and convey expert judgment (Yackee and Yackee, 2006). Additionally, the aggregation of individual demands through organizations gives these submissions more legitimacy in their claims to speak for "the people" (Almond and Powell, 1966). If this is right, we should expect proposals from interest groups or NGOs to have much more traction with the members of the Constitutional Council than those from individuals.

Regarding the content of the proposal, I argue that proposals that deal with the subject of fundamental rights are much more likely to have an effect than those that deal with political institutions. While there are a remarkable number of people in Iceland who have a keen interest in the reform of the electoral system, or improving financial regulation, the easiest part of the constitution for individuals to understand and respond to is the chapter on rights. As the descriptive statistics discussed later in this chapter show, the plurality of submissions from the public addressed this issue. Additionally, there are many small changes that can be made to the list of fundamental rights without upsetting the balance of other parts of the constitution. This is not to say that rights are without cost, but among the issues that drafters have to negotiate, I argue that there is more room for maneuver on rights. There is also a close precedent for this argument. In a similarly participatory aspect of the Egyptian constitution-making process, Maboudi and Nadi (2016) found that articles that dealt with rights were more likely to be changed in response to public feedback. This also accords with my findings in the chapter on Brazil earlier in this dissertation.

I argue in this chapter that it was the apolitical nature of the constitution-

making process, where political parties and interest groups were excluded, that led to the level of impact we observe in this case. However, this argument cannot be empirical tested on the basis of this case alone, but instead requires a larger comparative study (Gerring, 2007, 37-39). Throughout the chapter, evidence is presented in support of this argument, but it is not empirically tested.

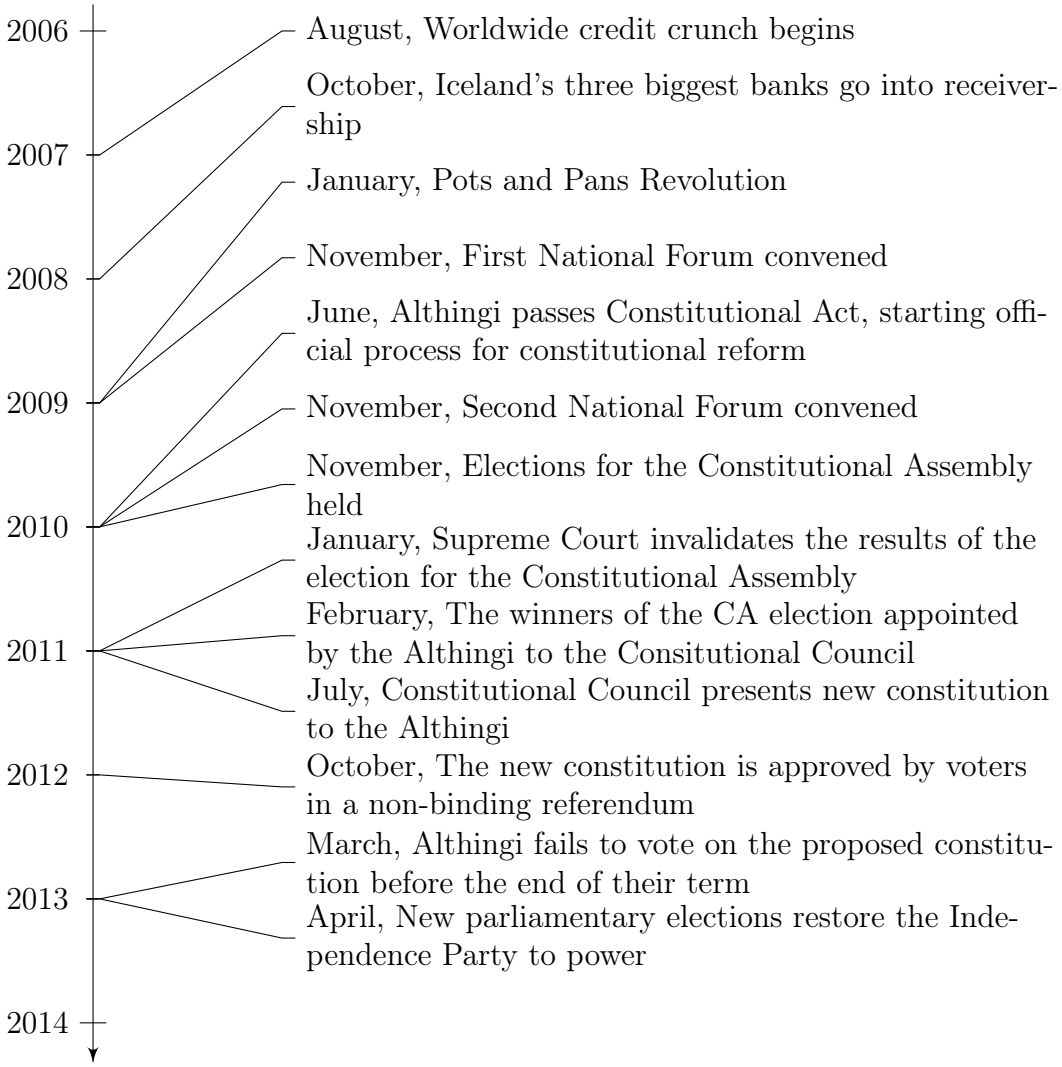
5.2 Impetus for Reform: Economic Crisis

It is helpful to begin by describing the context in which this project of constitutional reform started. Iceland was one of the worst affected countries in the banking crisis of 2008. Following a period in which government policy favored ever-greater deregulation of the financial industry, Iceland's three largest banks became preposterously overextended, and collapsed in October of 2008 (Sigurjonsson, 2010). The effect of this collapse was a significant economic crisis that touched the lives of the vast majority of the island's population of just over 320,000, and delegitimized the political parties and institutions in the eyes of many (Author's interview with "NRNJ," 5 July 2017, and with "YIGY," 15 March 2017). In the "pots and pans revolution," Icelanders took to the streets (cookware in hand) to demand new elections, and ultimately changes in the way their political and economic systems are governed (Castells, 2012, 34). The center-right governing coalition eventually bowed to this cacophonous expression of popular discontent, and was replaced by an interim government composed of members of the Social Democratic Alliance and Left-Green Movement parties. These two parties gained enough support in the general election of April 2009 to form a government, and began to take steps toward constitutional reform (Benediktsson and Karlsdóttir, 2011).

It is not obvious that the economic crisis of 2008 should lead to the effort to draft a new constitution. However, the current constitution had been installed as a temporary measure at the time of independence from Nazi-occupied Denmark in 1944, with multiple plans for reform or replacement failing to reform the law in the intervening years. The text of that constitution is substantially copied from the Danish constitution of 1849, with slight adaptations to the Icelandic context. As early as 1949, then President Sveinn Bjornsson, stated "We still have a mended garment, originally made for another country, with other concerns, a hundred years ago" (Gylfason, 2016a). By 2009, the political system had evolved to the extent that the constitution no longer described how the government of Iceland actually functions, and in some respects bore little resemblance to how the law had developed. With the political system largely discredited in the eyes of the public in 2008, the time seemed right to many to push for a new constitution.[1] Beyond this, there was at that time a level of interest in constitutional matters unprecedented in Iceland's history. One participant in the process noted that the political situation in 2009 was an example of what Bruce Akerman describes as a "constitutional moment" (Oddsdottir, 2014; Ackerman, 1998, 1213). The constitution-making process was initiated in a national forum in 2009, and was to some extent completed with a referendum in 2012, but was ultimately set aside by the parliament. This process is described in much greater detail in Section IV.

[1] As Machiavelli is reported to have said, "Never waste the opportunities offered by a good crisis" (Seelye, 2009).

Figure 5.1: Iceland Timeline



5.3 The Drafting Process in Iceland

The first major step in the process of reforming the Icelandic constitution was a National Forum (Þjóðfundur) organized by a group of grassroots organizations which called themselves "the Anthill" (Mauraþúfan). The Anthill organized a one-day event in November 2009, for the purpose of gathering public opinion on the core values of the nation, and how Iceland's government should be reformed. The selection of delegates to this event also set the tone for much of what followed. Of the 1500 people who attended the event, 1200 were chosen at random from the national voters registry, while the other 300 were chosen to represent business and civil society groups (Burgess and Keating, 2013, 424).

After the success of this first National Forum, the newly elected government got involved more directly in the process, and appointed a committee of seven experts to prepare the groundwork for drafting a new constitution. In November 2010, a second National Forum was held, this time a collaborative effort between the Anthill and the committee of experts. This second forum invited a similarly selected (quasi-random) group of 950. This time there was a greater focus on producing useful data from the discussions. Most importantly, the committee of experts summarized the findings of the second national forum, and published this along with a number of other resources (including two complete drafts for a new constitution) for the constitution drafters to use. This 700 page collection of resources provided the main source of information for the Constitutional Council as they began their work in Spring of 2011 (Author's interview with "XQPC," 13 March 2017). Moreover, the recommendations from this National Forum are for the most part reflected in the draft constitution produced by the Constitutional Council a year later.

The Constitutional Council (Stjórnlagaráð) was elected by means of single transferable vote in an election held in November 2010 with a slate of 522 candidates. This election was then ruled invalid by Iceland's Supreme Court, ostensibly due to problems with the design of the ballots and the voting booths, though some commentators have suggested that the action was politically motivated, and facilitated by a court staffed with appointees of the then-disgraced Independence Party (Gylfason, 2013b). The Althingi (parliament) then bypassed the court by directly appointing the 25 people chosen by the voters to the Constitutional Council.[2] The Constitutional Council began their work in April 2011, with a deadline to produce a draft a mere three months later.

Turnout in this election was very low (36%), which is perhaps not surprising given the nature of the election. The informational burden to make an informed vote was very high, with 522 candidates, none of whom were sitting politicians (though two had previously held elected office), or affiliated with any political party. The parties themselves for the most part ignored the election, with only one party providing any guidance to its members about preferred candidates (Author's interview with "GNEL," 15 March 2017). Few of the candidates spent any money campaigning. Some of the successful candidates were known already for articles they had written on politics in Iceland. All of the candidates were given time to appeal to the voters through brief radio appearances (Author's interview with "BHCQ," 11 April 2014). With so many candidates in the race, they were only permitted to answer three questions for this radio program.

[2]Although, one of the 25 top vote-getters declined this appointment, and was replaced with the 26th place candidate.

Although the gender ratio on the Council was relatively representative (or at least reasonably so for a group of 25), the Council was not descriptively representative in terms of education or profession.[3] The group was remarkably educated in comparison with virtually any public: six have a PhD, eleven more have a postgraduate degree. Five of the members of the Council are university professors, four are lawyers, and two are physicians. At least eleven of the council members had previously published articles or books on constitutional issues. Thus the group seems to have been highly qualified for the task, if not truly representative.

The drafting process was designed to allow for a high level of transparency at the Constitutional Council, with significant opportunity for the public to engage with the members of the Council through offering comments on the drafts and suggestions for improvements. While the work of the Constitutional Council was to some degree governed by an act of parliament passed in June 2010 (which, for example, required the plenary meetings to be open to the public), much of the detail of the process was worked out on a rather ad hoc basis (Althingi, 2010). In interviews, members of the Council suggested that there was an effort to meet the people where they were, and to make participation as simple as possible. One member of the Constitutional Council described the public consultation this way:

> We were running on the ideology of programming, sort of crowdsourcing... you do things in a period and then you test it, and then you do it again, you run it again. Instead of writing a whole new program, you test it as

[3]The authorizing legislation included a commitment to electing a somewhat representative Constitutional Council, and included a gender equity requirement in the allocation of the seats (Landemore, 2015). In the event, ex post balancing was not necessary as the public elected 10 female council members, fulfilling the 40% quota.

> often as you can, trying to find the bugs before they become really sort of hidden inside the whole mechanism (Author's interview with "SBPC," 15 April 2014).

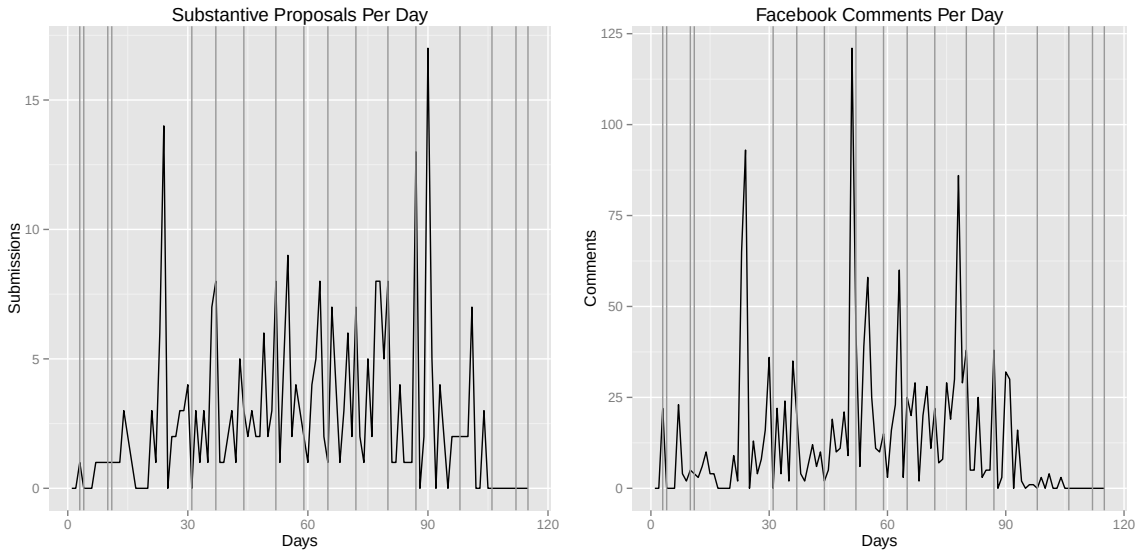
The Council's deliberations were open to the public and live-streamed on the Internet, and minutes of the proceedings were posted later. The Council also set up accounts on Facebook, Twitter, Flickr, and YouTube in order to facilitate engagement with citizens across a variety of platforms. The Council reported that they received 323 formal proposals,[4] and a total of 3,600 comments (Gylfason, 2011b). The 323 proposals were discussed by members of the Council and other interested people in comment threads below the proposals, with 1,575 comments posted in this way.

The varying level of public participation over time is somewhat surprising. I had expected to find that the level of participation (measured in terms of substantive proposals or Facebook comments per day) would increase over time, peaking near the time that the final draft of the constitution was to be delivered to parliament. However, to the extent that there is a trend, both the substantive proposals and commenting activity through Facebook peak around the middle of the drafting process (see Figure 1). Participation in terms of both substantive submissions and Facebook comments surged in the couple of days preceding the release of new drafts of the constitution. In Figure 2, participation is shown in a line plot, with the gray vertical lines indicating the days on which the constitutional council held a plenary meeting (at which time the new draft was posted on the council's website). The commenting period closed shortly before the final draft was due, but the level of engagement seems

[4]Excluding posts, by foreigners, and posts that merely convey compliments to the Council, the number of substantive proposals from Icelanders was 311.

to have been on the decline well before that.

Figure 5.2: Public Participation Over Time



After receiving a short extension to their original deadline, the Constitutional Council unanimously approved their draft constitution on July 29, 2011, and presented it to the parliament. Here, things slowed down considerably. A non-binding referendum on the text was held in October 2012. In addition to voting "yes" or "no" on the draft as written, Icelanders were asked to respond to five substantive questions addressing some of the most contentious issues that came up in the two national forums, and which remained controversial during the drafting process. Reflecting the divisions within the proposals the Council received, their final draft left several of these issues unresolved, offering ambiguous language, or allowing the legislature to make a decision.[5] Three particularly notable questions concerned language in the

[5]These means of avoiding final decisions at the drafting stage have been successful in constitution-making processes in divided societies (Lerner, 2011).

draft about public ownership of natural resources (a concern for the fishing industry), the decision not to reaffirm the Evangelical Lutheran Church as the national church, and changes to the electoral system.[6]

The referendum confirmed the choices made in the Constitutional Council where they had made clear statements (as in ownership of natural resources), demonstrated popular opinion about some areas where the text was left ambiguous (as on the questions of the establishment of a national church),[7] and endorsed the constitution as a whole (Robertsson, 2012). The voters approved the draft constitution with a vote of 66.9% in favor.

However, turnout in the referendum was around 50%, which is quite low compared to presidential and parliamentary elections in Iceland, which have averaged around 88% turnout between 1946 and 2013.[8] Turnout in parliamentary elections is of course driven in part by political party campaigns, and the lack of such mobilization efforts in this referendum could partly explain the low turnout. It should also be noted that the original plan was for the referendum to coincide with the June 2012 presidential election, but the Independence Party and Progressive Party mounted a filibuster in the parliament to prevent this from happening (Gylfason, 2016b). Iceland has only had four referendums in its history, but there were stand-alone referendums in 2010 and 2011 on legislation concerning the terms of Iceland's financial liability to foreign depositors following the banking crash, providing us with good points of comparison for turnout. The turnout rate in the 2010 referendum was 62.7%, and

[6]These are long-standing questions in Icelandic politics.

[7]Article 19 of the final draft read "The church organization of the state may be determined by law."

[8]Voting in Iceland is not compulsory.

turnout in the 2011 referendum was 75.3% (Statistics Iceland, 2010, 2011). This indicates that turnout in the 2012 referendum was likely to be significantly lower than a parliamentary election, but it still fell short of the other referendums. Polling just prior to the 2012 referendum indicated that support for the draft text among all citizens was around 66%, which mirrors the outcome in the referendum (Market and Media Research, 2012). In addition to the parliamentary maneuvers described above, opponents to the new draft ran radio advertisements arguing against approval in the run-up to the referendum, which may have also contributed to the low turnout (Author's interview with "GNEL," 15 March 2017).

Following the referendum, the fate of the constitution was back in the hands of the parliament. By this point, almost four years had passed since the beginning of the "pots and pans revolution," the economy had begun to improve, and it is likely that the sense of the urgent need for political reform had dissipated. Approval of the new constitution would have required an affirmative vote in the sitting parliament, and a second affirmative vote in the new parliament following the Spring 2013 election (Landemore, 2015). The bill for the new constitution was not brought up for a vote on its own, and eventually failed to even be included as a last-minute amendment to a different bill before the parliament dissolved at the end of the session. One member of the Constitutional Council suggested that the parliament had reverted to its former ways, lessons from the financial crisis unlearned (Author's interview with "DLEA," 15 March 2017). In the election that followed in April 2013, the center-left coalition that came to power in the wake of the financial crisis fared poorly, and the traditional center-right coalition that presided over the rampant neo-liberalism of the early 2000s was returned to power.

5.4 Measuring Participation

In assessing the quantity of participation, we must consider the familiar question, "compared to what?" The obvious points of comparison in the present work are the other two cases, South Africa and Brazil. These cases really stood out as a new way of making a constitution in the late 1980s and early 1990s, and serve as a good point of reference as the previous gold-standard for democratic constitution making. In South Africa's popular consultations in 1996, there were 15,292 submissions of substantive comments on the content of the new constitution from the general public and civil society (Gloppen, 1997, 257-261). Similarly, in Brazil's 1987-1988 experience of drafting a constitution, the constituent assembly received 72,719 proposals from the public and from civil society groups (Monclaire et al., 1991, 11). In both cases it is unlikely that the majority of the public comments received a great deal of attention, but it is worth considering the impact that they may have had on the constituent assembly's deliberations, and ultimately on the final draft (Murray, 2001b).

In terms of scale of involvement, we can compare Iceland to Brazil and South Africa on at least one dimension by weighing the number of substantive proposals against size of the electorate. The most comparable metric here is the number of substantive proposals submitted through an official channel created for this purpose. In Brazil in 1986, the Federal Senate created a system in which proposals could be submitted via a pre-printed card. In South Africa a decade later, there was a less formal system, but again a central repository of written suggestions was created. The blog-post like system on the Constitutional Council's website in Iceland seems like a close parallel to these earlier avenues for participation. In the case of Brazil, with 72,719 proposals from an electorate of 82,074,718, there was a participation rate of

88 proposals per 100,000 voters. In South Africa, 15,292 submissions from 22,709,152 eligible voters yields a participation rate of 67 proposals per 100,000 voters. The comparable metric for Iceland is 311 proposals from 235,495 registered voters, with a participation rate of 130 proposals per 100,000 voters.[9] The rate of participation is clearly far higher in Iceland, but as mentioned at the outset, we should expect this in a comparison between Iceland and large developing countries.

5.5 Data and Methods

The analysis that follows relies to a significant degree on two types of data: online records generated in the drafting process, and interviews with participants in the drafting process, especially the members of the Constitutional Council. Though the Council used a number of websites to enable public engagement, the main point of contact was the Council's own website, which facilitated the posting of substantive proposals for the constitution, and public comments on these proposals through Facebook. The most important documents for this analysis are the substantive proposals submitted through the Council's website, and the successive draft constitutions that the Council produced. All of these documents have been preserved online.[10]

For the analysis, two text files were created for each of the submissions from the public: one in the original Icelandic, and a second that was automatically translated with Google Translate. Next, each proposal was coded according to the topics

[9]It is important to note here that other forms of participation were also important in each of these cases, for example petitions in South Africa and popular amendments in Brazil. These other forms of participation drew far higher numbers of participants. However, the submission of written proposals through an official channel is common between these three cases, and in my view provides a convenient point of reference in evaluating the comparative level of popular participation.

[10]https://web.archive.org/web/*/www.stjornlagarad.is

which it addressed using a coding system based on the taxonomy of constitutional topics created by the Comparative Constitutions Project (Elkins et al., 2014). This coding was accomplished through a careful reading of the English translations, with the automatic translation supplemented by the use of an Icelandic-English dictionary. These topic categorizations were used to create a dataset, to which additional variables were added, including: the name of the author, date of submission, word count, number of Facebook comments responding to the proposal, number of Council members responding to the proposal, whether or not the author responded in the comment thread, the total number of proposals submitted by that author, and whether or not the author was affiliated with an NGO or CSO. Some of the substantive proposals addressed more than one topic, and were coded accordingly.

For the purposes of statistical analysis, this dataset was then altered in two principal ways. First, proposals that dealt with more than one topic were split into a proposal for each topic. Second, the categories of topics were collapsed into two new taxonomies, one with nine categories,[11] and one with three.[12] This smallest categorization was the most useful for statistical analysis, given its focus on distinguishing between the effects of public participation on institutions versus rights, and was most appropriate for the small number of observations available for the study.

The drafts published by the Constitutional Council were collected in a similar way to the substantive proposals, in both Icelandic and English text files. Using some text analysis software (WCopyfind), each change between successive drafts was identified in new html files. These files with the changes highlighted were used to

[11]Executive branch, legislative branch, judicial branch, direct democracy, oversight institutions, fundamental rights, cultural issues, and the amendment process.

[12]Institutions, rights, and a residual category for topics not subsumed into these two.

determine whether or not the substantive proposals led to changes in a draft of the constitution, as described in greater detail later in the chapter.

The views of the members of the Constitutional Council were vital to this analysis, and were collected through semi-structured interviews. Two interviews were conducted via teleconference in 2015, and four more were conducted in person in Reykjavik in 2017. The views of several citizen-participants were also collected through semi-structured interviews. One was conducted in person in Reykjavik in 2017, and three more were conducted via teleconference. Each interview lasted between 45 and 90 minutes, and followed a list of questions prepared in advance, with the opportunity for the respondent to also suggest new avenues of conversation. The majority of the interviews were recorded in digital audio. Data from the interviews has been anonymized in this publication, following a research protocol approved by the author's Institutional Review Board.

5.6 Assessing the Impact of Participation

5.6.1 The Substance of Public Participation

As noted earlier, 311 substantive proposals were posted by Icelanders on the Council's website. Other citizens, as well as a few interested foreigners, also posted 1,575 comments about these more substantive proposals. Some concerns about the representativeness of the participants are warranted. The 311 proposals came from only 204 individuals, and the nine most active individuals combined to submit 24% of the proposals. All of these nine individuals were male, as were about three-quarters of all those who submitted proposals. While the age of the participants is more difficult to assess, one Icelandic scholar has estimated that 80% of the participants were between

40 and 65 years of age (Helgadóttir, 2014). These dynamics tend to confirm both broader trends in offline political participation (Verba et al., 1993), and research on online political participation that suggests that dialogues are dominated by a few highly-active users, and often by males (Albrecht, 2006; Dahlberg, 2001).

The vast majority of these substantive proposals are well organized, and communicated in a positive and collegial tone. Many of them are also highly informed. Some cite supporting evidence from the writings of prominent legal scholars and philosophers. Other commenters supported their claims with links to reports from NGOs, particularly International IDEA. A few Icelanders cited precedents from other national constitutions, notably the United States, Norway, Sweden, Denmark, and Finland. Depending on the issue, some commenters looked further afield, noting examples from other states that have declared neutrality, or the electoral systems of states similar in size to Iceland. International human rights treaties were also mentioned by a significant number of commenters. Reflecting on the Constitutional Council's attitude toward the public comments and proposals, one of the Council members stated: "We were really scared when we did it first, because we thought 'this is the Internet,' people are going to lash out, and they're going to be really rude... But the actual reality was that people were really nice, and polite, clever, helpful, and brilliant" (Author's interview with "SBPC," 15 April 2014.) The overall scale of the Icelandic public's involvement in the process is somewhat difficult to judge (more on this point later), but one can say with confidence that the engagement that did occur was of a notably high quality, as I shall explain in more detail below.

Many of the proposals addressed several issue areas, and some went through large portions of the draft constitution in a point-by-point response, thus being coded

Table 5.1: Distribution of Topics in Substantive Comments

Topic	Number Suggest.	Percentage Suggest.	Number FB Comms.	Percentage FB Comms.
Legislature reform	57	18.4%	227	9.9%
Electoral reform	56	18.1%	240	10.5%
Other human rights	50	16.1%	228	10.0%
Established church	41	13.2%	433	18.9%
Executive reform	39	12.6%	162	7.1%
Equality	25	8.1%	113	4.5%
Property rights	25	8.1%	134	5.9%
Direct democracy	23	7.4%	98	4.3%
Judiciary reform	18	5.8%	51	2.2%
Natural resources	18	5.8%	46	2.0%
Financial regulation	17	5.5%	151	6.6%
Environment protection	14	4.5%	39	1.7%
Neutrality/Pacifism	11	3.6%	36	1.6%
Freedom of information	10	3.2%	39	1.7%
Privacy	10	3.2%	37	1.6%

as addressing a number of topics. The number of substantive proposals is at the least an indicator for the level of public interest in a given issue, and perhaps even serves as a proxy measure for how controversial a given issue area may be. Table 1 details the distribution of topics covered in the substantive proposals and the Facebook comment threads. Not surprisingly, emphases between the proposals and comments have a correlation of 0.86 (in terms of the number of posts per topic). There are some particularly interesting differences between the tables. One that immediately stands out is the fact that the establishment of a national church was by far the most commented on issue (and the most contentious), while in terms of formal proposals and responses the issue only came in fourth place. Electoral reform is highly ranked in both measures. It should be noted that while some of these topics are long-standing controversies in Iceland, others are more niche subjects. One of the members of

the Constitutional Council wrote that "the people who participated in the online dialogue were a self-selecting cohort, that is generally more interested in topics such as the freedom of speech and the Internet, than the members of the general Icelandic public" (Oddsdottir, 2014, 1217).[13]

5.6.2 Overall Change in the Constitutional Text

Having laid out the background to the case, and described the nature of the participatory process, we can now turn to the second research question outlined at the beginning of the paper, which asked how much of the material from the public consultation process is included in the draft constitution. As a first cut at analyzing the impact of the public consultation process, I have measured the similarity between the 1944 constitution and the 2011 draft using two automated methods. The first way I have measured this similarity is by using software that finds copied strings of text. Using the original Iceland texts without translation, I find that 23% of the 2011 draft comes from the 1944 constitution (or from the other side 39% of the 1944 constitution is retained in the 2011 draft). It seems clear that the approach of the drafters in 2011 was to expand on the 1944 text. Many of these copied strings are substantively meaningful phrases, not simply precatory or procedural language that would be common to all constitutions.

The amount of material carried over varies between the chapters of the constitution. The chapter with the largest amount of retained material is the chapter on human rights. In this chapter, the civil and political rights from the 1944 constitution

[13]For an analysis of the public engagement process from a communication studies perspective, see Valtysson Valtysson (2014).

are mostly carried over, though with some slight modifications. This chapter in the 2011 draft is expanded from the 1944 constitution, however, and adds new rights for children, Internet freedom, access to information, religious freedom, environmental protection, and public ownership of natural resources.[14] An analysis conducted by the Comparative Constitutions Project (CCP) shows that the current constitution includes 24 rights, while the draft included 31. In their schema, the draft constitution dropped two rights in the area of criminal law: right to pre-trial release, and the right to a fair trial, but added eight new rights that had not been included previously. The CCP report also noted that the protection against discrimination included in the new draft was one of the broadest in the world (Elkins et al., 2012).

A second–and perhaps more sophisticated–way of measuring the similarity is to develop a topic model.[15] As with the other two case studies, I have used the method of latent dirichlet allocation to identify the topics contained in the substantive proposals and in the constitutional texts. In this implementation, a topic is essentially a probability distribution across groups of words. This technique can be used to classify large numbers of documents automatically, or to analyze the content of individual texts within the context of the larger corpus (Blei et al., 2003). This analysis yields a similarity between the 1944 constitution and the 2011 draft of 90%. That is, the two texts cover 90% of the same topics. Additionally, assuming that there are 15 topics covered in the substantive proposals from the public,[16] nine of these are also included

[14]Draft Constitution of the Republic of Iceland, 29 July 2011, Ch. II

[15]This analysis also used the original (un-translated) texts.

[16]In a topic model using latent dirichlet allocation, values of some parameters must be set by the analyst. There are no ex ante rules about how many topics should be included. It has been my approach to run the topic model with a varying number of topics, settling on the number that produces the most intuitively sensible and coherent topics. Other approaches to topic modeling establish the number of topics in other ways (Arun et al., 2010).

in the draft constitution. Though this can actually be more informative than looking for matching n-grams, but it still doesn't give us a very good substantive sense of how the texts compare. Even if we can be sure about which words have changed, we may not be sure of what the change means.[17]

5.6.3 Verifiable Links between Proposals and the Constitution

To determine the precise connections between public submissions and the text of the constitution, I compared the successive interim drafts of the constitution with the proposals from the public. As described earlier, I used some text analysis software to identify and highlight all wording changes between successive drafts of the constitution, and sought to match these changes to individual proposals. This work principally consisted of reading a translation of each of the proposals and matching these specific demands with changes in the subsequent drafts. While the method of analysis here is not quite process tracing, it does bear some similarity to the logic of causation used in process tracing. Bennett has described four kinds of tests of causality that can be used in process tracing, which are differentiated by the degree to which they describe necessary and sufficient conditions for causation. (Bennett, 2010, 210). My decision rule for finding an impact from a proposal is much like Bennett's "smoking gun test." I code a successful proposal when there is a specific demand or complaint that precedes a change in the constitutional text. Admittedly, this kind of test does not completely eliminate the possibility that the outcome we observe was brought

[17] As any student of constitutional law knows, the precise meaning ascribed by a Supreme Court Justice to a single word can have far reaching effects. (See McCulloch v. Maryland 17 U. S. 316 (1819); Wickard v. Filburn, 317 U.S. 111 (1942))

about in some other way: it is a sufficient cause, but not a necessary cause (Collier, 2011, 827).

Using this method, I identified 29 instances where a "smoking gun test" is successful, and it seems reasonably certain that the Constitutional Council made changes in the text of the constitution in response to a public comment. In none of these cases was the precise wording suggested adopted, but the substance of the comment was incorporated into a subsequent draft of the constitution. In most examples of lawmaking there would be significant reason for skepticism about the role of proposals from the public as the causes of these changes. However, in the Icelandic constitution-making process, the non-participation of elites in general, but especially political parties and interest groups, isolated the drafters from other potential influences. In this context, we can be reasonably confident that these proposals from the public are indeed the causes of these changes in the constitutional text.

Furthermore, I presented a list of these 29 examples to several members of the constitutional council during interviews. They were generally unable to recall exactly this list, but found that the list was a reasonable recreation of what took place. They were able to recall some of the specific changes that I have included in my list. None of them suggested that I have included any spurious connections. The members of the Constitutional Council do of course have an interest in showing that they gave appropriate attention to the proposals from the public. However, at this point they are not all committed to continued efforts to pass the draft, and can discuss their work with some objectivity. Their views on the subject should be understood in that context, but are nonetheless valuable checks on the accuracy of the coding. As a further check, in interviews with several of the authors of these proposals, I

queried them about their assessment of the impact that their proposals had. They were certain that their proposals were given a fair hearing, but did not feel that all of their proposals were implemented (which agrees with my coding). When pointed to evidence that their proposal resulted in a change in the draft constitution, one respondent was unwilling to claim complete credit for the change (Author's interview with "NRNJ," 5 July 2017). The full list is reproduced in the appendix to this chapter. If anything, this list may under-represent the full impact of public participation, as by its design it ignores agenda-setting effects, or other potential impacts that are of a slightly nebulous nature.

Some of these changes involve rather unique provisions in the constitution, and are straightforward to link to comments from the public. For example, one of the earliest proposals from a member of the public was a request to add protection for the rights of animals.[18] This was added to the constitution following the tenth meeting of the constitutional council. Another clear example concerns the right to access the internet.[19] A proposal posted on 21 June discussed the importance of free access to information to democracy,[20] and references a report published a month earlier by the United Nations Human Rights Commission on freedom of expression, which described access to the internet as a human right (UNHRC, 2011). Three days later, the constitutional council added the right to access the internet to their draft constitution. The day that this new draft was published, another individual wrote that he supported the addition of the right to access the internet, and suggested that

[18] Árni Stefán Árnason, 6 April 2011. http://www.stjornlagarad.is/erindi/nanar/item33142/

[19] If it had been approved, Iceland would have been the first country to include the protection of access to the internet in its constitution.

[20] Þórlaug Ágústsdóttir, 21 June 2011. http://www.stjornlagarad.is/erindi/nanar/item33986/

this access should be uncensored.[21] The draft of the constitution published on 12 July changed the language of this provision to "unrestricted access." These examples illustrate the engagement of the Constitutional Council with the public comments, and the manner in which they used that information to shape the draft constitution.

Table 5.2: Simplified Topics in Substantive Proposals

	In Proposals		*In Constitution*	
Topic	*Num.*	*Pct.*	*Num.*	*Pct.*
Amendment Procedures	6	1.5%	0	0.0%
Cultural Issues	57	14.1%	3	10.3%
Electoral Process	56	13.9%	1	3.5%
Executive Branch	38	9.4%	1	3.5%
Judicial Branch	18	4.5%	0	0.0%
Legislative Branch	56	13.9%	1	3.5%
Direct Democracy	23	5.7%	4	13.8%
Oversight and Regulation	17	4.2%	0	0.0%
Rights	133	32.9%	19	65.5%
Total	404		29	

5.7 Statistical Analysis

5.7.1 Description of the Data and Model

As reported in Table 2, the qualitative analysis of the substantive proposals from the public generated a list of 29 instances where a proposal is almost certain to have caused a change in the text of the draft constitution. Although this is a rather low rate (9.3%), it is likely higher than many observers of constitution-drafting processes

[21] Svavar Kjarrval Lúthersson, 24 June 2011. http://www.stjornlagarad.is/erindi/nanar/item34042/

would expect.[22] I consider this to be a significant level of impact. The levels of interest from both drafters and citizens are clearly uneven across categories, but the correlation between the overall distribution of proposals and the distribution of accepted proposals is actually quite high, at 0.88. Additionally, while the numbers of both positive and negative values in this dataset are small, they are sufficient for some statistical analyses of the probability that a particular comment would be included in the text of the constitution.

We can think more systematically about the kinds of proposals that made it into the constitution with a regression model that predicts inclusion with a set of covariates that include topic dummies, and a set of variables that capture characteristics of the suggestions and their individual contexts. Given this binary coding of the key outcome variable–whether or not a proposal was included in the constitution–I fit a probit model to estimate the values of a number of covariates that might be expected to influence the inclusion of individual proposals in the constitution. The full model is expressed mathematically as:

$$Pr(y = 1|x) = F(\beta 0 + \beta 1[daycount] + \beta 2[words] +$$

$$\beta 3[fbcomms] + \beta 4[stjcomms] + \beta 5[opresp] + \beta 6[totsubmits] + \beta 7[ngo] +$$

$$\beta 8[institutions] + \beta 9[rights] + \beta 10[others])$$

The first variable (daycount), is a count of the days passed since the first proposal was posted on the Constitutional Council's website–which I expected to have a negative coefficient, indicating that earlier comments are more likely to be

[22] That is 9.3% of the 311 proposals submitted by Icelanders. The number of observations in the rest of the paper varies as proposals are split to consider the various subject areas dealt with within individual proposals.

included.[23] The second variable (words), is the number of words in the proposal–also expected to have a negative coefficient, which would indicate that shorter proposals are more likely to be included. The next five variables all consider aspects of the comment activity that responded to the proposal: the number of Facebook comments on the proposal (fbcomms), the number of comments on the proposal from members of the Constitutional Council (stjcomms), a dummy indicating whether or not the author of the proposal responds to the comments (opresp), the total number of submissions from that individual (totsubmits), and whether they write on behalf on an non-governmental or civil society organization (ngo).[24] The remaining variables record the topic categories that the proposals considered.[25]

5.7.2 Results and Discussion

Coefficients for several variations of this model are reported in Table 3. The coefficients are reported on the main lines, with the standard errors in parentheses beneath. The estimates are fairly stable across these statistical models. The variation in the models is chiefly that in Models 2, 3, and 4, I drop the variables for the timing and

[23]I expected that comments made earlier in the drafting period will be more likely to be accepted. The agenda at that time is more open. Additionally, drafters may be working in a more research intensive mode early in the process, before shifting to an editing approach toward the end of the process.

[24]These variables capture information about some of my expectations (or hunches) about contextual elements that might have an impact. I expected that proposals that received attention from a higher number of members of the Constitutional Council will be more likely to have an influence on the text. Additionally, proposals that were followed by comments in which the original poster is active would be more likely to be influential. And, that proposals made by individuals who post multiple proposals would be more likely to be adopted.

[25]The "institutions" category includes all proposals relating to the three branches of government, and to elections. The "rights" category includes all proposals having to do with human rights and duties of citizens. The "others" category includes all proposals that deal with direct democracy, amendment procedures, oversight mechanisms, and cultural issues.

length of the proposal, and the dummy for proposals from an organized group, in an effort to investigate the variables of greatest interest in a more parsimonious equation. In Model 1, we see that "daycount" has a negative coefficient, indicating that later proposals were less likely to be included in the constitution, though the effect is small. We can be quite certain that the length of the proposal had no effect on its inclusion. Also–perhaps unsurprisingly–proposals that received comments from more members of the constitutional council were more likely to be included in the constitution, though the total number of comments was not important. The response of the proposal author to comments on the proposal was not influential.

The most important finding in Model 1 is that proposals submitted by organized groups were not more likely to be influential than those submitted by individuals. On the contrary, while the coefficient is not significant, it is estimated to have a negative effect. The finding may in part be explained by some of the unique features of the drafting process. Interest groups were not allowed to participate in the process with any sort of special accommodations, and by and large abstained from participating in the open process that was available to individuals. Even so, approximately 10% of the proposals on the Council's website were posted by representatives of NGOs or CSOs. The results here may not be suggestive of how this dynamic works in other cases, where interest groups and NGOs are often given preferential treatment (Gylfason, 2013a).

Models 2, 3, and 4 allow us to examine the possibility that the effectiveness of public participation depends on the subject matter of the proposal, by varying the reference category for the topic variables. In Model 2, we see that relative to the "other" category, "institutions" are less likely to be included in the constitution,

and "rights" are more likely. Likewise, in Model 3, we see that proposals dealing with "institutions" and "others" are both less likely than "rights." Finally, Model 4 shows that relative to "institutions," both "rights" and "others" are more likely to be included.

Although the probit coefficients are suggestive, their interpretation is not immediately clear, so the marginal effects of these variables are presented in Table 4, and Figure 1. Here we can see that the effects of all of these variables are quite small. The variables relating to the metadata of the proposal have such small effects that they hardly bear mention. It is notable however, that additional comments from members of the Constitutional Council did increase the likelihood of a proposal's inclusion in the draft constitution by one or two percent. Model 1 provides a nice comparison of the relative effects of being in the "institutions" and "rights" categories, with "rights" being 5% more likely to be included relative to "others" (though this is not quite significant), and "institutions" about 5% less likely. The strongest effect in Model 4 is that of the "rights" dummy variable. In Model 4, the marginal effect of moving from the "institutions" category to the "rights" category, is an increase in the probability that a proposal would be incorporated in the constitutional text of approximately 16%. This finding strongly confirms one of the key claims made in this chapter, and also agrees with the findings of Maboudi and Nadi (2016) in the Egyptian case.

Why might public participation have greater effects in the domain of rights? In many areas of the constitutional text there are clearly competing alternatives. For example, one controversial topic in the Icelandic political system concerns the number of electoral districts in their system of proportional representation. This choice has a significant impact on the balance of power between rural and urban interests in

Table 5.3: Probit Estimates

	Model 1	Model 2	Model 3	Model 4
(Intercept)	-1.29^{***}	-2.06^{***}	-1.58^{***}	-2.71^{***}
	(0.38)	(0.27)	(0.20)	(0.33)
Days elapsed	-0.02^{***}			
	(0.00)			
Length of proposal	0.00^{**}			
	(0.00)			
Num. Facebook comments	-0.01	-0.01	-0.01	-0.01
	(0.02)	(0.01)	(0.01)	(0.01)
Num. comms. from Council	0.17^{*}	0.20^{**}	0.21^{**}	0.20^{**}
	(0.07)	(0.06)	(0.06)	(0.06)
Orig. poster commenting	-0.21	-0.30	-0.29	-0.29
	(0.29)	(0.27)	(0.26)	(0.27)
Total submits by poster	0.05^{*}	0.04	0.04^{*}	0.04
	(0.02)	(0.02)	(0.02)	(0.02)
Submitted by NGO/CSO	-0.18			
	(0.39)			
Topic: Institutions	-0.74^{*}	-0.65^{*}	-1.14^{***}	
	(0.35)	(0.32)	(0.29)	
Topic: Rights	0.65^{*}	0.53^{*}		1.20^{***}
	(0.26)	(0.24)		(0.29)
Topic: Other			-0.44	0.72^{*}
			(0.25)	(0.32)
AIC	179.48	192.75	194.60	191.83
BIC	219.76	220.97	222.81	220.05
Log Likelihood	-79.74	-89.38	-90.30	-88.92
Deviance	159.48	178.75	180.60	177.83
Num. obs.	415	416	416	416

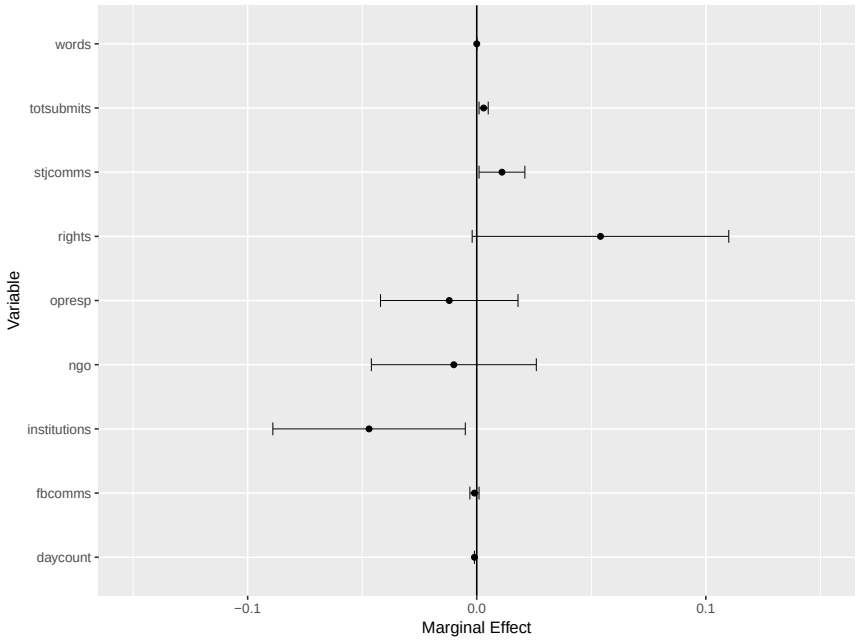
$^{***}p < 0.001$, $^{**}p < 0.01$, $^{*}p < 0.05$

Table 5.4: Marginal Effects for Model 1 and Model 4

	Model 1	Model 4
(Intercept)	-0.082^{*}	-0.237^{***}
	(0.032)	(0.036)
Days elapsed	-0.001^{**}	
	(0.000)	
Length of proposal	0.000^{*}	
	(0.000)	
Num. Facebook comments	-0.001	-0.001
	(0.001)	(0.001)
Num. comms. from Council	0.011^{*}	0.018^{**}
	(0.005)	(0.006)
Orig. poster commenting	-0.012	-0.022
	(0.015)	(0.018)
Total submits by poster	0.003^{*}	0.003
	(0.001)	(0.002)
Submitted by NGO/CSO	-0.010	
	(0.018)	
Topic: Institutions	-0.047^{*}	
	(0.021)	
Topic: Rights	0.054	0.161^{***}
	(0.028)	(0.045)
Topic: Others		0.087
		(0.047)
AIC	179.478	191.833
BIC	219.761	220.048
Log Likelihood	-79.739	-88.917
Deviance	159.478	177.833
Num. obs.	415	416

$^{***}p < 0.001$, $^{**}p < 0.01$, $^{*}p < 0.05$

Figure 5.3: Marginal Effects, Model 1



Iceland. Other politically salient decisions are essentially binary, as between a presidential system or a parliamentary system, with clear implications for many interested parties. These are areas where public participation is less likely to be influential, both because these decisions have clear costs and benefits for established elites, and because the drafters are likely to encounter conflicting proposals from the public. Moreover, changes in these areas often require a cascading series of edits to maintain a coherent text. However, in the area of rights, the proposals are more likely to be additive, rather than competitive. For example, a new class of persons can be added to the equal protection clause without creating conflicts with other areas of the text (as was in fact done in the Icelandic draft). The global trend has been to increase the number of rights in constitutions over time (Law and Versteeg, 2011), suggesting that rights in constitutions may operate with a ratchet-like mechanism in which

adding more rights is straightforward, but it is almost impossible to remove a right. Beyond this, it is likely that members of the public find rights more accessible than the intricacies of the translation of votes to seats in the legislature (though there were two suggestions from Icelanders that addressed exactly that).

There is also a more positive interpretation to put on some of the insignificant statistical result in this case. Null findings could be interpreted as evidence of fair process of evaluation of the suggestions submitted to the Constitutional Council. There is clearly little in the way of a systematic relationship between characteristics of the suggestions and the probability that they will be implemented (beyond the subject matter effect discussed above). Perhaps this is the best outcome, and evidence that the "best" suggestions were implemented regardless of other factors.

5.8 Why Did the Drafters Give Effect to Proposals from the Public?

Having established that the Icelandic drafters not only paid attention to the proposals from the public, but also included at least 29 of these proposals in their final draft, we must turn to the question of why. The explanation for this phenomenon relates to a number of elements in the context of constitution-making in Iceland, several of which have been touched on earlier in this chapter. First, the political context in Iceland between 2009 and 2012 involved a resurgence of democratic political activity alongside the deligitimation of political parties and institutions. It was this context of rejection of the political system that inspired the constitution-making process. The law that established the constitution-making process specifically forbade the president, government ministers, or members of parliament from standing for election to

the Constitutional Council (Althingi, 2010, Art. 6). The law further stipulated that the members of the Council should be bound only by their own convictions, and not by instructions from anyone else (Althingi, 2010, Art. 19). Alongside these legally required barriers between the Constitutional Council and the political establishment, the political parties evinced no interest in the work of the Council during its months of drafting. For the most part, civil society groups were not very active either (Author's interview with "XQPC," 13 March 2017, and "YIGY," 15 March 2017). The combination of these legal and practical factors meant that the drafters were quite isolated from the political system, and thus both more reliant on the public for information about what should go into the constitution, and unmoored from any prior policy commitments.

Relatedly, many of the Council members seem to have had concerns about the legitimacy of their appointment and about the relationship between their work and the role of parliament. Although the complaints about the legality of the original election to the Constituent Assembly are not creditable, the nature of the appointment process did tend to hang over the Council. The mandate of the Council was also somewhat unclear. Some members of the Council understood their role to be to draft a new constitution which the parliament would duly approve. Others understood their draft to be something that parliament would significantly amend. This difference of opinions persisted both in the Icelandic public and on the Council throughout the drafting process (Author's interview with "XQPC," 13 March 2017). Adding to this confusion about the fate of their draft in parliament was a worry on the part of some Council members that the draft could not be completed in the time

parliament had allowed (Author's interview with "GNEL," 15 March 2017).[26] These considerations pushed the Council members to take steps to shore up the legitimacy of their work, and to demonstrate the support of the public for their draft. Council members believed that giving significant effect to proposals from the public would give the draft sufficient legitimacy to carry it forward (Author's interview with "DLEA," 15 March 2017).

Finally, there is a real sense in which the simple explanation "No one told them not to,"[27] is the truth of how the Icelandic case can be explained in relation to more traditional examples of constitution making. The drafting process was somewhat ad hoc, without clear rules for how public input would take place or how it should relate to the drafting. In this context, the members of the Council had few reasons not to give attention to proposals from the public, and (as noted above) some rather strong incentives to be seen to be doing so. One member of the Council suggested that "There was really no cost in considering sensible suggestions" (Author's interview with "YIGY," 15 March 2017). In this relatively apolitical context, proposals from the public were much more valuable and influential than they are in most law-drafting processes.

5.9 A Failed Constitutional Revolution?

At the time of writing, this draft constitution still has not been ratified by the Icelandic parliament, and the draft remains in a sort of limbo. There is a small movement to keep constitutional reform on the political agenda, but they face opposition from

[26]Note that most successful constitution-making process in recent years have taken between two and five years (Updike Toler, 2014).

[27]As proposed by one early commenter on this project.

some of the political parties and entrenched interest groups. Constitutional revolution can be a problematic concept, but may be a useful way of thinking about what was attempted in Iceland. As used here, it is meant in the sense defined by Gary Jacobsohn, which includes the idea of renewal and paradigmatic shift (Jacobsohn, 2012). This seems to be how the people of Iceland understood their broader endeavor in the aftermath of the financial crisis—rebuilding what the "banksters" (as they called them), had destroyed. In this sense, the constitutional revolution would have been deemed a success if it satisfied two conditions. First, the new constitution would have to reflect the demands of the people, and not merely serve as another example of elite domination of popular preferences. Second, and perhaps most obviously, there would have to be real constitutional change. In the event, the analysis undertaken in this paper shows that the constitutional revolution was a success with regard to the first requirement, but not the second. It is possible that the success of the constitutional revolution in achieving real, popularly motivated change in the text of the constitution, ultimately doomed the draft to languish un-ratified. Change took too long, and in the interim, the old regime returned to favor with enough of the electorate to regain power.

The pots and pans revolution destabilized Icelandic politics, and we do not yet know what the new political equilibrium will look like. While the Independence Party did regain some of its vote share in the 2013 election, a number of new parties have also continued to spring up. This uncertainty persisted in national polls between 2013 and 2016. In a poll in March 2015, the Pirate Party had a plurality of support from Icelanders, beating the Independence Party with a predicted vote share of 23.9%, compared to 23.4% for Independence (Ward, 2015). One of the members of parliament from the Pirate Party, Jón Þór Ólafsson was one of the most active participants in

Table 5.5: Election Results

	2007		*2009*		*2013*		*2016*	
Party	*%*	*Seats*	*%*	*Seats*	*%*	*Seats*	*%*	*Seats*
Independence Party	36.6	25	23.7	16	26.7	19	29.0	21
Progressive Party	11.7	7	14.8	9	24.4	19	11.5	8
Social Democratic Alliance	26.8	18	29.8	20	12.9	9	5.7	3
Left-Green Movement	14.3	9	21.7	14	10.9	7	15.9	10
Liberal Party	7.3	4	2.2	0				
Iceland's Movement	3.3	0						
Bright Future					8.2	6	7.2	4
Pirate Party					5.1	3	14.5	10
Dawn					3.1	0	1.7	0
Household's Party					3.0	0		
Iceland Democratic Party					2.5	0		
Right Green People's Party					1.7	0		
Rainbow Party					1.1	0		
Reform Party							10.5	7
People's Party							3.5	0

the online discussion in 2011, and the party has expressed strong interest in reviving the issue of constitutional reform. The Pirates led in the polls from the Spring of 2015 until the Spring of 2016, giving renewed hope to supporters of the 2011 draft constitution. As it turned out, the Independence Party won the most seats in the October 2016 election, and formed a center-right coalition government with the Reform Party and the Bright Future party. These parties (Independence in particular) have opposed the draft produced by the Constitutional Council, and are unlikely to move for ratification. Yet changes to the constitution remain a subject of debate both within Icelandic society, and in the parliament. A January 2017 poll conducted by the Social Science Institute of the University of Iceland showed that public support for both the 2011 draft (58%), and constitutional reform in general (66%) remain high (Gylfason, 2017). This level of support is relatively unchanged from 2011.

5.10 Conclusion

On the whole, Iceland's constitution drafting process almost lived up to the hype. If not actually crowdsourced, the 2011 constitution drafting process was a "fully open and transparent" process, as described by the Constitutional Council (Stjórnlagaráð, 2011). Council members were highly engaged with the proposals submitted to the Council website, and it is clear that many of these proposals were reflected in the text of the constitution. This really is a remarkable phenomenon. Individuals have no means of validating their claim to speak for the people, broadly understood. They also have no means of ensuring that the Council would pay any attention to their suggestion. In a strategic understanding of political behavior, this outcome does not make any immediate sense. Nonetheless, the evidence clearly indicates that the members of the Constitutional Council took public participation seriously, and included many of the suggestions of the public in the final draft. The quality of participation in this case was quite high, and should lend support to initiatives toward similar processes in other cases.

The impact of public participation is almost certainly much higher here than in any other case (though measurements of this kind of impact are quite difficult, particularly when the number of comments is orders of magnitude higher). I argue that the most significant reason for the greater impact was the absence of political parties. The drafters in Iceland were not bound to follow any agenda or program for constitution change other than the mandate they were individually given by the voters. Furthermore, in the context of political upheaval in which the drafting took place, popular participation had taken on a particular significance. Yet, despite the best efforts of the members of the Constitutional Council and their allies, the con-

stitution was not ratified. It may be the case that the kind of drafting process that facilitates a high impact from public participation also decreases the likelihood that the draft can make it through ratification in the regular legislative assembly, as none of the parties have a significant stake in the document's ratification.

It is relatively rare in political science to have our cynicism challenged by a case in which there is an unexpectedly positive phenomenon. Yet that seems to be the case in this analysis of public participation in drafting a new constitution for Iceland in 2011. Here, public participation was meaningful. Proposals and comments from the public undoubtedly influenced the draft that the Council produced. The process on the whole should encourage us about the prospects for more democratic participation in an ever-more interconnected world.

Chapter 6

Synthesis and Conclusion

6.1 Introduction

As we have seen, public participation is a growing part of constitution-making processes, and is likely to play an increasingly important role as technologies for public engagement advance. This move toward public involvement has included recognition of an international legal right for the public to be consulted, diverse means of consultation, and strong evidence of significant public interest in participating. What has been lacking to this point has been a careful analysis of the extent to which public participation actually impacts the constitutional text.

The preceding chapters have investigated the extent and quality of public participation in three highly-participatory cases of constitution making. Further, they have sought to measure the impact of that participation with reference to the constitutional texts. The analysis shows that the level of impact is surprisingly high in Iceland's rather unique constitution-making process, and surprisingly low in South Africa's much celebrated experience. The Brazilian case is more complex, but shows some impact from public participation, though not on the major issues of controversy

in the text.

Taken together, the three case studies then give support to the theory described at the beginning of this dissertation, which proposed that the impact of public participation is determined primarily by the nature of the political parties active in the drafting process – to wit: weak parties allow for public input, while strong parties effectively block it. The case of Iceland carries this argument to its extreme, showing that in a case which did not involve political parties in the drafting, the level of impact from public participation was immense.

6.2 Reading the Three Cases Together

While the three cases are significantly separated in time and geography (three continents and over twenty years), the forms of public participation are quite similar, as are the progressive intentions of many of the drafters. It also bears note that the technology used in each case was a significant advance on all the cases before it. Brazil's SAIC database was very impressive for the time, allowing the interested reader to quickly determine the level of support for various kinds of constitutional provisions across demographic categories. South Africa's extensive use of television and radio repeats the work in outreach conducted in Brazil, and went even farther as the first constituent assembly to post its work-in-progress on the Internet. Iceland's use of social media and live streaming to facilitate public engagement was very natural in its time, but was still a groundbreaking advance in transparency and participation that has inspired similar campaigns in Mexico City and Chile.

While each case has its own unique historical and political context, they share a common theme of political renewal after a major failure of some kind. The degree

of failure differs greatly – from the abuses of apartheid to the much less concerning collapse of a financial system. But the new constitutions drafted in the processes considered in this dissertation each responds to a moment of political crisis and renewal. And each of the new constitutions sought to revolutionize the political system to varying degrees.

Though the cases differ in many aspects that complicate the analysis, the variation on the key independent variable would be difficult to achieve with any other trio of cases. South Africa's ANC is surely one of the most disciplined parties in the democratic world, while Brazil's political parties' endemic weakness endures to this day. Putting these three cases together maintains to a significant degree the level of public participation, while including a great deal of variation in the strength of political parties. The outcome in Brazil seems to some degree dependent on the unique innovation of the popular amendments. Yet in the South African case there were presentations by interest groups, mass demonstrations (though fewer), and petitions. Drafters could be quite certain that the majority of the members of the public had a particular view about issues like capital punishment, and yet chose not to follow the wishes of the public in the constitution. Petitions are not very different from popular amendments, but in South Africa the petitions had no effect. This suggests that the explanation for the effectiveness of the popular amendments in Brazil was not due solely to this procedural innovation, but was facilitated by the political context.

Certainly, there are other explanatory factors that may matter a great deal – the ambitions of presidents for example. However, taken together, these cases present strong evidence for the contention that the strength of political parties is the key variable explaining the variation in levels of impact in constitution-making processes.

The case studies have demonstrated dynamics that are largely in line with the theory presented at the beginning of this dissertation, and also in line with some of our larger expectations about how political parties function. While there are other intervening factors in each case, the nature of the political parties was immensely influential in determining the level of impact from public participation that we observe. South Africa's constitution makers invested significant amounts of time and money in facilitating public participation, only to see the text be developed in terms of compromises between two very disciplined and programmatic political parties. Brazil's frenetic drafting process witnessed a remarkable level of public engagement in many ways, and the weakness of the political parties created a space in which the demands of civil society groups could be turned into constitutional text. Iceland's decision to draft a non-partisan constitution led to a drafting process in which public input was both highly valued and unhindered. Leaving aside the larger judgments of the quality of these constitutions for a moment, we can say with some confidence that strong parties are inimical to effective public participation.

6.3 Other Concerns

6.3.1 The Quality of the Texts Produced

The quality of a constitutional text is a difficult thing to measure, and it has not been a focus of analysis in this dissertation. Nonetheless, it does seem helpful to make a few comments on the issue as we conclude this work, as the quality of the constitution produced is in part a reflection of the relative success or failure of the process, and relates in part to the impact of public participation.

The Brazilian constitution is famously long (currently 64,488 words – surpassed

only by India, Nigeria, and several US states) and yet was incomplete in many ways when it was ratified. As noted in the chapter on this case, President Sarney was unsparing in his criticism of the text at the close of the drafting process, asserting that the constitution would make the country ungovernable. That has not turned out to be the case, but the constitution contained many internal contradictions and was not truly workable as initially ratified. In fact, to this day, some relatively routine legislative actions (such as changes in the rate of tax on ethanol (Moraes and Zilberman, 2014, 114)) have required regular constitutional amendments. The Brazilian constitution is famously detailed, including provisions on many topics not addressed by most other constitutions, such as the right to food (Art. 6), and an entire section on sports (Chapter III, S. III). In the Comparative Constitutions Project's (CCP) inventory of textual content, the text is highly comprehensive (ranked 20th in scope, and 10th in the number of rights).

The South African constitution is widely recognized by scholars as an exemplary text (Simeon, 1998; Sunstein, 2001; Kende, 2003; Alence, 2004). US Justice of the Supreme Court Ruth Bader Ginsburg once infamously implied that the South African constitution might be better than the American constitution as a model for other countries writing a new charter. She said: "That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary... It really is, I think, a great piece of work that was done" (Keating, 2012). Legal scholar Cass Sunstein called the South African charter "the most admirable constitution in the history of the world" (Sunstein, 2001, 416). Its domestic reputation began on a very high note, but has since faced increasing criticism, as a younger generation faces a lack of progress toward social justice, and unfulfilled promises for social and economic transformation in the two decades since the end

of apartheid (Terreblanche, 2015; Mthombothi, 2017). The extent to which this can be blamed on the constitution itself is a matter of current debate in South Africa (Calland, 2017). If we look at the text through the lens of the content as inventoried by the CCP, we see that it is a reasonably comprehensive text, and provides extensive human rights protections. Furthermore, the text provides for a number of very serious checks on the abuse of government power through the Chapter 9 institutions, such as the Public Protector.

The Icelandic draft constitution of 2011 was not quite as spartan as the text it was intended to replace, but was still quite short, and less detailed than most constitutions currently in force. While it added some new rights, it still failed to address some important topics in constitutional law, such as the rights of those accused of crimes, economic freedoms, and social rights. In its brevity, it has of course missed some other things, and critics of the text noted imprecise language at various points (Guillenchmidt et al., 2013). However, it responded to input from the public in adding new mechanisms for direct public involvement in making legislation, and created new rights as yet unheard of in other countries, such as the right to access the Internet.

6.3.2 Legitimacy

Participatory processes are (at least anecdotally) strongly associated with perceptions of legitimacy in the constitutions they produce. This is a matter that demands further empirical research on at least two accounts. The first is a worry that this legitimacy bonus is based on false statements on the part of constitution makers, and inaccurate judgments on the part of the public. It is clearly in the interests of politicians to give the impression that public participation was far more meaningful than it actually

was. This may be behind some of the rather fulsome statements made by Brazilian politicians in the interviews conducted for this dissertation. At the same time, for a citizen participant, the informational burden in assessing the impact of participation means that they have little to go on beside the claims made by these politicians.

The second concern impacts the successors to this drafting generation: how long does this participation bonus last? As noted above, the South African constitution is now facing some criticism from South Africans who believe that the compromises made in the drafting process have served to limit the degree and pace of economic and social transformation in the country. In defending the constitution against this charge, one South African academic pointed to the participatory nature of the drafting process as a bulwark of legitimacy for the constitution, such that its legitimacy had until recently been beyond question. This may suggest that the half-life of the legitimacy bonus is about a generation – in line with Thomas Jefferson's suggestion about the life span of a constitution (19 years) (Kurland and Lerner, 1986, 392-397)

6.3.3 The Quality of Democracy

This dissertation has not been concerned in the main with the quality of democracy either before or after these new constitutions were produced. In other works cited here – principally Eisenstadt et al. (2017a) – that was the main outcome of interest. In two of the cases considered here, Brazil and South Africa, the new constitution was drafted during a transition to democracy. In both cases, the level of democracy is better by most metrics now than it was prior to the ratification of the new constitution. However, both countries remain deeply flawed in their practice of democracy today.

Furthermore, in both cases their defects of democracy are related to the political parties that dominated the analysis here. In the case of Brazil, the systemic weakness of the political parties continues to support a personalistic and corrupt style of politics. While in South Africa, the ANC's apparently unbreakable hold on power has led to concerning levels of corruption in some quarters, and a related lack of accountability for the government. It is unclear whether the situation would be any different if the constitutions had been drafted without public input. Again, Iceland is a strange outlier. The country has had very high levels of democracy for decades, and since the constitution has not yet entered into force, it has had no impact on the level of democracy.[1]

6.3.4 Guidance for Constitution Makers

To this point I have avoided addressing most normative concerns, and have not offered much that might be useful to those actually involved in the drafting of new constitutions. Assuming that designers of constitution-making processes genuinely seek to have effective input from the public, each case should be seen in somewhat cautionary terms, and yet each also offers some positive lessons.

Turning to the cautionary side, there are a number of points that become clear from these cases. First, one should be very alive to the possibility that public consultations will produce such a volume of material that it will be very difficult to properly process and distill. Even in Iceland, with its small number of submissions, it was a significant added burden for the drafters to consider input from the public in addition

[1]Though some would argue that the decision of parliament not to ratify the new constitution was a democratic failure (Gylfason, 2013b; Lessig, 2016).

to the usual discussions within the drafting body. When we consider cases like Brazil – with over 72,000 submissions – it becomes obvious that the task of processing the written material from the public and making it useful to the drafters requires a significant investment in manpower. The current constitutional amendment consultations in South Africa (on revision of Sec. 25 of the constitution) have apparently produced more than 700,000 submissions from the public (Timeslive, 2018). It is inconceivable that the drafters of this rather limited amendment will read even a small percentage of these. If all the drafters consume is a summary table of the content of these submissions from the public, one has to ask if a written submission is of any more value than a petition or an opinion poll. Second, one should consider the extent to which public participation can reasonably be expected to make a difference, and pitch the appeal for public comments in light of this. If, for example, issues of interest to both the public and politicians are of such weight and immediacy that no volume of comments from the public could change the outcome, one should perhaps consider whether having a public consultation process is effective or honest. It could be that inviting members of the public to speak on the issue (even if they are not heard) will yield a boost to perceptions of legitimacy, but that is a matter for future research. The current South African experience suggests that such legitimacy bonuses have a relatively short life span.

There are also some clear positives in this story. The Icelandic case demonstrates that it is possible to draft a constitution in conditions of real-time transparency. Transparency is a growing area for international activism, and we should expect that demands for transparency in constitution-making processes will be on the increase in the years to come. The debate on this issue is certainly not settled, as the South African case demonstrates the value of giving drafters space to decide

contentious issues in privacy. However, Iceland's experience also shows that drafting need not take place in a closed room with no public record of the proceedings. Live streaming of plenary sessions is most likely the way of the future. The effective combination of legal drafting and boots-on-the-ground activism in Brazil suggests an effective path for organizations seeking to effect constitutional change. The concrete proposal of constitutional text backed by massive demonstrations of public support for those proposals creates a situation in which the outcome of that activism is clear to many – both politicians and the public. Unlike isolated letters from individual constituents, or even signatures on petitions, these discrete demands backed by public pressure create conditions under which it may be costly for politicians to ignore the demands of the public. Beyond this, we should be encouraged to find that members of the public can contribute to a constitution-making process with a great deal with impressively well-informed and careful written submissions. The cases considered here were not filled with the kinds of cranks that many politicians assume would turn up.

In a constitution-making process there are many matters that political actors can determine. They can decide on the nature and composition of the drafting body, the rules of procedure, and the ratification process. But they cannot make changes to the political culture by fiat. As much as constitution-making processes can mark a clear break with the past and the dawn of a new era in a country's history, no one can alter the larger social and political context. There is then an element of path dependency in this. In countries with long histories of strong parties, it is difficult to see how public participation could be made effective. The South African drafters said very hopeful things about public participation at the time, but both the analysis conducted here and their own reflections years later show that public participation did not make a great deal of difference. If public participation is to be meaningful in

countries with that kind of political context, it may be necessary to follow Iceland, and elect a special assembly without the participation of parties. However, this too comes with risks – most importantly that the constitution will not be passed into law if established political groups have no stake in its ratification. Also, there are some indications that a constitution drafted in such a way may have blind spots with regard to the pressing issues of governance.

6.4 Final Thoughts

This dissertation has touched on a number of themes – the advantages and disadvantages of strong parties, the competence of average citizens as drafters of constitutions, the ability of drafters to take public input into account, and the possibility that public participation may produce more heat than light. We have seen that public participation can really make a difference in the constitutional text when the political context provides an opening. I have stressed the importance of political parties throughout, and maintain that the variation in party strength is the key explanatory factor. The findings here suggest that a more clear-eyed approach to popular participation is required both in scholarship and in practice. Public participation is but one part of a momentous period in a country's political history, and its effectiveness cannot be assumed.

Appendices

Appendix A

Appendix to Chapter 4

A.1 Details of Included Popular Amendments

- PE00007-5
  - 34,240 signatures
  - Supported by various organs of the RC Church in Rio de Janeiro.
  - That abortion should be illegal.
  - Art. 227 includes right to life, though no explicit ban on abortion.
  - That the family unit should be protected by the state.
  - Art. 226 offers the family the protection of the state.
  - That violence within families should be prevented by the law
  - Art. 226 includes this.
  - That common law marriages would be recognized.
  - Art. 226 includes this.
  - That religious marriage would have civil effects.

  - Art. 226 includes this.
  - That there be state assistance to maternal-child issues
  - Art. 227 includes this.

- PE00013-0
  - 283,381 signatures
  - Supported by the CNBB
  - That payment should be in money and to a level that would provide necessities of life.
  - Art. 7 (IV) mandates a minimum wage that can provide the necessities of life.
  - That the right to property should be connected to its social function.
  - Art. 5 includes this.
  - That rural property that does not fulfil its social function may be redistributed for the purpose of agrarian reform.
  - Art. 184 includes this.

- PE00018-1
  - 30,521 signatures
  - Supported by medical and dental associations in Mato Grosso do Sul
  - That it is the duty of the various levels of government to support public health.
  - Art. 23 and 196 include this.

  - That the federal government should spend at least 13% on health, the lower levels 25%.
  - This specific is not included, but each level has responsibility.

- PE00020-2
  - 42,444 signatures
  - Supported by women's groups
  - That equality be guaranteed (including a list of classifications)
  - Article 5 does much of this.
  - That differences in salary on the basis of gender or marital status be banned.
  - Art. 7 includes this.
  - Protection of job and salary for pregnant women.
  - Art. 7 includes this.
  - That the state give protection to families.
  - Art. 226 does this.
  - That the rights and duties in marriage should be equal.
  - Art. 226 does this.
  - That the state guarantee necessities of life to children, including food, medicine, and education.
  - Arts. 208 and 227 include this.
  - That the state not interfere in family planning.

  - Art. 226 does this.

- PE00025-3
  - 43,960 signatures
  - Supported by cooperative organizations.
  - That cooperatives be allowed to form without interference from the state.
  - Art. 5 does this.
  - That cooperatives receive special treatment with regard to taxation.
  - Art. 146 does this.

- PE00029-6
  - 37,400 signatures
  - Supported by state and local governments of Rio Grande do Sul.
  - That the creation, merger, or dismemberment of municipalities would follow state law, and that there be prior public consultation about these actions.
  - The exact language of this popular amendment is included in the final constitution in Art. 18 S 4

- PE00035-1
  - 30,000 signatures
  - Supported by business/industrial federations in São Paulo

  - That the economic order have as its purpose the satisfaction of the necessities of life, the well-being of the people, liberty of initiative, private ownership of the means of production, and the rights of workers.
  - This is partially included in Art. 170.
  - That there be free competition in the economy.
  - Art. 170 does this.
  - That property have a social function, but be protected from abuse of economic power.
  - Art. 5 and Art. 170 have some of this.
  - That the right to private property be guaranteed.
  - Art. 5 does this.

- PE00036-9
  - 418,052 signatures
  - Supported by business/industrial federations in São Paulo
  - That entities created by industry or trade for training, recreation, or social assistance for workers be allowed to continue as they are presently organized and funded.
  - Art. 149 provides for this.
  - Art. 150 VI(b) addresses some of this as well.

- PE00040-7
  - 41,114 signatures

  - Supported by academic groups (anthropology, geology, science)
  - That indigenous peoples have special rights to the protection of their organizations, customs, clothing, language, and land.
  - Art. 231 S 2 does this.
  - That the lands of indigenous peoples be protected.
  - Art. 231 S 1 does this.
  - That natural resource exploitation on indigenous land requires the authorization of the federal government and the consent of the indigenous people.
  - Art. 231 S 3 does this.
  - That indigenous groups not be allowed to be removed from their lands
  - Art. 231 S 5 does this.
  - That prior laws that exploit indigenous peoples be declared null.
  - Art. 231 S 6 does this.

- PE00048-2
  - 14,717 signatures (did not meet threshold)
  - Supported by federation of engineers, association of industrial technologists, and association of geologists
  - That public education be free and secular.
  - Free part is found in Art. 206
  - That there be freedom of public expressions of thought and information.

  - Art. 220 does this.
  - That censorship be banned.
  - Art. 220 S 2 does this.
  - That primary education be in Portuguese, with the exception that indigenous peoples be enabled to study in their native language.
  - Art. 210 S 2 does this.
  - That states and municipalities regulate their various responsibilities with regard to education.
  - Arts. 211 and 212 do this.

- PE00054-7
  - 400,000 signatures
  - Supported by workers group, agricultural workers' group, landless workers' group
  - The introductory language is included almost verbatim in Art. 7.
  - That the minimum salary would be fixed by law, and nationally unified.
  - Art. 7 does this.
  - That the minimum salary be sufficient for the necessities of life.
  - Art. 7 does this.
  - That the salary at night will be higher than the salary by day.
  - Art. 7 (IX) does this.
  - Limitation of work day to 8 hours, and work week to 40 hours.

  - Art. 7 (XIII) does this.
  - That there be paid maternity leave.
  - Art. 7 (XVIII) offers maternity leave without prejudice to employment or wages.
  - That hygiene and safety in the workplace be improved.
  - Art. 7 (XXII)
  - That differences in salary on the base of race, color, etc. be prohibited.
  - Art. 7 (XXX) does this.
  - That child labor (14 years) be prohibited.
  - Art. 7 (XXXIII) does this.
  - That retirement be provided to men after 30 years of work, and to women after 25 years of work.
  - Art. 40 (III b) does this.
  - That there be freedom to form trade unions.
  - Art. 8 does this.

- PE00055-5
  - 200,000 signatures
  - Supported by labor and rural workers associations.
  - That the state should regulate economic activity, including mining, hydro-electric resources, and national development plans.
  - Art. 23 does this.

- PE00060-1
  - 42,226 signatures
  - Supported by bank workers' associations
  - That workers have a right to profit sharing.
  - Art. 7 (XI) does this.
  - That workers have the right to be represented in the governance of companies.
  - Arts. 10 and 11 do this.
- PE00063-6
  - 131,000 signatures.
  - Supported by national associations of engineers and architects.
  - That urban property must fulfill its social function, and may be expropriated only with compensation.
  - Art. 182 does this.
- PE00066-1
  - 272,624 signatures
  - Supported by workers' groups, including CUT.
  - That there be a national minimum wage that satisfies basic necessities of life.
  - Art. 7 (IV) does this.

  - This is much in line with PE00013-0, and PE00054-7.
  - That there be a special family salary level.
  - Art. 7 (XII) does this.
  - That the salary at night be higher than the salary during the day.
  - Art. 7 (IX) does this.
  - Basically identical to PE00054-7.

- PE00089-0
  - 33,000 signatures
  - Supported by a monastery and a couple of community associations.
  - That the federal government have the power to expropriate property in exchange for just compensation.
  - Arts. 182 and 184 do this.

- PE00098-9
  - 43,275 signatures.
  - Supported by agricultural, cooperative, and rural societies.
  - That the right to private property be guaranteed.
  - Art. 5 (XXII) does this.
  - That property should fulfill its social function.
  - Art. 5 (XXIII) does this.

- PE00102-1

  - 39,247 signatures.
  - Supported by the military police of Goiás, and associations of retired officers.
  - That no one can be imprisoned unless they were caught committing a crime, or a competent judge ordered it.
  - Art. 5 (LXI) does this.

- PE00110-1
  - 36,441 signatures.
  - Supported by associations representing cleaning and maintenance companies.
  - That Art. 13, section XXV in the Projeto de Constituição da Comissão de Sistematização be removed.
  - The language was removed from the final draft of the constitution.

A.2 Additional Tables Summarizing SAIC Data

Table A.1: Geographical Distribution of SAIC Submissions

States	# in SAIC	% of SAIC	% of Population	Ratio
Distrito Federal	1879	2.59	0.99	2.60
Roraima	106	0.15	0.07	2.15
Paraná	9682	13.32	6.40	2.08
Minas Gerais	10960	15.08	11.27	1.34
Mato Grosso do Sul	1095	1.51	1.16	1.30
Santa Catarina	2777	3.82	3.04	1.26
Paraíba	1932	2.66	2.32	1.15
Goiás	2163	2.98	2.67	1.12
Piauí	1389	1.91	1.81	1.06
Alagoas	1253	1.72	1.66	1.04
Amapá	110	0.15	0.15	1.02
São Paulo	14721	20.25	20.95	0.97
Rio Grande do Sul	4420	6.08	6.56	0.93
Rio Grande do Norte	927	1.28	1.60	0.80
Pernambuco	2902	3.99	5.15	0.77
Espírito Santo	947	1.30	1.70	0.76
Ceará	2445	3.36	4.44	0.76
Mato Grosso	521	0.72	0.97	0.74
Maranhão	1808	2.49	3.38	0.74
Rio de Janeiro	4843	6.66	9.48	0.70
Bahia	3540	4.87	7.92	0.61
Sergipe	424	0.58	0.95	0.61
Amazonas	522	0.72	1.20	0.60
Rondônia	152	0.21	0.42	0.50
Acre	83	0.11	0.25	0.45
Pará	891	1.23	2.90	0.42
Tocantins	0	0.00	0.61	0.00
Not specified	190	0.26	0.00	

Table A.2: Gender of SAIC Participants

Gender	# in SAIC	% in SAIC	% in Population	Ratio
Male	45119	65.58	49.3	1.32
Female	23679	34.42	50.7	0.68
Not specified	3881			

Table A.3: Residences of SAIC Participants

Residence	# in SAIC	% in SAIC	% in Population	Ratio
Urban	58988	88.69	67.7	1.31
Rural	7520	11.31	32.3	0.35
Not specified	5867			

Table A.4: Ages of SAIC Participants

Age	Count	Percentage
10 to 14	4904	7.21
15 to 19	11569	17.02
20 to 24	8982	13.21
25 to 29	8754	12.88
30 to 39	13518	19.89
40 to 49	8801	12.95
50 to 59	6093	8.96
Over 59	155	0.23
Not specified	4703	

Table A.5: Occupations of SAIC Participants

Industry	Count	Percentage
Agriculture, Fishing, and Extractive Industries	3691	5.85
Manufacturing Industry	1745	2.77
Construction Industry	1248	1.98
Other Industrial Activities	1775	2.81
Trade in Goods	4284	6.79
Service Sector	9346	14.81
Public Administration	11363	18.01
Social Activities	2573	4.08
Transportation Industry	950	1.51
Communication	2578	4.09
Other Activities	23534	37.30
Not specified	9589	

Table A.6: Education Level of SAIC Participants

Level of Education	Number	Percentage
Illiterate	686	1.01
Primary Education Incomplete	20993	30.85
Secondary Education Incomplete	12769	18.76
Secondary Education Complete	13191	19.38
Tertiary Education Incomplete	7011	10.30
Tertiary Education Complete	11128	16.35
Post-Graduate Degree	1726	2.54
Not specified	4624	

Table A.7: Income Level of SAIC Participants

Income Brackets	Count	Percentage
Without income	14364	22.14
Up to the minimum salary	11625	17.92
Between 1 and 2 M.S.	10123	15.60
Between 2 and 3 M.S.	7416	11.43
Between 3 and 5 M.S.	7713	11.89
Between 5 and 10 M.S.	7516	11.58
Between 10 and 20 M.S.	4170	6.43
More than 20 minimum salaries	1892	2.92
Not specified	7793	

Appendix B

Appendix to Chapter 5

Table B.1: Changes in Drafts in Response to Submissions from the Public

Date	Participant Name	Change in draft constitution
6-Apr-11	Árni Stefán Árnason	Draft 10[1] adds a provision protect the rights of animals.
14-Apr-11	Olgeir Gestsson	Draft 7 adds provisions against government ministers voting as MPs.
15-Apr-11	Hjalti Hugason	Draft 11 places the religious articles in the human rights section, and adds protections for a broader category of organizations.
17-Apr-11	Lúðvíg Lárusson	Draft 7 bans conscription.
18-Apr-11	Herdís Þorvaldsdóttir	Draft 15 adds specific proections for vegetation, soil, etc. and promises that previous damage will be repaired.
28-Apr-11	Hans Tómas Björnsson	Draft 7 bans discrimination on the basis of genotype.
28-Apr-11	Samtök hernaðarandstæðinga	Draft 7 bans conscription.

[1]In this table, draft numbers refer to the number of the council meeting. Not all meetings produced a new draft. The first new draft was published after the fourth meeting (Draft 4), the next was published after the seventh meeting (Draft 7).

29-Apr-11	Kristinn Már Ársælsson	Draft 12 adds language requiring the government to keep minutes of meetings and to make this public.
29-Apr-11	Kristinn Már Ársælsson	Draft 12 adds requirements about publishing information about financial contributions to candidates and parties.
29-Apr-11	Kristinn Már Ársælsson	Draft 12 adds language on referenda and initiatives in line with this proposal.
2-May-11	Valdimar Samuelsson	Draft 4 changes the language on gender discrimination in line with this proposal.
5-May-11	Sigurður Jónas Eggertsson	Draft 10 adds new provisions to the article on education that is in line with this proposal.
8-May-11	Bergsteinn Jónsson	Draft 8 changes child rights language in line with this proposal.
9-May-11	Þórlaug Ágústsdóttir	Draft 17 introduces new language in the preamble that reflects this proposal.
9-May-11	Guðmundur Hörður Guðmundsson	Draft 10 adds language on environmental protection that includes the interests of future generations, as proposed here.
15-May-11	Hjörtur Hjartarson	Draft 18 lowers the necessary threshold for a popular intitiative from 15% to 10%, as proposed here.
20-May-11	Örn Leó Guðmundsson	Draft 10 includes the fact that the natural resources are the "everlasting" property of the people, as proposed here.
27-May-11	Frosti Sigurjónsson	Draft 18 lowers the necessary threshold for a popular intitiative from 15% to 10%, as proposed here.
27-May-11	Smári McCarthy	Draft 15 removes language allowing police to attend public assemblies and replaces this with language about restrictions in a democratic society.
30-May-11	Kristinn Már Ársælsson	Draft 11 removes some speculative language about the ability of the Althingi to hold secret meetings.
16-Jun-11	Jón Guðmundsson	Draft 17 changes the provision on freedom of association in line with this proposal.
21-Jun-11	Þórlaug Ágústsdóttir	Draft 14 adds a right to access the internet.

23-Jun-11	Sigrún Helgadóttir	Draft 15 makes changes to the protections of nature and the environment in line with this proposal.
24-Jun-11	Svavar Kjarrval Lúthersson	Draft 16 makes internet access unrestricted.
28-Jun-11	Nils Gíslason	Draft 16 removes the phrase "ever expanding" from the discussion of human rights protections, as was proposed here.
1-Jul-11	Sigurður Hr. Sigurðsson	Draft 16 requires asylum seekers to receive a speedy trial.
4-Jul-11	Svavar Kjarrval Lúthersson	Draft 16 changes referendum language to follow this proposal.
5-Jul-11	Daði Ingólfsson	Draft 18 removes government protection of religious groups, as proposed here.
5-Jul-11	Jakob Björnsson	Draft 16 changes language on the preservation of natural resources in line with this proposal.

Full lists of topics

Table B.2: Distribution of Topics in Public Comments

Topic	Number	Percentage
Legislature reform	57	18.39%
Electoral reform	56	18.06%
Other human rights	50	16.13%
Established church	41	13.23%
Executive reform	39	12.58%
Equality	25	8.06%
Property rights	25	8.06%
Direct democracy	23	7.42%
Judiciary reform	18	5.81%
Natural resources	18	5.81%
Financial regulation reform	17	5.48%
Environmental protection	14	4.52%
Neutrality/Pacifism	11	3.55%
Freedom of information	10	3.23%
Privacy	10	3.23%
Taxation	8	2.58%
Const. amend. rules	6	1.94%
Citizenship	5	1.61%
Health rights	5	1.61%
Subsistence rights/Min wage	5	1.61%
Dignity	4	1.29%
Official language	4	1.29%
Animal welfare	3	0.97%
Education	3	0.97%
Right to life	3	0.97%
Shelter	3	0.97%
Children's rights	2	0.65%
Free expression	2	0.65%
Intellectual property	2	0.65%
Right to public assistance	2	0.65%

Table B.3: Distribution of Topics in Facebook Comment Threads

Topic	Number	Percentage
Established church	433	18.92%
Electoral reform	240	10.48%
Other human rights	228	9.96%
Legislature reform	227	9.92%
Executive reform	162	7.08%
Financial regulation reform	151	6.60%
Property rights	134	5.85%
Equality	113	4.94%
Direct democracy	98	4.28%
Judiciary reform	51	2.23%
Natural resources	46	2.01%
Freedom of information	39	1.70%
Environmental protection	39	1.70%
Privacy	37	1.62%
Neutrality/Pacifism	36	1.57%
Animal welfare	32	1.40%
Official language	31	2.35%
Const. amend rules	27	1.18%
Education	25	1.09%
Subsistence rights/Min wage	24	1.05%
Taxation	22	0.96%
Citizenship	17	0.74%
Health	16	0.70%
Dignity	15	0.66%
Intellectual property	11	0.48%
Children's rights	10	0.44%
Free express.	10	0.44%
Right to public assistance	6	0.26%
Shelter	5	0.22%
Right to life	4	0.17%

Expanded Statistical Models

Table B.4: Statistical Models with Expanded Topics

	Model 1	*Model 2*	*Model 3*	*Model 4*
(Intercept)	-1.53^{***}	-1.29^{***}	-2.69^{*}	-2.89^{**}
	(0.38)	(0.38)	(1.12)	(1.03)
Days elapsed	-0.02^{***}	-0.02^{***}	-0.02^{***}	-0.02^{***}
	(0.01)	(0.00)	(0.01)	(0.01)
Wordcount	0.00^{*}	0.00^{**}	0.00^{**}	0.00^{**}
	(0.00)	(0.00)	(0.00)	(0.00)
Num. FB comms.	-0.01	-0.01	-0.00	-0.00
	(0.02)	(0.02)	(0.02)	(0.02)
C.C. memb's commenting	0.19^{*}	0.20^{*}	0.20^{*}	0.19^{*}
	(0.09)	(0.08)	(0.08)	(0.08)
Orig. poster commenting	-0.29	-0.25	-0.28	-0.27
	(0.31)	(0.29)	(0.30)	(0.30)
Tot. submits by same ind.	0.04	0.04^{*}	0.05^{*}	0.05^{*}
	(0.02)	(0.02)	(0.02)	(0.02)
Submit. by interest group	-0.15	-0.13	-0.17	-0.17
	(0.41)	(0.38)	(0.41)	(0.41)
Topic: Amendment	0.26		-2.94	
	(0.74)		(572.78)	
Topic: Culture	0.50		1.35	1.55
	(0.31)		(1.12)	(1.02)
Topic: Electoral system	-0.33		0.52	0.73
	(0.40)		(1.19)	(1.09)
Topic: Executive branch	0.17		0.84	1.03
	(0.44)		(1.10)	(1.00)
Topic: Legislative branch	-0.05		0.75	0.94
	(0.41)		(1.09)	(0.99)
Topic: Direct democracy	1.21^{**}		1.97	2.18^{*}
	(0.39)		(1.13)	(1.02)
Topic: Oversight and reg.	-0.82		-3.50	
	(0.79)		(312.09)	
Topic: Rights	0.79^{**}	0.63^{*}	2.07	2.27^{*}
	(0.27)	(0.26)	(1.09)	(0.98)
Topic: Institutions		-0.75^{*}		
		(0.35)		
AIC	174.32	179.56	184.10	180.24
BIC	234.06	219.85	248.55	236.64
Log Likelihood	-71.16	-79.78	-76.05	-76.12
Deviance	142.32	159.56	152.10	152.24
Num. obs.	309	415	415	415

$^{***}p < 0.001$, $^{**}p < 0.01$, $^{*}p < 0.05$

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