Fruit of the Poisoned Vine?
Some Comparative Observations on Chile’s Transformational Authoritarian Constitution

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Abstract: Can a constitution born in dictatorship serve democracy, or is it inevitably tainted by the circumstances of its birth? This question is central in Chilean politics today, but Chile is not alone. Roughly 20% of constitutions in force today were drafted during undemocratic periods. Chile’s constitution, however, is part of a smaller set which we call transformational authoritarian constitutions. These constitutions (1) are explicitly framed as helping to structure a return to electoral democracy after a period of time; (2) reflects certain policy goals designed to be permanent; and (3) contain an enforcement mechanism to ensure that both these goals are met. The article then goes on to consider how constitutional reform should be achieved, drawing on comparative evidence.

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Can a constitution born in dictatorship serve democracy, or is it inevitably tainted by the circumstances of its birth? This question is a significant one in Chilean politics today. It is also an important question for comparative constitutional lawyers to consider. Chile’s Constitution of 1980 represents an important but understudied category of constitutions: those drafted in a dictatorship that survive a transition to democracy. Other prominent examples include the constitutions of Mexico adopted in 1917, Indonesia’s of 1945, Turkey’s of 1982; Portugal’s 1974 document; and Taiwan’s Constitution, drafted on the mainland of China in 1947. Less well-known examples include Panama’s military-drafted document of 1972 and Guyana’s of 1980.1 I take this opportunity to speculate on the category, and to offer some tentative thoughts on the current question about whether—and if so how—to replace the document. The latter, of course should be taken as what they are: the thoughts of an uninformed foreigner who has not examined the Chilean debates in depth. Nevertheless, I hope that some of the data I bring to bear can inform the discussion in this country.

Why would democrats retain a constitution of dictators? As an initial matter, one might think about this category of countries as being examples of those in which formal constitutional replacement is not correlated with actual ‘small-c’ constitutional change. In some countries, shifts between democracy and dictatorship tend to be marked by formal constitutional revision and replacement. In others, the two are less tightly linked. My colleagues and I use this observation to argue that constitutional change is a distinct phenomenon from regime change.2 Chile (Figure 1) is a casebook example.3 It is a country whose history is marked by constitutional stability along with political fluctuation. As such, the 1980 Constitution shares something in common with its predecessors of 1832 and 1925: it has governed over a period of great political change. Indeed, the 1832 Constitution is the 15th most enduring out of more than 900 national constitutions adopted since 1789.4

--Figure 1 here--

1 Table 1 has a listing, which includes some ambiguous cases, such as Fujimori’s Constitution of 1993, or of constitutions drafted during transitions. Argentina 1853 fits the category notwithstanding major reforms in 1994.
2 Elkins, et al., 2009, the Endurance of National Constitutions.
3 Thanks to my colleague James Melton for this Figure.
4 The 1980 Constitution is already older than more than those of half the countries of the world.
There are other possible reasons a country would retain an old constitution. One is that the old constitution must be retained for political reasons—either because it enjoys some legitimacy among the general population, or because its erstwhile proponents still retain enough power to block any attempt at replacements. The Mexican and Indonesian cases seem like examples of the former dynamic. In both cases, the Constitution was associated with a significant event—a revolution or a moment of independence—and so retains legitimacy notwithstanding its use by authoritarians. Chile, on the other hand, is a case of retained veto over major change. Political forces associated with the erstwhile military regime play a potential spoiler role, and continue to benefit from a set of institutions—the binomial legislative system, supermajority requirements over certain rules, and ex ante review by a constitutional tribunal—that remain important today.

This article seeks to contribute to some important debates in comparative constitutional law. Notably, there has been increasing attention to the role of constitutions in authoritarian regimes. It is common to characterize constitutions in dictatorships as mere shams or embodying “constitutions without constitutionalism.” Following this line of thought, one might think that constitutions are inherently democratic institutions and that authoritarian constitutions are epiphenomenal. But recent work has revealed that, in contrast with a simplistic view of constitutions in dictatorships as being shams, they have an array of sophisticated functions that help regimes to accomplish certain goals, such as committing to property rights, coordinating among the ruling elite, or communicating to the subjects of the constitution about the regime’s goals and policies. These functions might actually extend authoritarian rule. Such constitutions also sometimes have in them latent features, which can serve to undermine authoritarian rule, or can emerge as tools of coordination when it is close to failing. Understanding the logic of the Pinochet constitution helps to enrich this literature.

The article is organized as follows. We first consider the general category of transformational authoritarian constitutions, those designed in dictatorships to guide and constrain a return to democracy. Chile serves as perhaps a paradigm example of this type, but it

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is not the only one. We then demonstrate that in form, these constitutions are fairly similar to those found in democracies, with the addition of special minority veto provisions. Next, we consider the question of whether constitutions ought to be amended or replaced, and if the latter, whether replacement should be achieved through a constituent assembly, legislature or another modality. Finally, we discuss some evidence on the roles of courts and the public in constitutional reform.

I. Transformational Authoritarian Constitutions as a Category

What is an authoritarian constitution? As Zach Elkins, James Melton and I argue elsewhere, the question is trickier than it first appears. One might think that a constitution is authoritarian if it governs an authoritarian regime, and democratic if it governs a democratic one. In this sense, constitution-type is congruent with regime type. But this defines away the category that Chile represents. We know that constitutional choices have long legacies, and changing them is costly. We also know that democrats and authoritarian regimes can sometimes exist sequentially even under the same constitution. Thus, we might miss an important subcategory of cases of authoritarian legacies if we simply define a constitution as changing when the political system changes. Constitutional change, as we argue, is different from political regime change, though in many cases the two are tightly linked.

Is a constitution ‘authoritarian’ if it began its life under an authoritarian situation but evolved to reflect, ultimately, many of the document’s formally democratic promises? We need to consider whether constitutions that are designed to evolve might somehow form their own subcategory. That is the approach we take here. ‘Transformational’ constitutions are those that are designed to facilitate regime change, even if gradual.

Following Elkins et al, we begin by simply characterizing a constitution as authoritarian if drafted in a year in which the country is coded as authoritarian, and democratic if it is drafted in a year of democracy. We use a binary coding, following much of the literature in

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9 Elkins et al., supra note 2.
10 Elkins et al., supra note 8.
comparative politics.\textsuperscript{11} Using these criteria and drawing on the Comparative Constitutions Project database on constitutions of independent nation states since 1789, we see that the vast majority of these documents were drafted by authoritarian regimes. As Figure 2 (taken from Elkins et al 2014) indicates, 695 of the 846 historical constitutional systems for which we have data on regime type would be considered authoritarian.\textsuperscript{12} And, although we are in an ‘age of democracy,’ some 56% of constitutions currently in force were drafted by dictators.\textsuperscript{13}

Using these criteria, we might believe that the number of transitional authoritarian documents was high indeed. Table 1 lists current constitutions in force in democracies that were drafted by authoritarians. In some cases, their drafters were monarchs or revolutionaries. Few seem to reflect the Chilean model in which a military regime sought to entrench a certain set of limits that would guide and constrain a return to electoral politics, though Turkey 1982 is an important analogue to which we will return.

Figure 3 (also drawn from Elkins et al. 2014) provides some sense of the distribution of constitutions based on these criteria over time. The large dark gray area in the middle captures the set of authoritarian documents that remain authoritarian—and in some sense might be considered a pure type. If the countries governed by these documents switched to democracy, they would replace the constitution as well. The smaller light gray area below these ‘pure’ authoritarian constitutions represents those that were written by authoritarian leaders but survived a transition to democracy at some point in their life span. Although this smaller group makes up only 10% of historical constitutions, nearly 20% of constitutions in force today are of this variety (as listed in Table 1). Admittedly, this crude list includes cases—such as Burundi, Ghana, Japan—that were in the process of democratizing when the constitution was produced. Still, the category is worthy of further investigation.

Assuming that this group forms a coherent category, what are the criteria that distinguish a transformational authoritarian constitution? As an ideal type, I propose the following as essential criteria: (1) the constitution is explicitly framed as helping to structure a return to electoral

\textsuperscript{11} The characterization draws from the Unified Democracy Scores. See Pemstein et al 2010. Elkins et al, supra note 8, describes our measure.

\textsuperscript{12} The universe of constitutional systems from 1789-2008 numbers 911; we have regime type data for 846 of these.

\textsuperscript{13} Elkins et al., supra note 8, at 145-146.
democracy, after a period that may or may not be specified; (2) the constitution reflects certain policy goals designed to be permanent, that is to constrain the future democratic regime; and (3) the constitution provides for an enforcement mechanism to ensure that both these goals are met. In other words, the transformational authoritarian constitution acknowledges the superiority of popular sovereignty and seeks to transfer power to democrats, but only subject to certain limitations. Further there is some mechanism guarantee these limits.

The 1982 Constitution of Turkey provides a nice paradigmatic example. Turkey has a long tradition of electoral politics, but has also experienced periodic bouts of military rule. As Goldenziel notes, the Venice Commission calls Turkey a “tutelary democracy,” in which democracy is bounded by an alliance of the military, bureaucracy and courts. In the 1960s, the Kemalist elite that had run Turkey for decades established a Constitutional Court, in part to protect the core values of secularism from reversal by religious parties. As those parties increased in popularity, the Court repeatedly disbanded them and also engaged in a long series of battles with the elected branches of government.

The 1982 Constitution, adopted during one of the periods of direct military rule, illustrates many of the themes of transformational authoritarianism. It is in form a democratic document, calling for elections. Like many military-adopted documents, it speaks of the essential role of the military in saving the nation, but also speaks in a democratic register: democracy is mentioned five times. It reaffirms the values of republicanism and secularism as foundational principles that are unamendable. But it also sets up clear mechanisms to limit democratic politics. These included the National Security Council, which served as a check on and supplement to the civilian cabinet. Furthermore, the Constitution featured a low threshold to declaring a state of exception that could be extended indefinitely. Most prominently, the Turkish Constitutional Court plays an important role in enforcing the strictures of the 1982 constitution, providing a strict boundary on democratic politics. The Court, and the judiciary more broadly,

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17 Isiksel, supra note 13, at 717.
has served to slow down Turkey’s democratic transition at several crucial junctures. To provide only one example, in 2008, the Constitutional Court ruled that properly enacted constitutional amendments overturning the ban on wearing a headscarf at state universities were themselves unconstitutional. It also sought to ban the country’s ruling political party, the Justice and Development Party (AKP), for violating principles of secularism.

Beginning in 2003, a series of amendments have been passed to try to reform the constitution to reflect the rise of the new populist Islamist party, the AKP. Yet the legacy of the document may turn out to be difficult to escape. Many believe the AKP will seek to replace one form of authoritarianism with another, and will use some of the very same instrumentalities as the military. As Isiksel notes, “authoritarian constitutionalism encourages challengers to develop the same bad habits as the old guard.”

Other examples might include several of Thailand’s 18 constitutions adopted since 1932. Thailand has been a uniquely unstable constitutional environment, as government has oscillated between corrupt civilians and military authoritarians. Military governments in Thailand, at least since the 1970s, have as a formal matter accepted the moral superiority of democracy, but have occasionally stepped in to remove particular leaders or clear a situation of gridlock. After a coup, the military now seems to routinely promise a return to civilian rule, but also has drafted constitutions which differ on one crucial point from their civilian counterparts: ensuring a non-elected upper house. This reflects the military-bureaucratic distrust of elected politicians, and allows a veto on change by ensuring that some appointed actors will have a say on policy.

Closer to home the Panama Constitution of 1972, promulgated by General Torrijos following his 1968 coup, designated him as Maximum Leader of the Panamanian Revolution, with extraordinary powers to last for six years. These powers expired in 1978, and, under US pressure, the National Assembly passed a series of amendments calling for a return to democratic processes over the next several years. Formally, the Constitution remains in force today, having survived the rise and fall of strongman Manuel Noriega.

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19 Isiksel, supra note 13, at 72.5.
Transformational authoritarian constitutions bear some relation to the species of transitional constitutionalism, as described by Teitl.\textsuperscript{22} But they differ in that, unlike those documents that focus on reckoning with the past, transformational authoritarian constitutions are typically designed to \textit{insulate} the designers from any future justice. Hence the various mechanisms of immunity found in the 1980 Constitution here in Chile provide a paradigm example: the category of \textit{leyes}, requiring a 4/7 majority; the Constitutional Court; the binomial election system; and the guarantees of impunity.

Transformational authoritarian documents may be transformational with regard to regime type, but not with regard to accountability for past crimes. While transitional constitutionalism as defined by Teitl focuses on coming to terms with the past, the transformational authoritarian document obfuscates the past. As the English-language expression goes, one must break a few eggs to make an omelet, and we don’t want to examine that process too carefully. The logic is that without guarantees of a future role and some immunity for the transformational authoritarian, democratic transition is impossible in the first place. In this sense they form a kind of counter-category to Teitl’s transitional constitutionalism.

From a normative point of view, transformational authoritarian constitutions remind us that entrenchment is a two edged sword. While democratic theorists celebrate entrenchment as helping to make democratic self-rule possible, it may also serve to limit the scope of that self-rule in situations when one must bargain with an old regime.\textsuperscript{23} Entrenchment, as Professor Isiksel puts it, can “foreclose institutional innovation, adaptation, and learning, magnifying the inadequacies, imperfections, and even injustices of the norm in question.”\textsuperscript{24} Using the technology of constitutionalism to slow down political processes is a move that goes back at least to the American founding fathers, but the ends to which this tool is deployed are as myriad as constitution-making circumstances.

\section*{II. Features of Transformational Authoritarian Constitutions}

In a recent co-authored chapter, my colleagues Zachary Elkins, James Melton and I provide some descriptive evidence about this category of cases and how they are distinct from the ‘pure’

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\textsuperscript{23} Isiksel, \textit{supra} note 13, at 708.
\textsuperscript{24} Ibid.
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authoritarian constitutions.\textsuperscript{25} We conduct regression analyses concerning the content of the written constitution, measuring (1) the differences between democratic and authoritarian constitutions, and (2) the differences between authoritarian constitutions that experience a transition to democracy and those that do not. We also include several variables to control for factors that are generally associated with the contents of constitution (region; the country’s previous constitution type; and era of drafting). The analysis shows that authoritarian constitutions that eventually shift to democracy look much more like democratic constitutions than like ‘pure’ authoritarians. On several dimensions—rights, judicial independence, detail—authoritarian constitutions that do experience a transition to democracy at some point during their life span are no different in substance than constitutions written by democrats, at least in terms of the constitutional attributes analyzed.

Transformational authoritarian constitutions, then, are closer to democratic constitutions than one might expect. And in this sense they differ systematically from “pure” authoritarian constitutions. Our evidence provides some support for the observation of Levitsky and Way that the formal institutions of their category of “electoral authoritarians,” are similar to those of democracies. But we introduce a temporal dimension into the analysis: we expect to see specific institutions to control politics downstream.

III. Chile’s Case

Chile seems to fit this paradigm well. General Pinochet’s junta passed the 1980 constitution with an eye to returning power to democratic forces through an orderly transition. This Constitution entrenched property rights (a major concern of the Chilean right), banned communist parties, gave the military a de facto veto through the power to appoint senators, and set up, among other institutions, a constitutional tribunal with power to engage in pre-promulgation review of legislation as a check on the conduct of future actors. But besides these veto points, the Chilean Constitution seems fairly democratic in form. It contains 43 rights from an index of 116 that we analyze, which is 16 more rights than its predecessor constitution of 1925, and 11 more than the mean for all constitutions. It provides for elections after a period of time. And it provides for judicial independence, among other features associated with

\textsuperscript{25} Elkins et al., \textit{supra} note 8.
electoral democracy. The distinguishing features of the 1980 Constitution are those that regulate time and process rather than substance.

Analysts report that the Chilean judiciary as a whole played a generally regressive role in democratization. In the first place, under the myth of maintaining an apolitical role, they sought to avoid interfering with the dictatorship.26 Next, for the first decade after Pinochet, they were mostly an obstacle to political change and served to enforce the constitutional bargain of an amnesty for the dictators and strong entrenchment of property rights. They acted to block judicial reforms as well, maintaining hierarchical control over lower court judges under the Supreme Court. Finally, in the early 2000s Chilean judges began to overturn the amnesty laws that had been the basis of Pinochet’s transition from power. The courts were an effective downstream enforcer of the amnesty for a long time. They were thus a crucial mechanism of the transformational authoritarian constitution, a guarantor.

At the same time, legal institutions did play a role in constraining the junta. Robert Barros’ important study of the Constitutional Tribunal argues that the country’s tradition of legality served to make legal institutions an attractive solution to internal coordination problems within the regime.27 During the first few years of its existence, the Constitutional Tribunal was compliant and duly blessed the dictates of the regime as constitutional.28 However, in September 1985, the Court issued a ruling that had profound downstream implications for the structure of political competition. The constitution required that a plebiscite would be held to approve or reject the first civilian president, to be nominated by the military. The relevant organic constitutional law proposed that this referendum be overseen by an ad hoc electoral court. The Tribunal, however, held that the plebiscite required full structure of electoral oversight including lists of voters and independent counting. This reduced the military ability to rig the plebiscite.

This was to a large degree a constitution-reinforcing decision. It induced the opposition to participate rather than boycott the plebiscite. The military, in turn, may have been disappointed in the decision, but having invested in the entire structure of the constitutional scheme, may have been reluctant to dismiss it out of hand. Further, the military acquiesced in these rulings in part because it was not unified internally.29 The court then followed this with a

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26 Hilbink, 2007, Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile.
28 Ibid. at 213.
29 Ibid. at 216.
series of decision in which the junta was required to allow a fair structure of the political process, including free and equal access to the media and rules on political organizations. The process constrained the junta that had set it up. The opposition eventually won the plebiscite, shocking Pinochet and paving the way for a return to democracy. This illustrates how courts, even in dictatorships, can exercise some autonomy and allow gains by opposition forces. The guarantor institution was a credible commitment device, restraining both dictators and democrats.

**IV. Evolution or Revolution? Transforming the Transformational Constitution Today**

All constitutions need to adjust over time, as the world itself changes. New political coalitions and social movements arise; new economic circumstances occur; and the international environment is constantly transforming. It is thus impossible to imagine that any constitution could be completely stable.

There are, of course several different modalities of constitutional change. Constitutions can be replaced entirely: this occurs far more frequently than one might expect. Constitutions can change through formal amendments (which number in the hundreds in the Chilean case), and this might seem to be the most obvious one. Far more frequently, constitutions are transformed through interpretation by courts and other political actors, as the text remains the same but meaning changes; in some cases this may even involve unintended shifts in practice or meaning.

One might, at the simplest level, treat these different modes of informal and formal interpretation as pure substitutes. That is, one could simply choose between replacing the constitution all at once and replacing it through a series of amendments in which the formal continuity is retained but the text changes completely. We know, after all, that constitutions can be radically transformed through amendments. Argentina’s Constitution of 1853 remains nominally in force today, though it is unrecognizable in many ways. To take some examples from my own country, California passed 130 amendments to its state constitution in 1966; South

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30 Ibid. at 214.
31 Our study shows that 92% of historic constitutions, and all of those in force today, include some amendment procedure. Data on file with authors.
Carolina passed 200 between 1971 and 1973. The text of these documents today bears little resemblance with that as initially adopted.

Furthermore, we also know that even constitutional changes marked by formal ruptures may conceal a good deal of continuity. Legacies persist and constitutions can have an afterlife even if they are fully replaced. There is, as my colleagues and I have shown in our 2009 book, remarkable serial similarity in the contents of constitutional texts within a single country (see Figure 4). The Figure documents measures of dyadic similarity, in which we can compare any two constitutional texts, over time within various countries. The Figure shows that constitutions adopted within a country’s history tend to be more similar to each other than to a constitution picked at random from the entire set of world constitutions. In short the distinction between replacement and amendment may not be as stark as one might imagine or hope.

--Figure 4 here--

So are amendment and replacement indeed pure substitutes? The question is both conceptual and empirical. Conceptually, the question goes to whether there is indeed a kind of identity in the lifespan of a constitution, so that there is a continuity in the object under consideration. It has something in common with philosophers’ notions of the continuity of a human life. As William Parfit asks, if a surgeon, over a long period of time, takes a part of a human brain out and replaces it with an exact replica, and so proceeds until none of the original tissue remained, would it still be the same brain? Parfit uses the point to argue that physical continuity is not necessary for the continuation of human identity, and philosophers have used this as a departure for theorizing about issues of human life or death. By analogy, if one amends every provision in a constitution, one at a time, over a sequence of years, is it the same constitution?

Whatever one’s view of the philosophy of mind, I think the answer is yes in regard to constitutions. My answer is perhaps more empirically grounded than conceptually. Constitutions, like human bodies, are systems of institutions that work together, and affect the subsequent courses of action. Constitutions shape the political environment, which produces particular actors in a position to subsequently modify the rules of the game. One must treat them as biographies.

33 Taken from Elkins et al. 2009.
34 Parfit, 1984: 474, Reasons and Persons.
and not simply as static moments. Thus, changing each piece over several years would still lead to a continuity of constitutional identity.

Empirically, we observe in a 2009 study that there seem to be significant costs to constitutional replacement. We find that various goods such as growth, democracy, and peaceful conflict resolution increase with the age of constitutions, on average. In short, there are reasons to think that formal continuity may matter for various indicia of success—legitimacy, institutional functioning, and the production of public goods.

As an aside, I note also that the assumption that the circumstances of drafting will inevitably and permanently taint the subsequent document has some relation to normative concepts of original intent. Scholars of American constitutional law, debate—endlessly—the appropriate role of the founders’ intent in interpreting the constitution today, more than two centuries later. I, myself, am partial to the views of what are labeled the Living Constitutionalists who emphasize the continuous process of re-creating the constitution in each era. If we can fundamentally adjust a text written under very different circumstances, constitutional transformation is possible, and we should not worry so much about the circumstances of the founding. The identity that we share with the founders may have symbolic power, but it need not have legal power.

All this, however, does not mean that it is desirable to keep the old constitution in all circumstances. Surely, in some contexts, the taint associated with a constitution’s birth is sufficiently powerful that replacement is desirable. Let us briefly canvass arguments for revolution and evolution in such circumstances.

a. The Case for Revolution, or Half-Revolution

When should an entirely new constitution be written? Clearly doing so marks a large symbolic break that may be desirable in some cases, particularly after radical political change. Roughly one in five transitions, either from democracy to dictatorship or the other way around, are marked by the adoption of a new constitution. These regime changes lead to a quest for a new founding moment to orient subsequent political activity.

36 Elkins et al., supra at note 2.
37 Strauss, 2010, the Living Constitution.
Furthermore, regime change is thus neither a sufficient or necessary condition for constitutional change. Sometimes even very stable regimes adopt a new constitution: Sweden completely rewrote its constitution in 1974, both to consolidate a large number of amendments that had taken place since the previous version had been adopted in 1809, and to institute a unicameral as opposed to bicameral parliament. This might be seen as a more technical project, without obvious symbolic predicate. But nevertheless it shows that crisis is not a prerequisite for constitutional replacement.

Much work in recent years has emphasized the importance of constitutional identity. This line of work emphasizes the role of the constitution in defining the people, in grappling with the past and in articulating a vision for the future. Constitution-making processes can provide an opportunity to engage the population in a deliberative project that can have important salutary effects on the polity. For this reason, it has become a norm for the drafting of new constitutions in restructuring states that the population be widely consulted, and typically also have the role of approving the constitution. The constitution-making project can help to cement the nation’s sense of itself.

Drawing on Hegel and Alcan, Michel Rosenfeld describes a three-stage process of incorporating the past. First comes the phase of pure negation, which involves a total repudiation of the past; the constitution is aversive of its history. Next, though, there is the recognition that every nation has a past. Constitutional identity cannot be formed in a vacuum, and so the constitution-making project must identify and select some elements of identity from the past that were initially discarded. The third stage is the negation of the negation, which involves the restructuring of these elements into a coherent whole.

This project of reforming the past through constitution making has its attractions. For Chile today, negating the negation would involve, not regression to a pre-Pinochet reality, but the incorporation of the diffuse elements of its recent political history into a coherent whole. And such breaks can be accomplished while retaining legal continuity with the past. Andrew Arato, for example, has formulated a model of ‘post sovereign’ constitution-making in which the creation of the new order after the fall of dictators is accomplished within the bounds of the

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40 See also Scheppele, 2008:1389, “a Constitution Between Past and Future,” *49 Wm. & Mary L. Rev.*
previous constitution, even if that document is normatively and historically tainted. \(^{41}\) An old constitution can facilitate the birth of a new dawn, simply by grounding the constitution-making process.

These then are the arguments for a new constitution for Chile today. The symbolism of the past, the technical flaws of an oft-amended document, and the specific constraints on majoritarianism provided by the legacies of authoritarian rule all argue for a new beginning, which can be done by invoking the constituent authority.

b. The Case for Evolution

Edmund Burke once wrote that a “government which governs well has the legitimate claim to the obedience of its citizens, even it was illegitimate in origin.”\(^{42}\) In a Burkean vein, proponents of evolution emphasize the virtues of gradual change in constitutions. A general way to approach the problem is of costs and benefits. Constitutional change is costly and total revision is even costlier. It takes time and energy to engage in the deliberation required for amendment. Furthermore, there are risks to total amendment. This is because changing many institutions opens up much more deliberative space; more issues can be negotiated, and ultimate outcomes are more uncertain. The greater the scope of the bargain, the more difficult it is to complete, and the less predictable \textit{ex ante}. Thus, one might argue in a Burkean vein, it is best to proceed by changing institutions one at a time through constitutional amendment.

There are some prominent examples of constitutional evolution away from authoritarian regimes. Indonesia is a very important example that has received too little attention in the literature.\(^{43}\) More than a decade and a half years after the fall of Suharto, Indonesia is widely regarded as a successful example of democratization. This was achieved through two rounds of amendments of the Constitution of 1945, which retained important symbolic legitimacy associated with the country’s independence. Indonesia is a very diverse country that faced several secessionist movements, as well as a legacy of decades of military rule, when Suharto was forced from power in 1988. The country might thus be seen to have unfavorable odds at

\(^{41}\) Arato, 2009: 5-7, Constitution-making Under Occupation: the Politics of Imposed Revolution in Iraq. Arato distinguishes between legality and legitimacy. For example, the U.S. Constitution was created through a legal rupture, but continuous legitimacy. The Japanese postwar constitution was created with a rupture in legitimacy for many, but legal continuity.


\(^{43}\) Horowitz, 2013, Constitutional Change and Democracy in Indonesia.
constitutional transition. Rather than form a new constitution with a sharp break, Indonesia chose to adopt four rounds of constitutional amendments between 1999 and 2002. These completely transformed the political system. The process defied conventional wisdom in many ways. First, Indonesia held elections before initiating constitutional changes and then allowed the legislature, rather than a constituent assembly, carry out the work. Second, the amendment process was driven by insiders, with members of Suharto’s own political party playing key roles. Through a combination of happenstance, luck, and clever institutional design, Indonesia translated its elaborate and complex system of social cleavages into a multiparty system. When the process was ready to spin out of control with the impeachment of Abdurrahman Wahid in 2001, the country responded by creating a constitutional court to adjudicate such disputes in the future. This represented a crucial institutional adjustment.

In Taiwan, too, the constitutional reforms of the 1990s and early 2000s represented a gradual set of reforms that dealt with many of the legacies of authoritarian rule. Before the democratic transition, Taiwan was governed by a one-party regime that had been elected on the mainland in the late 1940s. This group held power over a population of native-born Taiwanese, who were bitterly repressed. When democratization began in earnest under Taiwan-born President Lee Teng-hui in the late 1980s, a major constraint was the People’s Republic of China, which might have viewed a new constitution as a declaration of independence and cause for aggression. Thus the democrats proceeded with a series of constitutional amendments that profoundly transformed both the governance structure and the country’s constitutional court, which in turn helped to clear away many of the legacies of authoritarian rule. All this was accomplished gradually, without provoking either internal or external enemies to spoil the process.

In short, at least some anecdotal evidence suggests that radical reform is not necessary to effectuate profound change in a political system, and that a constitutional scheme that governs a dictatorship can indeed survive to democracy. Evolution has been the mode in Chile to date, including at two major junctures in 1989 (Law 18.825 amended 54 provisions), as well as 1997 (21 provisions changed in three separate amendments) and 2005 (12 amendments and more than 50 provisions changed). Again, all this does not mean that evolution is the mandatory strategy. Rather, it means that it is an option.
V. How to Reform? Constituent Assembly vs. Legislature

Constituent assemblies and legislatures are two of the most common modalities of constitutional reform. In a 2009 study, we found that of some 400 constitutional design processes, constituent assemblies were employed in 143 cases, usually as sole actor. But there are many variations and few consistent practices. Many hybrids exist.

India’s constituent assembly, for example, decided to act as an ordinary legislature prior to the adoption of the constitution in 1949. This is an example of what the literature calls a constituent legislating assembly, simultaneously conducting the day to day legislative affairs of an ordinary legislature while also continuing to function as a constituent assembly. Another example comes from Panama, whose constitution promulgated in March of 1946 stipulated that the Constituent National Assembly convert itself into the Legislative Assembly with members serving until September 30, 1948. El Salvador’s constituent assembly made the same move in 1983.

Much of the debate in the literature has followed Jon Elster’s path breaking work in which he argues that ordinary legislatures should not draft constitutions. Elster divides motives in constitution-making into three: reasons, passions and interests. Although he recognizes that all have their role to play, he thinks the optimal design of a constitution-making process will maximize the role of reason relative to self-interest and popular passions. Legislatures, he suggests, are inferior to special constituent assemblies that are engaged solely in constitution-making. This is because he thinks, legislatures are more likely to engage in institutional aggrandizement, are less likely to be focused on the task, and are more likely to be victim to path-dependencies in which the ordinary legislative level influences the “higher” constitutional level. Another claim is that legislative bodies will put too much detail into the document, as they fail to distinguish between higher order norms and ordinary policy. Brazil’s 1988 constitution is held up as a poster child for this claim.

Working with co-authors, we produced a pair of papers interrogating these assumptions. We found that, notwithstanding Elster’s intuitions, there were few systematic differences

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44 “To reduce the scope for institutional interest, constitutions ought to be written by specially convened assemblies and not by bodies that also serve as ordinary legislatures. Nor should legislators be given a central place in ratification.” Elster, 1998:117, Deliberative Democracy. Elster has retained this view in his recent work. Elster 2013, chapter four.

between those constitutions that were produced by legislatures and assemblies. We did find evidence of institutional aggrandizement in constitutions drafted in processes dominated by the executive, which was another of Elster’s conjectures. As between the legislature and an assembly, however, there were no differences in terms of length, legislative power, or the number of rights.

Constituent assemblies imply the exercise of the *pouvoir constituant*, and so in some circumstances may go beyond their instructions to freely exercise constitution-making power. In Latin America, the doctrine of the constituent power is sometimes held to be very large indeed. David Landau (2013) has argued that the use of constituent assemblies in Venezuela and Bolivia was highly problematic because of the risk that assemblies will ignore any upstream constraints that have been put on the process.\(^{47}\) The river can jump the banks. For example, in Venezuela in 1999, Comandante Hugo Chavez seized control of the constituent assembly to consolidate control over all independent institutions, including the Supreme Court that briefly resisted his power grab. He rigged the voting rules so that, with 60% of the vote, his party obtained 95% of the seats in the Assembly. And he did this with no legal continuity—the prior constitution had not provided for a constituent assembly. Eventually, the Court using the doctrine of the ‘original constituent power,’ blessed his move. While it tried to put limits on the exercise of this power, Chavez ignored these, and eventually packed the Court, leading one scholar to characterize the Court as having “sign[ed] its own death warrant.”\(^{48}\)

The constituent assembly in Bolivia did remain within the constraints, but only after violent protests that risked tearing the country apart. Evo Morales’ party tried to invoke the original constituent power. Bolivia’s effort was induced by an attempt to include long-excluded forces in Bolivian society, but was also a highly polarized process in a weakly institutionalized environment. At one point, violent riots erupted, leading to three deaths and hundreds of injuries. This reminds us that constitution making is not always an opportunity for consensus but can be moments of political trauma. As Landau argues, precisely because constituent assemblies may be seen as engaged in higher lawmaking, they can sometimes be difficult to constrain.

This is not to say that constituent assemblies are always destabilizing by any means. Colombia’s experience in 1991 was one in which, in the face of a fading pact and new insurgent parties, a constituent assembly was elected, but no party dominated. The Assembly served as a vehicle to restructure Colombian politics into a more competitive system.\textsuperscript{49} But it does suggest that simple predictions of results based on the choice between constituent assembly and legislature are hard to make.

Another possibility for Chile to consider is a national conference to discuss the framework of constitutional reform, without necessarily producing a specific text. These are bodies that are separate from the ordinary legislature, and not reliant on it for authority. They can also be quite large. For example, Mali’s national conference held in 1991 had approximately 1,800 delegates. To the extent that larger delegations may produce more broadly representative and/or inclusive membership, it may reduce any risk of institutional self-dealing will be further reduced. Widner’s analysis suggests that such conferences are more adept at incorporating large swaths of civil society in the constitutional design process than are ordinary legislatures.\textsuperscript{50}

There are few set rules for the design of a national conference. It may be used to generate new ideas, to provide suggestions, or even binding decisions on subsequent decision-makers. In the Chilean context it might allow for broad input from many social forces, without the potentially harmful consequences of alienating the existing political parties and institutions, which by and large are functioning admirably well. We turn to this risk next.

c. The Roles of Parties and Electoral Systems

The Venezuelan and Bolivian cases represented instances in which the constituent assembly was called because of shifts in the party system. Long established pacts were beginning to break down, and insurgent parties representing new constituencies were on the rise. This meant that constitution making was easily politicized, and political conflicts that might be considered to be within the realm of ordinary politics, escalated to the constitutional level. The party system interacted with constitution making to foreclose the possibilities of calm deliberation.

\textsuperscript{49} Ibid. at 962.
In other cases, political parties can play a positive role in constitutional reform. One danger to avoid, however, is the temptation to bypass the political party system. The Icelandic experience is one in which parties ended up blocking a radical initiative from below.\textsuperscript{51} Iceland’s remarkable experiment began with the severe financial crisis of 2008, in which the country’s banking system collapsed. In the aftermath, a groundswell of support for constitutional change led to the overwhelming passage of a parliamentary statute to guide the process. Next was the convening of a randomly drawn group of 950 citizens to generate ideas for constitutional reform. Then, in the fall of 2010, twenty-five ordinary Icelanders were elected from a field of over 500 to serve on a constitutional council that would formulate a new constitution. The councilors sought wide participation, and Icelanders were able to follow the council’s decisions and contribute suggestions through the Internet using a Facebook page. There was an iterated process of drafts and comments, which led to some changes in the proposed draft. It’s unlikely the general public has ever had such direct involvement in constitution making.

The final draft produced by the commission greatly expanded direct democracy, allowing the public to be involved in ongoing governance. It included affirmation of the one-person, one-vote principle, with a complicated electoral system. The draft also, controversially, provided that the country’s natural resources are the property of the state, available for short-term license but not for sale to private parties. This provision sought to effectively reverse the country’s privatization of fishing licenses in the early 1990s, a process that some said had restored the vigor of the fishing industry, but also contributed to growing disparities in wealth. The draft was the basis of a referendum in October 2012 that was supportive of the proposed changes. Under the current constitution, amendment requires a vote in two successive parliaments, so the public’s views were merely advisory. But the momentum suggested that a rare example of successful bottom-up demands for constitutional change might be at hand.

The action then shifted to the parliament to develop a final bill. That’s where things got tricky. The opposition Progressive and Independence Parties began to attack the proposals with vigor; the Council of Europe’s Venice Commission issued a report that identified a number of concerns in the draft; and the parliament began tinkering with the Bill. This week the parliament passed a bill without the key provisions from the citizen’s draft, while raising the threshold for

constitutional changes in the next parliament to 2/3 of parliament plus 40% of the popular vote. This was done in the shadow of upcoming elections that many expect the opposition is expected to win.

In short, political parties, if stable, cannot be bypassed by the amendment process. To do so is to risk derailment at a further stage. Only in situations in which the existing political order is completely discredited can the strategy of bypassing politicians be effective.

d. Role of Courts as Guardians

Courts can play an important role as guardians of the constitution-making process. They form an example of an upstream constraint. Obviously this option is most available when the courts have a good track record and are trusted by the actors in the political process.

The most famous example of judicial protection of the constitution making process is that of the Constitutional Court of South Africa during the period of the Interim Constitution (1993-1996). That constitution had laid out a set of basic principles to guide the drafting of the ultimate constitution by the constituent assembly. But the final constitution had to be certified by the Constitutional Court as conforming to the list of Constitutional Principles laid out in the earlier draft. The principles included both general concepts and also specific provisions that mattered to particular parties such as cultural self-determination and regional decentralization. In the event, the Constitutional Court rejected several provisions of the Constitution, as requested by several of the main political parties.52 The Court provided guidance as to how to revise the text to conform to the Principles. After a revision, the Court engaged in a second round of certification, and approved the draft. Interestingly, the Court had a role in certifying provincial constitutions, and rejected one of them, that of KwaZulu Natal.

Another example occurred in Kenya. During the long period of Kenya’s constitutional evolution from the one-party Moi regime in the first decade of this century, the Courts played some role. From 2001 to 2005, a series of drafts were produced by a drafting conference and then by parliament. There was little agreement on such basics as the type of government. In 2004, the Kenyan High Court decision in Timothy Njoya & Others v CKRC and the National

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52 The National Party and the Democratic Party voted for the Constitution, but challenged certification of certain points. The Inkatha Freedom Party also challenged the document. The provisions included those on federal balance of power and that the Bill of Rights was not sufficiently entrenched.
Constitutional Conference held that the constitution could not be replaced without a referendum. The ordinary amendment process included in Section 47 of the Constitution allowed for amendments, but not a complete replacement. In other words, one had to go back to the well of the pouvoir constituent in order to move forward with reforms of a certain scale. This is consistent with a distinction found in some constitutions between amendment and a revision, which implies a larger scale of change.

The Colombian Constitutional Court made a similar move. The Constitution allows the Court to review amendments for procedure, including whether they are issued by a competent authority. The Court used this power to create a doctrine wherein amendments can be distinguished from replacements, which no authority has the power to effectuate. The Court thus set itself up as a guardian ensuring that no amendment exceed a certain undefined scope.

More generally, constitutional courts have become quite active in policing constitutional amendments, sometimes on substantive grounds and sometimes on procedural grounds. Some Constitutional Courts (beginning with India's) have developed an idea that certain amendments cannot be made because they would change the fundamental structure of a constitution—while not about certifying the initial document it is an example of how a court could hold that a constitution is unconstitutional.

In other states where the Constitution contains different procedures for a ‘total revision’ and a ‘partial revision’ of the Constitution, such as Austria or Nicaragua, Courts sometimes declare themselves competent to define the distinction. Even without textual support, some courts have generated the distinction. For example, in South Korea deciding that the Government could not fulfill a campaign promise to move the capital city. The court spoke in terms of an unwritten “customary constitution,” which could not be changed without a public referendum. In this case, the Court was cloaking its power grab (inventing an unwritten text that only it could see) by saying that it could be overcome with a certain level of political support.

In the Icelandic example described above, the parliamentary bill authorizing the ‘citizens’ constitution,’ drafted in the aftermath of the financial crisis called for, among other things, the election of 25 citizens to serve as a Constitutional Commission. The country’s Supreme Court, however, invalidated the election. The parliament decided to appoint all of the elected members, so it was of little consequence. Another negative example occurred in Egypt in June 2012, when the Egyptian Supreme Constitutional Court dissolved the People's Assembly. The threat of
further action by the country’s courts is what prompted president Morsi to ram through his ill-fated constitution in late November.

Whether all this is democratic or not, is not our immediate concern. The conceptual point is that, whether or not they are authorized, courts often emerge as the policemen in constitutional reform processes. And this means that they are a potential modality to be considered in designing a constitutional reform process.

There is another role for courts in constitutional change, one that is so obvious as to be almost invisible. Courts modify the constitution through constitutional interpretation. Thus, if a political system believes that there are problems that need to be addressed, empowering the courts is a potential mechanism, though an unpredictable one. For example, Mexico’s constitution has recently been amended to allow the courts to treat the rules of any treaty to which Mexico is a party—including human rights treaties—as superior to domestic law. This means that the normative basis of the constitution has been dramatically expanded. While beyond the scope of this article to address, one possibility for Chile is to reform the jurisdiction of the Constitutional Tribunal so as to encourage it to take a more aggressive role in ex post, as opposed to ex ante, constitutional review. Many countries in the region have reformed their systems of amparo to reflect the modern trend toward greater judicial protection of rights. There is no obvious reason why Chile should be an exception.

e. Role of the People

We conclude with some comments on the role of the people in constitutional reform. As Figure 5 shows, there has been a significant trend towards including the public in constitutional design. Indeed, some have argued that the right to participate in constitutional design has the status of a norm of international law.53 Public participation comes at many phases in the constitutional design process. The public can be consulted in the process of formulating ideas for constitutional reform; it can monitor the drafting process; and it can also play a role in ratifying the final product through a public referendum.

--Figure 5 here--

Such roles can make a real difference and serve as an important downstream constraint on the process. For example, in some cases, we observe public rejection of constitutional drafts:

53 Hart 2003; Franck and Thiruvengadam 2010.
Kenya’s Wako draft was rejected in a public referendum in 2005, and a draft constitution in the Seychelles failed to reach the 60% support threshold in 1992. In each case, these rejections led to renewed attempts at constitution making that were more inclusive, and were ultimately successful.

Chile’s public is politically informed and generally fairly well educated. In this sense, there is no theoretical reason why the public cannot play an important role in adopting a new constitution for itself. It is probably advisable, then, that any effort to reform the Constitution of Chile include the voice of the public at the final stage, or very close thereto.

VI. Conclusion

Chile’s experience epitomizes what we have characterized as transformational authoritarian constitutionalism, in which the constitution is explicitly designed to return to popular rule, but entrenches certain policy goals beyond democratic decision-making, and provides genuine institutional mechanisms to enforce these limits. It is a genuine form of constitutionalism, including the essential elements of entrenchment and constraint of both rulers and ruled. It is an explicitly temporary arrangement, in which even the founders must realize has the potential to decay over time. But, believing in the merits of their policy preferences, the founders seem to think the limitations will eventually become so internalized by the population as to be self-enforcing. In this sense, these are optimistic documents.

In many ways, the 1980 Constitution of Chile has served its purpose, however defined. It successfully entrenched major policy priorities of the military regime, while also facilitating a major political transition, and has secured a strong market economy. Though too slow for proponents of democratic reform, the transition has been accomplished without violence, with most amendments having secured the political support of the inheritors of the 1973 coup.

At this writing in late 2013, there are now calls for change, reflecting the completely different context of Chile today. Such calls are quite natural and should be addressed. How to do so is the great debate of Chilean politics today. My suggestion is that the comparative literature sheds little light on the precise modality by which reform is accomplished, whether through constituent assembly or legislature. We can say, however, that there are other possibilities that should be considered. A national conference on constitutional reform might be a first step; the

last step should include broad participation through constitutional referendum. And the drafting process in between ought to include the existing political parties, as they cannot be avoided in any case.
FIGURES AND TABLES

[Insert Table 1 here]

**Table 1: List of Current Constitutions Born in Dictatorship that Evolve to Democracy**

<table>
<thead>
<tr>
<th>Country</th>
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<th>Country</th>
<th>Year</th>
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</thead>
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<tr>
<td>Argentina</td>
<td>1853</td>
<td>Hungary</td>
<td>1949</td>
<td>Norway</td>
<td>1814</td>
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<td>1831</td>
<td>India</td>
<td>1949</td>
<td>Pakistan</td>
<td>2002</td>
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<td>Benin</td>
<td>1990</td>
<td>Indonesia</td>
<td>1959</td>
<td>Panama</td>
<td>1972</td>
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<td>Burundi</td>
<td>2004</td>
<td>Japan</td>
<td>1946</td>
<td>Peru</td>
<td>1993</td>
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<td>1980</td>
<td>Liberia</td>
<td>1986</td>
<td>Samoa</td>
<td>1962</td>
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<tr>
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<td>1980</td>
<td>Mexico</td>
<td>1917</td>
<td>Sao Tome and Principe</td>
<td>1975</td>
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<td>Georgia</td>
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<td>Nepal</td>
<td>2006</td>
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<td>Guyana</td>
<td>1980</td>
<td>Nicaragua</td>
<td>1987</td>
<td>Turkey</td>
<td>1982</td>
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Figure 1: Constitutional Change and Regime Change in Chile
Figure 2: Number of Constitutions Born Authoritarian or Democratic

Figure 3: Number of Constitutions Born Authoritarian or Democratic by Subsequent Regime Change


Illustration: Constitutions that are “born democratic with no regime change,” are those that were promulgated in a democratic setting and spent their entire history in a democratic setting. Those “born democratic with regime change,” were promulgated in a democracy but lived under authoritarianism as well. And so on.
Figure 4: Serial Similarity
Figure 5: Trend in Public Approval of Constitutions

Universe: Constitutions that specify a promulgation procedure.
Bibliography


