

# A Matter of the Few: Dynamics of Constitutional Change in Chile, 1990–2010

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## Introduction

Establishing an enduring constitution is a daunting task, particularly outside western Europe and North America.<sup>1</sup> While in some societies, politicians willingly limit their future powers by defining constraints to their actions in a written agreement, in other societies, the challenge is quite the opposite; we observe constant negotiation regarding what the shape of the political system will be. This Article explores the political dynamics responsible for transforming the rules of constitutional reform in a political system.

Theory tells us that political actors are willing to create and follow rules because they want to reduce transaction costs and decrease uncertainty about any given outcome.<sup>2</sup> Theoretically, politicians should be willing to abdicate full sovereignty as they consider how long-term planning would promote national stability.<sup>3</sup> Moreover, political actors may fear the permanent effect of unwise decisions. According to Elster, constitutions serve two goals: protecting individual rights, and putting limits on majority decisions in order to avoid certain changes.<sup>4</sup> This is why constitutions explicitly make changes highly difficult, even defining some realms as unconstitutional.<sup>5</sup>

In a democratic context, constitutionalism should solve the tension between popular participation (the rule of the majority) and political uncertainty. Theoretically, constitutions protect citizens from “particularism and myopia which can easily result from unchecked popular rule.”<sup>6</sup> As

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1. ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 10 (2009).

2. See Jon Elster, *Introduction to CONSTITUTIONALISM AND DEMOCRACY* 1, 8–9 (Jon Elster & Rune Slagstad eds., 1988) (explaining that part of the reason a political assembly would give up part of its sovereignty is that “[t]he expected stability and duration of political institutions is an important value in itself” and that “if nothing could ever be taken for granted, there would be large deadweight losses arising from bargaining and factionalism”).

3. Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY*, *supra* note 2, at 195, 216–17, 222–23.

4. Elster, *supra* note 2, at 3.

5. See *id.* at 3–4 (“The latter function is served in several ways: by declaring certain changes unconstitutional; by making the process of change so complicated and demanding that few proposals will be able to clear the hurdles . . .”).

6. *Id.* at 13. Other authors suggest that constitutionalism is inherently antidemocratic because the essential function of a constitution is to remove certain decisions from the democratic process. See, e.g., Holmes, *supra* note 3, at 196 (quoting Justice Robert Jackson’s statement that some

Holmes points out, constitutional precommitment is a useful device for forestalling the temptation to engage in collective self-destruction.<sup>7</sup>

Yet, constant changes in national constitutions challenge the assertion that actors are willing to give up their power in order to reduce political uncertainty. What is the explanation for the apparently “self-destructive” logic some countries face when political actors are constantly trying to re-define constitutions? Latin America provides a particularly fruitful jumping-off point because it stands out as one of the most active regions in terms of constitutional replacement and amendment.<sup>8</sup>

This Article observes the dynamics of constitutional reforms in Chile and challenges some of the prevailing assumptions provided by the literature. In the case of Chile, democratic authorities inherited a constitution that included stringent mechanisms for reform. However, between 1989 and 2010, the Chilean constitution experienced two major moments of reform (1989 and 2005),<sup>9</sup> and the Chilean congress passed 24 reforms, affecting 76% of the articles contained in the constitution (91 of 120 articles).<sup>10</sup> By some measures, these reforms had an impact on approximately 140 different critical areas.<sup>11</sup> In the last twenty years, the executive and legislative branches introduced 342 bills in congress, an average of 17 proposals per year.<sup>12</sup> How can we make sense of such intense activity in a country that has neither experienced dramatic changes in the balance of power between political forces nor implemented particularly flexible institutional structures?

Contrary to the overall trend toward the complete replacement of constitutions in Latin America over the last two decades, Chile is one of the few countries in which the political elite opted for a strategy of gradually reforming the constitution inherited from the military regime. While most recently-democratized countries within the region have experienced public debates on the subject (through popular consultations, referenda, national

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“fundamental rights may not be submitted to vote,” and opining that from this perspective, constitutionalism is essentially antidemocratic). Still, others suggest that constitutional restraints can be democracy-reinforcing; courts and other institutions may be empowered as watchdogs in the democratic process. *E.g., id.* at 197.

7. Holmes, *supra* note 3, at 239.

8. See James L. Busey, *Observations on Latin American Constitutionalism*, 24 AMERICAS 46, 48 (1967) (“[I]n many instances Latin American constitutions are extremely fragile, and subject to frequent and easy change.”).

9. See Claudia Heiss & Patricio Navia, *You Win Some, You Lose Some: Constitutional Reforms in Chile’s Transition to Democracy*, 49 LATIN AM. POL. & SOC’Y 163, 172–85 (2007) (describing the 1989 and 2005 reforms to the Chilean constitution).

10. See *infra* Table 3.

11. Claudio Fuentes, *Elites, opinión pública y cambio constitucional [Elites, Public Opinion and Constitutional Change]*, in EN NOMBRE DEL PUEBLO: DEBATE SOBRE EL CAMBIO CONSTITUCIONAL EN CHILE [ON BEHALF OF THE PEOPLE: DEBATE ON CONSTITUTIONAL CHANGE IN CHILE] 45, 55–66 (Claudio Fuentes ed., 2010) (detailing some of the areas affected by the reforms).

12. See *infra* Table 3.

conventions, or a combination of the three),<sup>13</sup> in Chile, constitutional reform has involved a relatively small segment of the political elite.<sup>14</sup>

This Article aims to highlight some of the causal mechanisms involved in this constant attempt to reshape constitutions. On the one hand, this Article confirms some of the arguments concerning the politics of constitutionalism. For instance, Ackerman as well as Elkins, Ginsburg, and Melton have argued that inclusion is a key factor driving stability; the more inclusive the process of drafting or amending a constitution, the more stable that document will be.<sup>15</sup> Given the inherited character of the Chilean constitution, important segments of the political elite have expressed a sustained discomfort with the arrangement imposed by Pinochet.<sup>16</sup> In addition, disloyalty toward the constitution increases when the mechanisms for amendment do not include relevant segments of society.<sup>17</sup>

At the same time, this Article attempts to clarify some of the causal mechanisms suggested by the literature. Indeed, scholars have examined a rich set of variables explaining constitutional replacement and amendment. Among the most popular factors explaining replacement are key junctures such as transitions to democracy, diffusion of political ideas, relevant changes in the balance of political power, and the emergence of new political actors.<sup>18</sup> Among the variables explaining amendments (or the lack thereof) are party fragmentation; power-sharing and electoral-sharing institutions; and other institutional features, such as constitutional adjudication and independence of courts.<sup>19</sup>

In this Article, I emphasize two central features. First, I focus on the asymmetries of power between the executive and legislative branches, adding a causal mechanism to the story. Presented with an opportunity for change, the executive branch employs important institutional and political tools, such as promoting agreements and pushing certain reforms, both for intervening in and affecting the political process.

13. See Carlos Santiago Nino, *The Debate over Constitutional Reform in Latin America*, 16 *FORDHAM INT'L L.J.* 635, 636–37 (1992–1993) (noting a scheduled referendum on government structure in Brazil, a proposed constitutional convention in Peru, institutional reform proposals in Uruguay, and “continuous public debate on constitutional reform” in Argentina).

14. See *infra* Table 7 (indicating that there were only twenty-seven key players in the 2005 reforms).

15. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 274–75 (1991); ELKINS ET AL., *supra* note 1, at 78–79.

16. See Fuentes, *supra* note 11, at 54–55 (noting the discontent among the political elite regarding the current constitutional arrangement, leading to both the the 1989 and 2005 reforms).

17. See ELKINS ET AL., *supra* note 1, at 82 (noting that inclusion leads to more groups having a stake in constitutional changes).

18. See *id.* at 134–39 (explaining the results of their model, which measured the effects of environmental factors on constitutional duration).

19. Gabriel L. Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America* 32–33 (Nov. 26, 2010) (conference paper) (on file with author).

The second feature involves veto players. Rather than examining the actual change in the balance of power, I focus on actors' expectations concerning change. In bargaining over the rules of the game, political actors are constantly trying to anticipate the impact that some changes may have on the future distribution of power. Therefore, actors adopt forward-looking strategies when considering constitutional amendments.

This Article is comprised of four Parts. Part I is a brief review of the literature concerning constitutional change. Part II introduces the central features of the Chilean case study. Part III examines the factors driving constitutional change in Chile. Finally, some general conclusions are outlined in Part IV.

## I. Constitutional Change

Constitutional change should be particularly uncommon because we may expect constitutional structures to be reformed only in exceptional times. Constitutional change is also curious given the fact that constitutional provisions impose strict barriers to avoid superfluous changes to the document (supermajority requirements, veto points, etc.).<sup>20</sup> Theory tells us that institutions are created in order to lower political transaction costs, to solve principal-agent problems through the creation of structures of accountability and incentives, to solve historically embedded conflicts within a given society, or to serve a combination of these purposes.<sup>21</sup> As one may expect, self-enforcing mechanisms make institutions very resistant to change. Change would have to come from the margins and only as an exception to the rule.<sup>22</sup>

However, constitutional norms are not static, and in practice, we observe important levels of replacement or amendment across various regions. Negretto observes that Latin America has experienced higher rates of constitutional replacement than Western Europe but that the number of amendments is higher in current constitutions in Western Europe than in those in Latin America.<sup>23</sup>

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20. See, e.g., U.S. CONST. art. V (requiring two-thirds of both houses of Congress and three-fourths of the states to ratify a constitutional amendment); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60 (Braz.) (prohibiting amendments abolishing, *inter alia*, individual rights or the separation of powers).

21. For a good summary of the arguments about the creation of institutions and the economic and sociological approaches to deciphering institutional changes, see MERILEE S. GRINDLE, AUDACIOUS REFORMS: INSTITUTIONAL INVENTION AND DEMOCRACY IN LATIN AMERICA 20 (2000).

22. See PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 142 (2004) (describing four sources of institutional resilience to change: coordination problems, veto points, asset specificity, and positive feedback).

23. For instance, between 1789 and 2001, Latin America (composed of eighteen countries) saw 192 constitutions enacted (an average of 10.7 constitutions per country) with a mean duration of 22.7 years. Negretto, *supra* note 19, at 42. In contrast, western Europe (composed of 16 countries) enacted 51 constitutions (3.2 constitutions per country on average) with a mean duration of 76.6

In trying to explain constitutional change, some authors have suggested that the cultural tradition of constitution building in Latin America increases the tendency toward constant reform.<sup>24</sup> According to this argument, reforms do not usually entail a social process of legitimizing debates before the public, as often happens in the United States.<sup>25</sup> By the 1960s, constant changes in Latin American constitutions were being attributed either to the importation of ideas from other countries or to the fact that framers had little contact with their socioenvironmental needs.<sup>26</sup> Busey agrees that “most Latin American constitutions were . . . foreign and rather artificial importations” but goes further by stressing the problem of institutional design.<sup>27</sup> According to Busey, inconsistency within documents made political systems unstable.<sup>28</sup> But then, what is it that makes political actors choose “bad” institutions?

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years. *Id.* The number of amendments in current constitutions (2001) is 1,971 in Western Europe and 141 in Latin America. *Id.* at 43. Negretto considers “replacement” to be when a constitution is enacted by a popularly elected constituent assembly. *Id.* at 22. He considers “amendments” to be the number of reforms a constitution experiences per year of life since enactment, as he is interested in the amendment rate. *Id.* at 7. By defining these key terms, Negretto implicitly recognizes their ambiguousness—distinctions can be made by counting the number of articles reformed, issues changed, and omnibus measures in a given year. Thus, for Negretto, the amendment rate in a given year ranges from a minimum of zero to a maximum of one.

24. See, e.g., Russell H. Fitzgibbon, *The Process of Constitution Making in Latin America*, 3 COMP. STUD. SOC’Y & HIST. 1, 1 (1960) (describing the Creole philosophers, the subsection of the population that drafted many of the original Latin American constitutions, and their enthusiasm for drafting idealistic constitutions).

25. Fitzgibbon, for instance, suggests that

[the Latin American approach is] to make new constitutions the product of reason, to base them upon what ideally ought to be. Hence, in some respects, they are anticipatory, and particular provisions may, for many years, lack supporting legislation or even the popular approval to make them effective. In the United States, on the contrary, constitutional changes customarily represent long-debated and finally crystallized public opinion; it is natural that the latter approach should give the appearance of a more practical and enforceable document.

Russell H. Fitzgibbon, *Constitutional Development in Latin America: A Synthesis*, 39 AM. POL. SCI. REV. 511, 522 (1945); cf. Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 530, 532 (1999) (“Constitutions can flourish and succeed only if they are firmly planted in the cultural soil from which they gain legitimacy. . . . [T]he insistence that only Western frameworks are legitimate and that certain constitutional and institutional structures are superior and applicable to all societies . . . is problematic at best and disastrous at worst.”).

26. See Busey, *supra* note 8, at 54 (“Specialists are in general agreement . . . that for the most part Latin American constitutions . . . are exotic foreign importations and [that] their framers had little contact with their own environmental reality . . .”).

27. See *id.* at 59–60 (examining the institutional flaws present in the constitutions themselves).

28. *Id.* Inconsistency within constitutional arrangements is, according to Busey, the core of the problem:

The documents themselves include built-in conflicts of meaning and intent. They are likely to grant powers to executive and centralized authority which are enough to assure the establishment of dictatorships, with or without other causal factors; and the unsatisfactory, self-defeating content of the documents themselves would be reason enough for frequent change.

*Id.* at 60.

Elkins, Ginsburg, and Melton have provided one of the most systematic accounts of comparative analysis, proposing three factors to explain constitutional longevity: inclusion, flexibility, and specificity.<sup>29</sup> Although they recognize that external shocks may provoke new political settlements, they argue that three critical structural features may promote stability.

The first characteristic is inclusion: “[C]onstitutions whose provisions are publicly formulated and debated will more likely be able to generate the common knowledge and attachment essential for self-enforcement.”<sup>30</sup> Thus, the way a constitution is drafted, approved, and enacted seems to be essential to its survival. This implies that some interest groups may see their interests projected in constitutional clauses. The issue here is that a large majority of citizens should be reflected in the final arrangement.

The second factor is flexibility.<sup>31</sup> Constitutions should contain some mechanisms to moderate either extreme flexibility or rigidity. It is difficult to find the correct balance, but the overall point is that constitutions must include certain mechanisms that allow for the adjustment of fundamental rules in response to changing conditions.

Finally, Elkins, Ginsburg, and Melton suggest that greater levels of specificity in a constitution “will tend to enhance rather than hinder endurance. A constitution covering more topics will tend to incentivize more interest groups toward enforcement, whereas depth helps them develop shared understandings of what the constitution requires and allows.”<sup>32</sup> In short, constitutions are more likely to endure when they are flexible, detailed, and able to induce interest groups to invest in their process.<sup>33</sup>

Observing the case of Latin America, Negretto provides a complex model in which contextual, institutional, and political factors explain change.<sup>34</sup> In his model, the degree of electoral inclusion and pluralism,<sup>35</sup>

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29. ELKINS ET AL., *supra* note 1, at 73.

30. *Id.* at 78.

31. *Id.* at 81.

32. *Id.* at 88.

33. *Id.* at 89. Case-study analysis presented by the authors suggests that while specificity is not always a necessary condition for endurance, inclusion seems to be a required condition at some level. *Id.* at 206.

34. Negretto, *supra* note 19, at 28–29.

35. *Id.* at 23. Within this variable, Negretto considers electoral formula, electoral cycle, presidential term, and reelection rules. *Id.* at 23–24.

separation of powers,<sup>36</sup> amendment rigidity,<sup>37</sup> and constitutional adjudication<sup>38</sup> may explain replacement and amendment.

Negretto and other authors have claimed that, at least in the case of Latin America, context matters because transitions to democracy, institutional crises, and relevant shifts in partisan contexts are likely to trigger constitutional replacement rather than constitutional amendment.<sup>39</sup> The enactment of new constitutions is more likely, particularly “when countries had no previous democratic experience or when the pre-authoritarian constitution is no longer regarded as a legitimate and effective instrument of government by both democratic leaders and citizens.”<sup>40</sup> Looking at the relationship between constitutional and regime changes worldwide, Elkins, Ginsburg, and Melton suggest that “a small, but significant, minority of regime transitions are accompanied by constitutional replacement and, likewise, a small minority of constitutional replacements coincide with regime transition.”<sup>41</sup>

Other conditions may affect constitutional replacement. Negretto suggests that the risk of constitutional replacement decreases with the existence of power-sharing institutions, the strength of constitutional adjudication, and the frequency of amendments.<sup>42</sup> According to Negretto, “constitutional replacement[] depends on the type of events that trigger constitutional change and on the capacity of political actors to adapt the constitution to changing environments by means of amendments or judicial interpretation.”<sup>43</sup>

Amendments are likely to increase when party-system fragmentation is either very low or very high, as long as amendment procedures are flexible.<sup>44</sup> In other words, if amendment procedures are rigid, amendments are expected to decrease.<sup>45</sup> But “as the number of parties in the system increase[s], there may be more demands for constitutional adaptation through amendment. At the same time, however, a higher level of party system fragmentation should lead to a lower rate of amendment if the amendment procedure is

36. *Id.* at 24. Negretto considers congressional structure (unicameral versus bicameral), presidential veto, and judicial independence. *Id.*

37. *Id.* at 24–25. Negretto determines the degree of rigidity in constitutional amendments by observing the threshold of votes required in congress to pass an amendment proposal and the number of actors whose consent is necessary to pass an amendment (veto points). *Id.* at 25.

38. *Id.* at 25–26. Negretto uses an index adding the number of different types of instruments for constitutional review specified in the constitution, considers whether the instrument has general effects, and considers whether it is open to every citizen. *Id.*

39. *Id.* at 26; see, e.g., ELKINS ET AL., *supra* note 1, at 60.

40. Negretto, *supra* note 19, at 15.

41. ELKINS ET AL., *supra* note 1, at 59–60.

42. Negretto, *supra* note 19, at 23.

43. *Id.* at 32.

44. *Id.* at 17–18, 20, 30.

45. *Id.* at 30.

stringent.”<sup>46</sup> Finally, it seems that replacement and amendment are inversely correlated.<sup>47</sup> That is, the risk of constitutional replacement decreases as the rate of amendment increases, which may be related to the flexibility of the adapting institutions to changing environments.<sup>48</sup>

At the risk of oversimplifying the main arguments proposed by the literature, scholars have suggested contextual, institutional, and political factors to explain constitutional change. External shocks may trigger change, but certain institutional and political conditions should also be considered. Institutionally, we should observe the levels of flexibility within a constitutional framework as well as whether the framework allows for power-sharing institutions. Politically, we should look at the way constitutions are framed, the distribution of power among political and social forces (including the influence of interest groups), and the level of fragmentation within the political system.

## II. Constitutional Reforms in Chile

Lack of inclusion is a powerful force for promoting change. The less inclusive an arrangement is perceived to be, the more political actors will seek to change the status quo. Bruce Ackerman argues that there is a first moment, a “constitutional moment,” in which decisions are made by the people.<sup>49</sup> This moment rarely occurs, and typically under three conditions: first, a politically partisan movement must convince an extraordinary number of their fellow citizens of their proposed initiative; second, opponents must have the opportunity to organize their forces and express their views; third, the proponents must convince a majority of the population “to support their initiative as its merits are discussed, time and again, in the deliberative fora provided for ‘higher lawmaking.’”<sup>50</sup>

If none of these conditions is present, it is reasonable to expect that political actors will try to modify the status quo either because they want to increase their power gains (to remain in power or to obtain reelection) or because they have concerns about the long-term legitimacy of the political system as a whole.<sup>51</sup> Independent of actors’ motivations, we should expect that in cases where constitutions are imposed by a minority, a relevant trend toward the modification of the status quo is likely to occur.<sup>52</sup>

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46. *Id.*

47. *Id.* at 32.

48. *Id.* at 32–33.

49. ACKERMAN, *supra* note 15, at 307.

50. *Id.* at 6.

51. See Negretto, *supra* note 19, at 10–12 (explaining that political actors seek constitutional changes because existing institutions no longer serve the interests of those who have the power to change them, or because of the dysfunctional performance of existing political institutions).

52. See ACKERMAN, *supra* note 15, at 6 (arguing that the first step in creating a constitutional moment requires convincing a large majority of people to take a position seriously, a task that



The problem is that the forces of change do not always manifest themselves in the same way. In Chile, Pinochet's constitution was enacted in 1980 and imposed several antidemocratic features, including appointed senators,<sup>53</sup> veto power for the armed forces within the political system,<sup>54</sup> maintenance of General Pinochet as senator for life,<sup>55</sup> high levels of military autonomy,<sup>56</sup> overrepresentation of right-wing sectors within the political system,<sup>57</sup> and strict barriers to reform that were designed to avoid future transformations of the constitution.<sup>58</sup> As the 1980 constitution was designed to maintain the privileges of specific groups (right-wing parties and the military), we should expect that democratic authorities would have raised the flag of change and advocated for immediate replacement or substantial amendment to such an antidemocratic arrangement.

Instead, in Chile we observed a rather moderate and gradual process of amendment. We did not see political actors mobilizing their constituencies or calling for the abolition of such antidemocratic law immediately after the transition. Even within left-wing political parties, we observed a moderate view on the strategies toward transforming the constitution.<sup>59</sup> Contrary to all intuitive expectations, during the transitional period in Chile, neither political elites nor social actors addressed the subject.<sup>60</sup> Both opted instead for a very cautious, moderate strategy.

Within the South American context, Chile and Peru became the exceptions to the rule, as they both experienced a transition to democracy without the replacement of the authoritarian constitutional provision.<sup>61</sup> But what made Chile truly unique was the absence of an open debate on the subject as soon as democracy was reestablished, as happened in other countries. Even in Peru, immediately after Fujimori left power in 2000, a commission for the study of constitutional reforms was established by the provisional government.<sup>62</sup> Thus, although we observed reforms in Chile, they were primarily the result of an elitist bargaining process.

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would arguably be much easier in a society in which only a minority was involved in creating the constitution).

53. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 32, § 6 (amended 2005) (Chile).

54. *Id.* arts. 95–96.

55. *Id.* art. 45 (amended 2005).

56. *Id.* arts. 90–94 (amended 2005).

57. *Id.*

58. *Id.* arts. 116–119 (amended 1989).

59. See Patricio Silva, *Technocrats and Politics in Chile: From the Chicago Boys to the CIEPLAN Monks*, 23 J. LATIN AM. STUD. 385, 401 n.41 (1991) (recognizing a late 1970s transformation of left-wing parties with their abandonment of Leninism and valuation of democracy).

60. *Id.*

61. See *infra* Table 1.

62. Enrique Bernales, *Los caminos de la reforma constitucional en el Perú [The Paths of Constitutional Reform in Peru]*, 2005 ANUARIO DE DERECHO CONSTITUCIONAL

Table 1. Constitutional Arrangements in South America

Origin / Mechanism	With Constituent Assembly	Congressional Reforms
Current Constitution Enacted Under Democratic Rule	Brazil (1988): A Paraguay (1992): A Colombia (1991): C A Argentina (1994): A Venezuela (1999): R A R Ecuador (1998): C A Ecuador (2008): R A Bolivia (2009): R A R	Uruguay (1967) 1996: R 2004: R
Current Constitution Enacted Under Non-democratic Regime		Perú (1993) Chile (1980) 1989: R 2005: R

Key: A: National Constituent Assembly  
C: Consultation  
R: Binding Referendum

Source: Gabriel Negretto, Political Parties and Institutional Design: Explaining Constitutional Choice in Latin America, 39 BRIT. J. POL. SCI. 117 (2009); Georgetown University Center for Latin American Studies, POLITICAL DATABASE OF THE AMERICAS, <http://pdba.georgetown.edu/>.

Another characteristic of the Chilean case is that institutional barriers meant to hinder constitutional reform did not prevent political actors from changing the constitution.<sup>63</sup> Indeed, several of the intuitive conditions predicted by the literature are not present in this case: no significant social groups pressured for reforms, no relevant political party in congress used the issue as a platform for mobilizing its constituency against the 1980 constitution, no significant economic or institutional crisis affected the country, and no significant change occurred in the balance of power between the main political forces in congress from 1990 to 2010.<sup>64</sup> The story of constitutional reform in Chile is characterized by agreements among the elite, influence of a few academic experts, and lack of citizen engagement.

In order to make sense of the features described above—a lack of political mobilization during the transition and relevant reforms afterwards—

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LATINOAMERICANO [YEARBOOK LATIN AM. CONST. RTS.] 157, 157–58 (Mex.). Even in Peru, provisional President Valentin Paniagua (2000–2001) created a Commission for the Study of the Constitutional Reform. *Id.* at 158. The national congress under Toledo's administration (2001–2006) took into consideration the conclusions from that commission and proposed a reform, which also included the consultation of a number of civil-society organizations. *Id.* at 160–61. However, the debate in congress was highly divisive as some congressional representatives thought a new "Constituent Assembly" was necessary. *Id.* at 162.

63. See, e.g., Heiss & Navia, *supra* note 9, at 178 (analyzing Chile's 1989 constitutional reforms, including one that eliminated a 1980 constitutional provision requiring two consecutive congresses to approve certain constitutional changes).

64. See *infra* Table 4.

I argue that we need to analyze in greater detail who the agents of change were. And, as several authors have pointed out concerning Latin American politics, a central feature is the executive branch's dominance of the political agenda.<sup>65</sup> In this Article, I will demonstrate how the combination of a proactive executive branch and disciplined political parties explains Chile's gradual and highly elitist strategy of constitutional change.

But the politics of constitutional amendment also require the cooperation of players who have the power to veto. The literature asserts that change comes when the existing constitution "becomes incompatible with new political conditions, when the constitution does not serve the interests of powerful political actors, or when it fails to work as a governance structure."<sup>66</sup> I suggest a slightly different causal mechanism explaining actors' motivation to promote change. I assert that in some cases they are willing to accept reforms because they expect future political gains as a result of the bargaining process. The expectation of future reputational returns is a strong driving force for the promotion of change.

#### A. *The Big Picture: Cycles of Constitutional Reforms*

In Chile, the 1980 constitution established a combination of a strong executive, autonomy of the armed forces, and a complex system of checks and balances among different state institutions.<sup>67</sup> In the original version of the constitution, presidential powers included a presidential term of eight years without the possibility of reelection;<sup>68</sup> the power to dissolve the chamber once per term;<sup>69</sup> the power to nominate ministers, regional representatives, provincial governors, ambassadors, and mayors;<sup>70</sup> and the exclusive power to propose bills on issues concerning taxes, collective bargaining, social security, and the creation of new public services.<sup>71</sup> But at the same time, the constitution established greater levels of autonomy for

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65. See GRINDLE, *supra* note 21, at 10 (observing that during the political and economic reforms in Latin America during the 1980s, "economic reform leaders typically introduced their reforms through the use of executive decree powers rather than through legislative processes," and that "in the throes of attempting to introduce major economic policy reforms, politicians typically concentrated power in the executive"); Gary W. Cox & Scott Morgenstern, *Latin America's Reactive Assemblies and Proactive Presidents*, 33 COMP. POL. 171, 175 (2001) ("Latin American executives typically have greater powers of unilateral action than either U.S. presidents or European prime ministers . . .").

66. Negretto, *supra* note 19, at 10.

67. See Heiss & Navia, *supra* note 9, at 166–67 (outlining the basic framework of the 1980 constitution, which included an initial eight-year presidential term; a system for protected democracy that contained restrictions on political parties and labor unions; and the assignment of the military to a tutelary role, which included budgetary and administrative autonomy).

68. C.P. art. 25 (amended 2005) (Chile).

69. *Id.* art. 32, § 5 (amended 1989).

70. *Id.* art. 32, § 9 (amended 1991).

71. *Id.* art. 62, §§ 1–2, 5–6 (amended 1997).

some institutions, including the Constitutional Tribunal, the armed forces, and the Comptroller General.<sup>72</sup>

Moreover, the constitution aimed to diminish the influence of political parties. First, it reduced the influence of local politics by replacing elected officials with appointed mayors and allowed for the creation of local and regional development councils in which members of the armed forces and the police had guaranteed seats.<sup>73</sup> Second, it established a binominal electoral system, a unique device that forced all parties to collaborate with one or two established coalitions in order to obtain a seat in congress.<sup>74</sup> Third, it established appointed senators, thereby increasing the influence of the armed forces within the political system.<sup>75</sup> In the original scheme, appointed senators accounted for 25.7% of the senate.<sup>76</sup> Finally, former presidents who had served terms of more than six years had the right to serve as senators for life.<sup>77</sup>

The framers aimed to make constitutional reform extremely difficult for future authorities. For instance, in certain strategic areas, the constitution established a special supermajority requirement of either three-fifths or two-thirds for any constitutional reform.<sup>78</sup> Additionally, for certain chapters of the constitution, the approval of two consecutive legislatures was required.<sup>79</sup> Finally, the constitution established so-called *leyes orgánicas* (organic laws) that required a special three-fifths supermajority vote for approval and that

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72. Compare *id.* arts. 81, 87, 93 (amended 2005) (providing that members of the Constitutional Tribunal would not be removable and would have lengthened terms of eight years; that the Comptroller General would not be removable and would retire at age 75; and that the commanders in chief of the armed forces would not be removable, although the president could call on them to retire with the consent of the National Security Council), with CONSTITUCIÓN DE LA REPÚBLICA DE CHILE of 1925 arts. 21, 78(a) (providing that the members of the Constitutional Tribunal would be removable by the president with the consent of the senate and would only have four-year terms and providing no limits on removability of the Comptroller General or commanders in chief).

73. C.P. arts. 101, 108–109 (amended 1997) (Chile).

74. See *id.* art. 43 (amended 2005) (providing that the chamber of deputies would be composed of 120 members and that each region would elect two senators). The 120 deputy seats are apportioned with two seats per each of the sixty electoral districts; this binomial electoral system has historically favored the two largest coalitions. *Background Note: Chile*, U.S. DEP'T OF STATE (Mar. 10, 2011), <http://www.state.gov/r/pa/ei/bgn/1981.htm>.

75. C.P. art. 45(d) (amended 1989) (Chile).

76. See *id.* art. 45 (amended 1989) (providing that nine senators out of a total of thirty-five would be appointed and that the remaining twenty-six would be elected from the thirteen regions). Four of these appointed senators had to either be former commanders in chief of the armed forces or former chiefs of police and were appointed by the National Security Council in which the armed forces and the police hold a majority; three were appointed by the supreme court; and two were appointed by the president. *Id.* arts. 45(b)–45(f) (amended 1989).

77. *Id.* art. 45(a) (amended 2005).

78. *Id.* arts. 116–118 (amended 1989). The 1980 constitution established a special supermajority requirement in Chapter I (Essential Basis of Institutionalism), Chapter VII (Constitutional Tribunal), and Chapter X (Armed Forces). *Id.* arts. 9, 81, 94 (amended 2005).

79. *Id.* art. 118 (amended 1989).

involved a wide range of crucial themes including institutional, political, social, and economic issues.<sup>80</sup>

A concrete example may help to illustrate the distortions of the political system. The constitution established that the head of the armed forces and the chief of police had fixed appointments of four years.<sup>81</sup> The president could not remove them without the approval of the National Security Council (NSC).<sup>82</sup> However, the military controlled the majority of votes in that council (four out of seven votes).<sup>83</sup> Two members of the NSC could call a meeting if they considered the state to be under threat.<sup>84</sup> Moreover, through the NSC, the heads of military institutions appointed four senators and two members of the Constitutional Tribunal.<sup>85</sup> Military institutions also held seats in regional and municipal development councils and the National Mining Company (Codelco).<sup>86</sup>

Politicians had strong incentives to alter the existing balance of power prior to the transition, but the story of reform was characterized by moderate and gradual changes. This story can be summarized in four stages. After the 1988 plebiscite in which Pinochet lost, the military regime and the opposition, *Concertación de Partidos por la Democracia* (CPD), engaged in a highly informal negotiation to reform some aspects of the constitution.<sup>87</sup>

The CPD, along with some of the more liberal segments of right-wing parties, organized a commission and proposed a set of essential reforms to the military regime.<sup>88</sup> Even though the regime invited representatives of the opposition to send their proposal to the government, the *Junta Militar* submitted only a limited set of reforms to a national referendum in July 1989.<sup>89</sup>

80. See, e.g., *id.* art. 63 (establishing a three-fifths supermajority vote for approval of constitutional organic laws); *id.* art. 38 (amended 2005) (stating that organic laws would control the basic organization of the public administration); *id.* art. 71 (amended 2005) (stating that organic laws would control the terms of presidential bill expedition); *id.* art. 74 (amended 2005) (pronouncing that organic laws would govern the Chilean court system).

81. *Id.* art. 93 (amended 2005).

82. *Id.*

83. *Id.* art. 95 (amended 1989).

84. *Id.*

85. *Id.* art. 81 (amended 2005); *id.* art. 45(d) (amended 1989).

86. See Juan Agustin Allende, *Historical Constraints to Privatization: The Case of the Nationalized Chilean Copper Industry*, 23 *STUD. COMP. INT'L DEV.* 55, 71 (1988) (recounting the appointment of Codelco's Chief Executive Officer by the central government and military functionaries to act in the implementation period); Brian Loveman, *Government and Regime Succession in Chile*, 10 *THIRD WORLD Q.* 260, 268 (1988) (identifying the military's direct representation on development councils).

87. *WORLD BANK INST., CHILE: RECENT POLICY LESSONS AND EMERGING CHALLENGES* 396–97 (Guillermo Perry & Danny M. Leipziger eds., 1999); see also Heiss & Navia, *supra* note 9, at 169 (“The dictatorship . . . did not formally negotiate with the opposition.”).

88. *WORLD BANK INST.*, *supra* note 87, at 397 & n.6.

89. See Heiss & Navia, *supra* note 9, at 170 (“[B]ecause the Concertación could only accept or reject but not modify the dictatorship's proposed reforms, the military could maximize the number of protected democracy provisions that remained untouched. The concessions . . . fell short of what the opposition had asked for.”).

These reforms included a slight reduction in the vote required for constitutional reforms in organic laws;<sup>90</sup> the elimination of the requirement that two consecutive legislatures approve certain chapters;<sup>91</sup> the elimination of the executive power to dissolve the chamber;<sup>92</sup> the establishment of a four-year transitional government without the possibility of reelection;<sup>93</sup> the incorporation of the Comptroller General in the NSC to help balance the relationship between civilians and military;<sup>94</sup> the elimination of the clause proscribing parties that promote “totalitarian” doctrines;<sup>95</sup> and an increase in the number of elected seats in the senate from twenty-six to thirty-eight,<sup>96</sup> reducing the proportion of appointed senators from 25.7% to 19.1%. Thus, this moderate reform allowed for the establishment of better conditions for future constitutional reforms.

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90. *Id.* at 178; *see also* C.P. art. 63 (amended 1989) (Chile) (requiring three-fifths of congressional representatives in each house to approve a reform of organic laws); Law No. 18825 § 35, Junio 15, 1989, DIARIO OFICIAL [D.O.] (Chile) (amending article 63 to require four-sevenths of the congressional representatives in each house to approve a reform to organic laws).

91. *See* C.P. art. 118 (Chile) (requiring approval of a two-thirds majority of two consecutive legislatures before a constitutional amendment to certain chapters can take effect); Law No. 18825 § 52 (Chile) (repealing article 118).

92. *See* C.P. art. 32, § 5 (Chile) (permitting the president to dissolve the Chamber of Deputies once during his term); Law No. 18.825 § 16 (Chile) (abrogating article 32, § 5).

93. Law No. 18825 § 53 (Chile) (restricting the term of the first president to four years and prohibiting his reelection in the following term); *see also* Heiss & Navia, *supra* note 9, at 164 (noting that the first presidency following the reforms, “widely expected to go to the Concertación,” would be limited to four years).

94. Law No. 18825 § 44 (Chile); *see also* Heiss & Navia, *supra* note 9, at 177 (asserting that this reform “curtail[ed] the armed forces majority” on the NSC).

95. *See* Law No. 18825 § 2 (Chile) (repealing article 8 of the original 1980 constitution, which declared certain political activities unconstitutional); Heiss & Navia, *supra* note 9, at 172 (“Infamous Article (Art) 8 embodied the military’s vision of protected democracy.”).

96. Law No. 18825 § 25 (Chile); Heiss & Navia, *supra* note 9, at 178.

Table 2. Key Moments of Constitutional Reform

Year	# of Areas	Actors	Subject (Most Relevant)
1989	56	Pinochet Regime Referendum	Presidential period (4); increased senators; balanced appointment of senators between civilians and military; acceptance of the Communist Party
1990/2003 Aylwin (3) Frei (7) Lagos (4)	14	CPD and <i>Alianza</i> Congress	Presidential period (6); terrorism; municipal elections; supreme court appointments; gender equality; mandatory preschool and secondary education; freedom of expression
2005 Lagos (1)	58	CPD and <i>Alianza</i> Congress	Elimination of “enclaves” (appointed senators, armed forces, National Security Council); executive–legislative balance of power; presidential period (4); state of exception; Constitutional Tribunal
2006–2010 Bachelet (9)	12	CPD and <i>Alianza</i> Congress	Rome Statute; regional government; voluntary voting system and electoral registration; presidential election date; quality of politics and probity; Easter Island as special territory

Notes: CPD – Concertación de Partidos por la Democracia.

*Alianza* – Opposition coalition.

Numbers in parentheses are the number of reforms proposed by each president.

According to the head of the technical commission of the CPD, Francisco Cumplido, several aspects remained untouched, including the electoral system, the appointment of senators, and the mechanisms for constitutional reforms.<sup>97</sup> The reform actually increased the military’s autonomy by addressing military pensions, retirement, and budget calculations under the title of organic laws, thereby making it more difficult to approve changes to these systems.<sup>98</sup> Moreover, the approved proposal actually increased the vote required for reforms from three-fifths to two-thirds in certain sensitive areas such as Chapter III (constitutional rights and duties) and Chapter XIV (constitutional reform).<sup>99</sup>

97. CARLOS ANDRADE GEYWITZ, REFORMA DE LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE DE 1980 [REFORM OF THE POLITICAL CONSTITUTION OF THE REPUBLIC OF CHILE OF 1980], at 120 (1991).

98. Heiss & Navia, *supra* note 9, at 170, 179, 182.

99. See C.P. art. 116 (amended 1989) (Chile) (requiring a three-fifths majority vote to approve constitutional reforms); Law No. 18825 § 49 (Chile) (amending article 116 to require a two-thirds majority vote for reforms to certain chapters of the constitution).

A second critical period took place between 1990 and 2003, during the administration of the CPD-led coalition. Under the leadership of Presidents Aylwin (1990–1994), Frei (1994–2000), and Lagos (2000–2006), the CPD-led coalition promoted fourteen reforms, which included aspects concerning freedom of expression as well as political and social rights.<sup>100</sup>

But the most relevant reform came in 2005 during the Lagos administration, after five years of negotiation between the CPD and the right-wing coalition, *Alianza*. The change included the elimination of appointed senators, including lifelong senatorial appointments for former presidents; reforms to the states of exception; the elimination of several prerogatives of the armed forces; the addition of the power of the president to remove the head of the armed forces and the chief of police by submitting a symbolic report to congress; and the substantial reduction in the power of the NSC.<sup>101</sup> Moreover, reforms were enacted that affected other institutional features, including reducing the presidential term to four years without the possibility of reelection; eliminating the “extraordinary” period of sessions in congress, which reduced the power of the executive branch to control congress’s legislative agenda; establishing a congressional mechanism to summon members of the cabinet; increasing powers for congress to create investigative commissions; and reforming the composition of the Constitutional Tribunal, among others.<sup>102</sup>

After this agreement, during the Bachelet administration, new proposals were sent to, and approved by, congress. This inaugurated a new period of reforms, which included approval of the Rome Statute,<sup>103</sup> a reform of regional government that permitted greater levels of decentralization,<sup>104</sup> a

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100. Law No. 19295, Febrero 22, 1994, D.O. (Chile) (changing the presidential term to six years); Law No. 19448, Febrero 12, 1996, D.O. (Chile) (directing municipal elections); Law No. 19519, Septiembre 6, 1997, D.O. (Chile) (increasing the number of supreme court judges); Law No. 19526, Noviembre 7, 1997, D.O. (Chile) (creating new public services); Law No. 19541, Diciembre 18, 1997, D.O. (Chile) (modifying the judicial appointment process and adding qualification requirements for supreme court justices); Law No. 19597, Diciembre 24, 1998, D.O. (Chile) (modifying supreme court review of constitutional organic laws); Law No. 19611, Junio 9, 1999, D.O. (Chile) (adding the provision that “[m]en and women are equal before the law”); Law No. 19634, Septiembre 21, 1999, D.O. (Chile) (adding the provision that “[t]he state will promote kindergarten education”); Law No. 19643, Octubre 22, 1999, D.O. (Chile) (changing the presidential election process and modifying the composition requirements for the Elections Qualifying Court); Law No. 19671, Abril 19, 2000, D.O. (Chile) (making changes to congressional sessions); Law No. 19672, Abril 19, 2000, D.O. (Chile) (establishing honors for former presidents); Law No. 19742, Agosto 25, 2001, D.O. (Chile) (reforming the system of state censorship); Law No. 19876, Junio 22, 2003, D.O. (Chile) (establishing mandatory preschool and secondary education); Law No. 20050, Agosto 18, 2005, D.O. (Chile) (qualifying the unitary nature of the state).

101. Law No. 20050 §§ 20–21, 45–48 (Chile). *See generally Democratic at Last*, ECONOMIST, Sept. 2005, at 38 (discussing the constitutional reforms that President Lagos was due to sign in 2005).

102. Law No. 20050 §§ 13, 18–19, 24, 41 (Chile).

103. Law No. 20352, Mayo 26, 2009, D.O. (Chile).

104. Law No. 20390 §§ 3–5, Octubre 16, 2009, D.O. (Chile).



constitutional shift from compulsory to voluntary voting,<sup>105</sup> a declaration of Easter Island as a special territory,<sup>106</sup> and reforms regarding the quality of politics and the probity of public administrators.<sup>107</sup>

Thus, observing the big picture, we see two crucial moments: 1989, when congress enacted a set of relatively unsubstantial reforms that were nevertheless crucial in paving the way for future agreements, and 2005, when congress eliminated a set of authoritarian “enclaves” and reshaped certain state institutions in order to produce a slightly different balance of power more favorable to the congress and the Constitutional Tribunal. In between these two moments, we observe specific initiatives approved by congress on a range of other less important but nevertheless substantial subjects.

Another way to observe the attempts toward constitutional reform is to examine proposals sent to congress. Between 1990 and March 2010, the executive and legislative branches submitted a total of 342 bills in the form of *mensajes* by the executive branch or *mociones* by legislators.<sup>108</sup> An average of 17.1 constitutional reform proposals were debated in congress every year during this time.

Some characteristics of this political process are worth noting. First, the role of the executive branch in submitting and sponsoring bills is crucial within the Chilean political system. The executive branch originally submitted 71% of the proposals approved by congress. The executive branch also played a significant role in sponsoring the remaining 29% of the proposals.<sup>109</sup> Second, we would expect that political activity decreased following the crucial August 2005 agreement, which eliminated “authoritarian enclaves.”<sup>110</sup> However, the figures show a rather significant increase in the number of proposals, particularly those submitted by congressional representatives.

Third, the last column of Table 3 shows that as the democratic transition evolved, crucial themes were being debated. It was during the Lagos administration that more substantial, and therefore divisive, issues were discussed in congress. This is why, on average, a proposal submitted during the Lagos administration took more than four years to be approved. Long periods of negotiations preceded the approval of the Rome Statute (eighty-five months), the reform of regional governments (seventy months), the cru-

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105. Law No. 20337 § 1, Marzo 27, 2009, D.O. (Chile).

106. Law No. 20193 § 1, Junio 27, 2007, D.O. (Chile).

107. Law No. 20414 §§ 1–5, Diciembre 28, 2009, D.O. (Chile).

108. See *infra* Table 3.

109. These figures are based on analysis by the author of the 342 reform proposals submitted in congress from March 11, 1990, to March 10, 2010. These bills can be found in the bill proposal database, which is available at <http://www.camara.cl>.

110. See *supra* notes 101–02 and accompanying text.

cial 2005 reform eliminating the authoritarian enclaves (sixty-one months), and the elimination of the compulsory voting system (fifty-eight months).<sup>111</sup>

How can we make sense of this trend of reforms? The first intuitive response is that unsatisfied political elites are likely to constantly push for reform. But the political process in Chile was rather gradual. No significant reform was enacted until 2005, fifteen years after the transition.<sup>112</sup> Government actors and legislators clearly avoided the subject during the Aylwin administration. It is only after 2000 that we observed more significant political efforts to change the status quo.

Table 3. Constitutional Proposals Debated by Congress, 1990–2010

Period	Bills Introduced by Executive Branch	Bills Introduced by Congressional Representatives	Total Bills (Avg. by Year)	Bills Approved (Executive Initiative)	Average Time Bills Were Debated in Congress
Aylwin '90–'94	8	33	41 (10.2)	3 (3)	4.3 months
Frei '94–'00	13	78	91 (15.2)	10 (6)	20.8 months
Lagos '00–'06	8	58	66 (11.0)	8 (5)	41.8 months
Bachelet '06–'10	11	133	144 (36.0)	3 (3)	20.3 months
<b>Total</b>	<b>40</b>	<b>302</b>	<b>342 (17.1)</b>	<b>24 (17)</b>	<b>25.6 months</b>

*Note:* “Bills Introduced” are single bills submitted to congress containing one or more issue. “Bills Approved” are determined on the basis of the year in which the bill was submitted.

Changes in the political balance of power do not explain this trend. When one observes the distribution of power in congress between 1990 and 2010, the overall stability is striking.<sup>113</sup> As previously mentioned, any political movement seeking to create a constitutional reform must obtain at least four-sevenths of the vote in both chambers for a change to organic laws, three-fifths for a change to nine of the constitution’s chapters, and two-thirds for a change to the remaining six chapters.<sup>114</sup>

111. These figures were calculated based on when the bills were introduced and when they were approved. The bills can be found in the bill proposal database, which is available at <http://www.camara.cl>.

112. *See supra* Table 2.

113. *See infra* Table 4.

114. *See supra* notes 78–80, 90 and accompanying text.

Table 4. Balance of Power in Congress, 1990–2010 (%)

	Chamber of Deputies			Senate		
	<i>CPD</i>	<i>Alianza</i>	<i>Independ.</i>	<i>CPD</i>	<i>Alianza</i>	<i>Independ.</i>
1990–1994	60.0	40.0	-	46.8	53.2	-
1994–1998	58.3	41.7	-	44.7	55.3	-
1998–2002	58.3	41.7	-	50.0	50.0	-
2002–2006	52.5	47.5	-	50.0	50.0	-
2006–2010	54.2	45.8	-	52.6	44.7	2.7
2010–2014	47.5	48.3	4.2	52.6	44.7	2.7

*Source:* Ministerio del Interior [Ministry of the Interior], Gobierno de Chile [Government of Chile], *Resultado Electoral 2009* [Electoral Results 2009], SITIO HISTÓRICO ELECTORAL [HISTORICAL ELECTORAL SITE], <http://www.elecciones.gob.cl/>; BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE [NATIONAL LIBRARY OF CONGRESS OF CHILE], <http://www.bcn.cl/>.

Thus, several of the conditions laid out in the literature as necessary were not present. There was no significant change in the balance of power, new political actors did not emerge, and no significant economic, social, or political crisis triggered change. Moreover, according to the literature, high levels of party fragmentation plus stringent amendment procedures should lead to low rates of reform.<sup>115</sup> Both conditions were present in Chile, but we still observe high levels of reform.<sup>116</sup> In the next Part, I will endeavor to explain this unexpected outcome.

### III. Explaining (Constant) Attempts to Change the Rules of the Game

Ackerman as well as Elkins, Ginsburg, and Melton are right in defining inclusion as a central feature for constitutional stability. As long as relevant actors are not included within the framing of constitutional arrangements, we may expect constant battles over the rules of the game in a given country.

But what makes political actors initiate reforms? At first glance, the case of Chile offers an intuitive response: actors who are discontented with

115. See *supra* notes 44–48 and accompanying text.

116. See *supra* Table 3 (showing the number of constitutional proposals approved during each presidential period from 1990 to 2010). David Altman defines Chile as one of the most fragmented political systems in Latin America, calculating the number of effective parties at eight. David Altman, *Continuidades, cambios y desafíos democráticos en Chile (2006–2009)* [Continuities, Changes and Challenges of Democracy in Chile (2006–2009)], 64 COLOM. INTERNACIONAL [COLOM. INT'L] 12, 18 (2006). However, it should be emphasized that in the Chilean political system, the electoral structure forces the establishment of two main coalitions. *Id.* at 28. In this sense, there are indirect mechanisms to force coalition discipline.

the status quo will push for change. However, a closer examination of the *contexts* in which the actors exist may illuminate the real agents of change. Asymmetries of power among actors and actors' expectations about future shifts in the balance of power are relevant and must be taken into account.

#### A. *Passive and Proactive Executives*

As several authors have pointed out, in presidential systems the executive branch plays a key role in legislative outcomes.<sup>117</sup> This does not imply that legislatures are irrelevant. Scott Morgenstern summarizes executive–legislative relations by suggesting that even though Latin American assemblies are primarily reactive (and presidents are essentially proactive), their relations take the form of a “bilateral veto game.”<sup>118</sup> Presidents can choose “either to make an end run around the assembly or to join it.”<sup>119</sup>

Concerning Chile, Peter Siavelis correctly asserts that “the president has always been an important legislator, with the ability to dominate the legislative process given his agenda-setting ability, budgetary dominance, and areas of exclusive initiative. . . . [I]n postauthoritarian Chile the president has been the most important legislative actor, and perhaps the most important legislator.”<sup>120</sup> He adds, though, that these strong presidents need to moderate their policies as they need to satisfy coalition partners.<sup>121</sup>

Indeed, the executive branch in Chile enjoys strong powers, such as the exclusive initiative in all legislation involving the provision of fiscal resources, including taxation; the automatic approval of the budget if congress fails to approve it; the right to define what is being discussed in congress through the mechanism of “urgencies”; the benefit of an “extraordinary period” in which congress can debate only the proposals sent by the executive; and the access to a high level of expertise and important institutional capacities within the Ministry of the Presidency, which are used to write proposals and keep track of law-related issues.<sup>122</sup> Another relevant

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117. See, e.g., MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 147 (1992) (“[T]he authority of the president to introduce legislation makes him or her a central player in the legislative process from the outset . . . .”); cf. Scott Morgenstern, *Towards a Model of Latin American Legislatures*, in *LEGISLATIVE POLITICS IN LATIN AMERICA* 1, 1 (Scott Morgenstern & Benito Nacif eds., 2002) (“[M]any recent Latin American presidents . . . have railed against obstructionist, corrupt, or ineffective legislatures. Fujimori used this excuse to close the Peruvian Congress, and Menem in Argentina and Collor in Brazil sought to govern without involving their legislatures.”).

118. Gary W. Cox & Scott Morgenstern, *Epilogue: Latin America's Reactive Assemblies and Proactive Presidents*, in *LEGISLATIVE POLITICS IN LATIN AMERICA*, *supra* note 117, at 446, 446.

119. Cox & Morgenstern, *supra* note 65, at 187.

120. Peter M. Siavelis, *Exaggerated Presidentialism and Moderate Presidents: Executive–Legislative Relations in Chile*, in *LEGISLATIVE POLITICS IN LATIN AMERICA*, *supra* note 117, at 79, 83–84.

121. *Id.* at 83.

122. *Id.* at 84.

executive power is the ability of ministers and their advisors to sit in on the assembly (particularly in congressional committees) and actually solicit the support of the chamber on any given piece of legislation.<sup>123</sup>

Power asymmetry between branches is a relevant starting point for this analysis. It explains, for instance, the success of executive bills in comparison to that of representatives' proposals. As previously mentioned, of the twenty-four proposals approved by congress, seventeen were introduced by the executive branch and only seven by legislators.<sup>124</sup> Even the speed of approval is faster for executive proposals versus congressional bills (205 days versus 487 days, respectively).<sup>125</sup>

Executives are not always proactive, though. The use of executive powers has changed over time and therefore requires further explanation. To begin with, several political and strategic conditions made the first two post-transition democratic governments more cautious about pushing an extensive agenda of constitutional reforms. But after 2000, during the Lagos administration (2000–2006), we observed a more proactive executive branch. Although it faced a similar balance of power in congress, the behavior of the executive branch was significantly different from 1990 to 1999 than it was from 2000 to 2005. This difference is due to strategic as well as contextual conditions.

In the case of the Aylwin administration (1990–1994), a crucial concern was strategy. According to Edgardo Boeninger, Aylwin's Minister of the Presidency, one of the programmatic goals of the new authorities was the democratization of political institutions.<sup>126</sup> However, in his first message to the nation, Aylwin said, "[I]f we were to proceed in that manner [promoting reforms], it would produce a difficult and confrontational congressional debate with a high probability of rejection, given the signals sent by [the liberal right-wing party] *Renovación Nacional*, in the sense that [the reforms] . . . were inappropriate at this time."<sup>127</sup> Thus, the first democratic government chose to look for the support of right-wing parties on economic subjects (tax reform, for instance), postponing its political reform platform.<sup>128</sup>

There were political concerns as well. A central reform would imply taking relevant powers away from the armed forces, but the authorities were not yet willing to engage in a direct confrontation with the armed forces. Indeed, by 1984 Patricio Aylwin was convinced that the only way to promote

123. Cox & Morgenstern, *supra* note 65, at 185.

124. *See supra* Table 3.

125. Siavelis, *supra* note 120, at 87.

126. *See* EDGARDO BOENINGER, *DEMOCRACIA EN CHILE: LECCIONES PARA LA GOBERNABILIDAD* [DEMOCRACY IN CHILE: LESSONS FOR GOVERNABILITY] 390 (1997) (describing the primary goal of the Aylwin government as the removal of the military from its political role and the reinsertion of democratically obedient institutions into the political order).

127. *Id.* at 389.

128. *See id.* at 466–82 (chronicling the Aylwin administration's early economic, social, and tax reforms).

a peaceful transition to democracy was to avoid the question of the legitimacy of the constitution, and therefore to accept the armed forces as a veto player:

The only advantage that [Pinochet] has over me . . . is that the constitution is ruling—whether I like it or not. This is . . . part of the reality that I accept. How can we break this impasse without anyone suffering humiliation? There is only one way: to deliberately avoid the theme of [the constitution's] legitimacy.<sup>129</sup>

Politically, President Aylwin chose a less confrontational strategy and accepted the relative autonomy of the armed forces. In 1990, just after Aylwin took office, Ricardo Lagos—his Minister of Education—suggested to him the idea of announcing one critical reform: the reestablishment of the presidential power to remove high-ranking officers from the armed forces.<sup>130</sup> President Aylwin responded that he believed “that doing something too strong was not convenient . . . at that moment.”<sup>131</sup> Thus, during the first four years, the government opted for a strategy that combined pragmatic agreements with right-wing parties in congress and informal resolutions of conflicts with the military.<sup>132</sup> Left-wing parties within the coalition accepted this strategy without looking for popular support to push for reform.

The second democratic administration, Frei (1994–2000), developed a relatively similar strategy with some minor changes. After a military uprising in 1995, the government decided to signal its commitment to constitutional reforms by introducing a bill package that proposed eliminating appointed senators, modifying the Constitutional Tribunal, significantly reducing the NSC's power, and reestablishing the presidential power to remove officers from the armed forces.<sup>133</sup> Several months later, the

129. RAFAEL OTANO, NUESTRO CRÓNICA DE LA TRANSICIÓN [NEW CHRONICLE OF THE TRANSITION] 21 (2006) (quoting Patricio Aylwin, Vice President, Partido Demócrata Cristiano de Chile [The Christian Democratic Party of Chile], Keynote Address at Inst. Chileno de Estudios Humanísticos Symposium: Un Sistema Jurídico–Político Constitucional para Chile [Chilean Inst. of Humanitarian Studies Symposium: A Judicial–Political Constitutional System for Chile] (July 28, 1984)).

130. PATRICIA POLITZER K., EL LIBRO DE LAGOS [THE BOOK OF LAGOS] 149 (1998).

131. *Id.*

132. See CLAUDIO FUENTES SAAVEDRA, LA TRANSICIÓN DE LOS MILITARES: RELACIONES CIVILES–MILITARES EN CHILE 1990–2006 [THE TRANSITION OF THE MILITARY: CIVIL–MILITARY RELATIONS IN CHILE 1990–2006], at 38–39 (2006) (describing how the Aylwin government compromised its goal of ensuring obedience of the military to the political order and instead focused on involving the military in decisions about foreign affairs and military technology).

133. Presidente Eduardo Frei Ruiz-Tagle, *Mensaje de S.E. El Presidente de la República con el que inicia un proyecto de reforma de la Constitución Política de la República* [Message from H.E. the President of the Republic Initiating a Reform Project of the Political Constitution of the Republic], BOLETÍN 1680-07, No. 146-331, at 4, 6, 7 (1995), available at <http://sil.senado.cl/docsil/proy1293.doc>; Presidente Eduardo Frei Ruiz-Tagle, *Mensaje de S.E. el Presidente de la República con el que inicia un proyecto de ley que modifica las leyes orgánicas constitucionales de las Fuerzas Armadas y de Carabineros de Chile* [Message from H.E. the President of the Republic Initiating a Project to Modify the Organic Constitutional Laws of the Chilean Armed Forces and Police], BOLETÍN 1682-02, No. 348-331, at 2, available at <http://sil.senado.cl/docsil/proy1711.doc>.

executive branch withdrew the proposal, as no agreement could be reached in congress.<sup>134</sup>

A strategic shift happened after Ricardo Lagos took office in March 2000. The political context helped him to pursue a proactive strategy of encouraging agreement with the opposition. In 1998, General Pinochet left the army and was appointed senator for life.<sup>135</sup> In October 1998, he was arrested in London, and in March 2000, he returned to Chile after his release on medical grounds. In his inaugural speech before congress, Lagos addressed the constitutional issue by suggesting that “[i]t is time to submit [the constitution] to an integral evaluation in order to adapt it to modern times as well as to give it all the legitimacy a supreme law of the state normally deserves.”<sup>136</sup>

A few weeks later, the president, attempting to promote a political agreement in the senate, spoke to the president of the senate, Christian Democrat Andres Zaldívar.<sup>137</sup> After an informal period of political consultations with key senators from the CPD and *Alianza*, both parties agreed to submit two independent congressional bills in July 2000.<sup>138</sup> This was a key moment in setting the agenda for reform. While the CPD’s original proposal involved the elimination of most authoritarian enclaves, *Alianza* submitted a more moderate set of reforms. Essentially, both segments agreed upon eliminating the appointment of senators, reforming the Constitutional

134. *Chile: Introductory Survey*, 2004 EUROPA WORLD Y.B. (vol. 1) 1078, 1079.

135. Fuentes, *supra* note 11, at 52.

136. Ricardo Lagos, President of Chile, Mensaje del Presidente de la Republica al Congreso Nacional [Message of the President of the Republic to the National Congress] (May 21, 2000), available at [http://www.bcn.cl/susparlamentarios/mensajes\\_presidenciales/21m2000.pdf](http://www.bcn.cl/susparlamentarios/mensajes_presidenciales/21m2000.pdf). Lagos proposed the need to eliminate appointed senators, change the binominal system, reform the Constitutional Tribunal and the National Security Council, reestablish the presidential power over the armed forces, increase legislative powers to oversee the executive branch, and promote an electoral campaign-finance system for the first time in the Chilean political history. *Id.*

137. Interview with Ricardo Lagos Escobar, Former President of Chile, in Santiago, Chile (June 1, 2010); Interview with Francisco Zúñiga, Professor of Constitutional Law, University of Chile, in Santiago, Chile (Aug. 25, 2010).

138. Interview with Gonzalo García, Advisor to the Minister of the Interior, in Santiago, Chile (Mar. 26, 2010). The CPD proposal was signed by senators Sergio Bitar, Juan Hamilton, Enrique Silva-Cimma, and Jose Antonio Viera-Gallo. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), in HISTORIA DE LA LEY NO. 20050 [HISTORY OF LAW NO. 20050], at 28, 39 (2005) [hereinafter HISTORIA], available at <http://www.bcn.cl/histley/lfs/hdl-20050/HL20050.pdf>. Francisco Zúñiga and Francisco Cumplido played a significant role during the early stages of this process by helping senators in their first drafts and by actively participating in the senate discussions as experts. Interview with Francisco Zúñiga, *supra* note 137. Hernán Larraín, Andrés Chadwick, Sergio Diez and Sergio Romero sponsored the *Alianza* proposal. Press Release, Senate of the Republic of Chile, Reformas constitucionales fueron ratificadas por 150 votos a favor 3 en contra y 1 abstención [Constitutional Reforms Were Ratified by 150 Votes in Favor, 3 Against, and 1 Abstention] (July 4, 2000), available at [http://www.senado.cl/prontus\\_galeria\\_noticias/site/artic/20080129/pags/20080129124117.html](http://www.senado.cl/prontus_galeria_noticias/site/artic/20080129/pags/20080129124117.html).

Tribunal, increasing the legislature's oversight of the executive branch, and making probity a public duty for public servants.<sup>139</sup>

The CPD proposed a bill that incorporated the elimination of enclaves, the reduction of military powers, and the proposal of a proportional electoral system.<sup>140</sup> But the CPD introduced other topics as well, such as making national citizenship easier to attain, transitioning from a mandatory to a voluntary voting system, reducing the presidential term from six to four years, and promoting the recognition of indigenous rights.<sup>141</sup> The *Alianza*, in contrast, did not make any reference to military powers but did try to balance the power of the executive branch. It did this by incorporating issues such as a reduction of the executive branch's ability to transfer resources from one agency to another without congressional approval and by increasing the required supermajorities in subjects concerning public spending.<sup>142</sup> Moreover, it proposed reducing the scope of international law by incorporating a clause that mandated that a constitutional amendment be enacted before the president could sign an international treaty that would affect national norms.<sup>143</sup>

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139. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), in *HISTORIA*, *supra* note 138, at 28, 32–49.

140. *Id.* at 39–49.

141. *Id.*

142. *Id.* at 32–39.

143. *Id.* at 36.



Table 5. Agenda Represented in 2005 Proposals

	CPD Proposals	<i>Alianza</i> Proposals
<b>Similarities in Original Proposal</b>	<ul style="list-style-type: none"> <li>• <b>Elimination of appointed senators</b></li> <li>• <b>Modification of Constitutional Tribunal composition</b></li> <li>• Empowerment of Constitutional Tribunal</li> <li>• Mechanisms to fulfill vacancies of legislators</li> <li>• <b>Increased legislative oversight of the executive branch</b></li> <li>• Being representative as an exclusive task</li> <li>• Probity</li> </ul>	
<b>Discrepancies Negotiated in Congress</b>	<ul style="list-style-type: none"> <li>• Citizenship</li> <li>• <b>Control over the military</b></li> <li>• Third sector (civil society, associations)</li> <li>• Presidential term reduction</li> </ul>	<ul style="list-style-type: none"> <li>• Regionalization</li> </ul>
<b>Discrepancies that Ended with No Agreement</b>	<ul style="list-style-type: none"> <li>• <b>Proportional electoral system</b></li> <li>• Indigenous rights</li> <li>• Voluntary voting</li> </ul>	<ul style="list-style-type: none"> <li>• Presidential power to make budget transfers</li> <li>• Increased quorums in areas affecting public spending</li> <li>• Public safety definitions</li> <li>• International law</li> </ul>

*Source:* These results are based on CPD and *Alianza* proposals submitted in congress. Moción Parlamentaria [Parliamentary Motion] (July 4, 2000), in *HISTORIA DE LA LEY* NO. 20.050, at 5 (2005) (Bulletin No. 2.526-07), available at <http://www.bcn.cl/histley/lfs/hdl-20050/HL20050.pdf>; Moción Parlamentaria [Parliamentary Motion] (July 4, 2000), in *HISTORIA DE LA LEY* NO. 20.050, *supra*, at 18 (Bulletin No. 2.534-07).

*Note:* Bold text represents topics traditionally considered to be “authoritarian enclaves.”

Proposals were debated in the senate for more than four years, until November of 2004. On three separate occasions, different versions of the proposals were sent to the Senate Commission on the Constitution, Justice, and Legislature (SCCJL).<sup>144</sup> A critical juncture was reached in November 2001, when the SCCJL delivered a 600-page report addressing the basis for the agreement between the CPD and the *Alianza*.<sup>145</sup> In November 2004, the proposal was transferred to the Chamber of Deputies, and six months later it was sent back to the senate.<sup>146</sup>

144. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), in *HISTORIA*, *supra* note 138, at 28; Segundo Informe Comisión de Constitución [Second Constitutional Commission Report] (Mar. 18, 2003), in *HISTORIA*, *supra* note 138, at 995; Nuevo Segundo Informe Comisión de Constitución [New Second Constitutional Commission Report] (Nov. 9, 2004), in *HISTORIA*, *supra* note 138, at 2124.

145. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), in *HISTORIA*, *supra* note 138, at 28.

146. Oficio de Cámara de Origen a Cámara Revisora [Position of Chamber of Origin to Review Chamber] (Nov. 11, 2004), in *HISTORIA*, *supra* note 138, at 2168, 2439.

The constitution does not contain a provision for the type of conflicts that arose between the two chambers during the negotiation of this bill in November 2004. In order to solve this political impasse, the executive branch introduced twenty-seven presidential vetoes for those subjects upon which the two chambers did not agree.<sup>147</sup> Then, between June and August of 2005, the executive branch and the legislature established an informal commission to solve all pending issues.<sup>148</sup>

The executive branch played a crucial role in setting the agenda, promoting informal agreements on divisive issues, and proposing alternative courses of action for legislators.<sup>149</sup> Indeed, even though the proposals formally emerged from the senate, the executive branch took a leading role in setting the agenda by promoting specific initiatives and restricting the scope of issues to be considered on the floor.<sup>150</sup>

The acting government knew that any constitutional amendment would require the agreement of the opposition. The government also knew that the best place to achieve a minimum consensus was in the senate. Throughout the negotiation, the strategy of the executive branch was to narrow down the scope of issues to be addressed in deliberations.<sup>151</sup> In introducing the goals of the executive, Chief of Cabinet José Miguel Insulza clearly stated that the purpose of this reform is not to promote new improvements to the constitution but to take care of “what is the essential core of the original 1980 constitution, that is, the idea of a protected democracy.”<sup>152</sup> He rejected the attempts of some CPD senators to increase the number of issues discussed in the reform—issues such as probity, freedom of expression, referendum initiatives, and other relevant subjects.<sup>153</sup> Insulza stated that “these issues are of great importance for the improvement of the constitution, but we need to address them once the essential philosophy has changed so that a constitution of protected democracy becomes a basic law.”<sup>154</sup>

During the first debates at the SCCJL, some senators explicitly recognized the need to broaden the scope of constitutional reforms. Senator Edgardo Boeninger (a member of CPD), for instance, argued that if the idea was to draft a text that would endure over time, relevant issues cannot be excluded, such as the executive power to remove an officer or the reform of

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147. Observaciones del Ejecutivo [Observations of the Executive] (Aug. 16, 2005), in *HISTORIA*, *supra* note 138, at 2714, 2724–29.

148. Interview with Anonymous, Constitutional Lawyer and Counselor to the Alliance for Chile, in Santiago, Chile (Aug. 18, 2010).

149. Interview with Jorge Burgos, Deputy of the Republic of Chile, in Santiago, Chile (Aug. 27, 2010).

150. *Id.*

151. *See id.* (explaining that the reforms had to be limited in order to make reform successful).

152. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), in *HISTORIA*, *supra* note 138, at 28, 52 (statement of José Miguel Insulza).

153. *Id.* at 8.

154. *Id.*

the military justice system. “[My] concern is that after approving these reforms, new voices may emerge asking for new amendments. This would be a diminished result, a failure. . . . [T]he purpose should be to achieve stable texts which endure for long periods.”<sup>155</sup> Moreover, Senator Jose Antonio Viera-Gallo introduced the need to regulate states of exception, an issue that was not considered in the original proposal.<sup>156</sup>

The executive branch followed the entire debate in congress very closely. Minister Insulza personally attended most discussion sessions in the senate, and his advisors acted as co-legislators by introducing amendments to ongoing proposals, submitting new indications, and making informal recommendations to representatives in congress.<sup>157</sup> Table 6 shows the number of proposals submitted to the SCCJL, where the original proposal of the constitutional reform had been outlined. Appointed senators were the most active, but the least successful, actors. The most successful institutional actors in getting proposals approved were the CPD, followed by the executive branch and the *Alianza*.

Table 6. Amendments Proposed to the First Draft of Reforms: July 2000–June 2001

<i>N</i> = 344	Proposed	Withdrawn	Inadmissible	Rejected	Approved
Executive	41	7	5	23	6 (14.6%)
CPD Senators	78	-	26	37	15 (19.2%)
<i>Alianza</i> Senators	110	1	34	59	16 (14.5%)
Appointed Senators	115	4	26	81	4 (3.4%)
<b>Total</b>	<b>344</b>	<b>12</b>	<b>91</b>	<b>200</b>	<b>41 (11.9%)</b>

Source: HISTORIA DE LA LEY NO. 20.050 [HISTORY OF LAW NO. 20.050] (2005), available at <http://www.bcn.cl/histley/lfs/hdl-20050/HL20050.pdf>.

The Ministry of the Interior established a team of constitutional lawyers who followed the debate in the senate closely and proposed alternatives to the discussion through formal indications to ongoing debates in different commissions.<sup>158</sup> Minister Insulza personally briefed the president on a regular basis, and negotiations were discussed during Sunday presidential

155. *Id.* at 63 (statement of Edgardo Boeninger).

156. See *Discusión en Sala* [Discussion in Chambers] (Sept. 3, 2003), in HISTORIA, *supra* note 138, at 1692, 1704–05 (statement of Senator Viera-Gallo) (recalling that he had raised the need to make amendments that had not been included in any of the previous motions and that included regulating states of exception).

157. See *Informe Comisión de Constitución* [Constitutional Commission Report] (Nov. 6, 2001), in HISTORIA, *supra* note 138, at 28, 703–04 (noting that Minister Insulza constantly attended Senate Commission meetings and collaborated with the members); see also, e.g., Interview with Gonzalo García, *supra* note 138 (discussing García’s role as an advisor in the reform process including the fact that he drafted reforms).

158. Interview with Jorge Burgos, *supra* note 149; Interview with Gonzalo García, *supra* note 138.

meetings with the executive political committee.<sup>159</sup> The executive branch established informal contacts with key actors in congress to negotiate agreements and propose consensual drafts on specific articles.<sup>160</sup> According to Deputy Jorge Burgos (CPD), a member of the Commission on the Constitution in the Chamber of Deputies,

I debated with two very influential people, not as government officials, but as constitutionalists, as friends and as comrades [in the same political party]—[Gonzalo] García and [Jorge] Carrea, [both at the Ministry of the Interior]. . . . Yes, I had [other] advice and discussions, but particularly when indications arose in the discussion and we had to bring them ‘after school,’ I stayed with Gonzalo and Correa. I always informed Insulza. We also worked well with Carmona’s opinions . . . .<sup>161</sup>

By early 2005, more than two hundred proposals were pending approval.<sup>162</sup> The government promoted the creation of an informal advisory group that included academic lawyers close to the CPD and the *Alianza*.<sup>163</sup> According to one expert, Carlos Carmona called him and said,

why don’t you form a commission with a group of constitutionalists, you interact with the [Chamber of] Deputies, and we will exchange points of view and we can promote agreement . . . . Form a commission; try to make it pluralist, and write an alternative proposal and we can present it to the House as a guide.<sup>164</sup>

The expert continued, “I talked with Carmona privately, and he sent it out. At that time, he chaired the Constitutional Commission. Juan Bustos and I met with him a couple times in private . . . and we had a few private, informal sessions with the Constitutional Commission . . . .”<sup>165</sup>

A second crucial moment came in June 2005 when the Chamber of Deputies sent the proposal back to the senate. As previously mentioned, the constitution does not contain any provision to address eventual discrepancies between the two chambers concerning constitutional amendments. The executive branch proposed the use of vetoes to solve this impasse and established an informal commission in which members of both chambers as well as the executive branch participated to achieve a final agreement.<sup>166</sup> As Gonzalo García—one of the Minister of the Interior’s key advisors for this

159. President Lagos established a regular Sunday meeting with the Political Committee of the Cabinet (Ministers of Interior, Communications, Presidency, and Finance). Interview with Ricardo Lagos Escobar, *supra* note 137. They briefed the President on the coming week’s agenda. *Id.*

160. Interview with Jorge Burgos, *supra* note 149.

161. *Id.*

162. Interview with Gonzalo García, *supra* note 138.

163. See Interview with Anonymous, *supra* note 148 (discussing the suggestion by Carlos Carmona that the lawyer form a group of constitutionalists to lobby and draft an alternate plan).

164. *Id.*

165. *Id.*

166. See *supra* notes 147–48 and accompanying text.

reform—explained, twenty-seven objections needed to be resolved: “And so a special procedure for sixteen vetoes was agreed upon. Some of the vetoes ended up being stylistic corrections, and some were substantive. . . . Then, new issues appeared with new demands . . . . I remember two: the extension of the freedom of expression . . . and improving the procedure respecting professional association . . . .”<sup>167</sup>

By drafting the final proposals through the use of vetoes, the executive branch obtained a critical advantage. This informal mechanism also allowed members of the executive branch to request the opinions of experts and other state powers. For instance, right-wing parties asked the executive branch for some of the members of the Constitutional Tribunal to have access to the final draft.<sup>168</sup> Gonzalo García mentioned,

Indeed, congressional representatives delegated to us the power to write the final draft of the constitutional agreement. At some point, the opposition requested that members of the Constitutional Tribunal check one of the drafts, which was very complicated from an institutional point of view. But we accepted that proposal since right-wing parties trusted the judges’ advice on the subjects we were negotiating.<sup>169</sup>

To convey a general idea about who the key players were, I created a ranking system based on the number of indications approved by congress during the first debate at the SCCJL, as well as actors’ perceptions of who was most relevant to this reform. Fewer than thirty people—including government representatives, legislators, and experts—are recognized as key players in the reform. Interestingly, during most of the negotiation, the subject of key players was not part of the debate in the national press. In addition, very few civil-society actors were involved during the extensive process of negotiations in congress.

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167. Interview with Gonzalo García, *supra* note 138.

168. *Id.*

169. *Id.*

Table 7. Key Players Within the 2005 Constitutional Reform

	Executive	Senators	Deputies	Experts
<b>First Level</b>	Carmona, C. Correa S. J. García, G. Insulza, J. M. Lagos, R.	Boeninger, E. Chadwick, A. Espina, A. Larraín, H. Viera Gallo, J. Zaldívar, A.	Ascencio, A Burgos, J. Bustos, J. Paya, D.	
<b>Second Level</b>	Vidal, F. Kleissac, J.	Diez, S. Romero, S. Hamilton, J.	Ceroni, G. Guzmán, P. Riveros, E.	Zuñiga, F. Cumplido, F. Nogueira, H. Gómez, G.

Note: This is a qualitative scale based on (a) the number of congressionally-approved bills each senator or deputy submitted, ranking them as high, medium or low; and (b) key actors' perception of each other's influence within the process based on fifteen interviews conducted with key actors.

Thus, the executive branch had institutional as well as political tools to push its agenda. Facing a change of administration in 2005 and with more than two hundred pending proposals, the government pressed for the quick closure of an agreement that omitted several of the programmatic issues that the CPD had promoted.<sup>170</sup>

A wide range of substantial topics was left out of the political discussion in 2000 because none of the political parties represented in congress introduced them. These topics included the revision of supermajority requirements for constitutional reforms, the existence of eighteen organic laws with supermajority requirements, the constitutional prohibition of union leaders running for public office, the elimination of the constitutional clause making abortion illegal under any circumstances, the acceptance of the death penalty in the constitution under a qualified supermajority, and the consideration of the "family" as the essential institution of the society along with the duty of the state to promote and strengthen it. The executive branch's strategy of narrowing the reform to a limited number of subjects, combined with the absence of the necessary supermajorities for approval in congress and the lack of active social support for these reforms, made it very hard for progressive forces to even suggest these proposals.<sup>171</sup>

170. *Id.*

171. A review of printed press during the period (2000–2005) reflects that the whole legislative process received very little media attention. Most articles were op-ed pieces by experts and congressional representatives arguing for or against very specific portions of the reforms. Active social actors did not participate in congressional debates, with three exceptions: indigenous organizations, who were invited to give their opinions concerning indigenous rights; representatives of professional associations attended some of the congressional sessions; and Colegio de Periodistas (a journalists' association) did some lobbying for specific reforms within the legislation. *See, e.g.,*

Progressive sectors of the coalition attempted, unsuccessfully, to work certain topics into the debate: more substantial reform of the electoral system;<sup>172</sup> constitutional recognition of indigenous rights;<sup>173</sup> and recognition of Chile not just as a democratic state but as a “social and democratic state, inspired in principles of freedom, equality and pluralism.”<sup>174</sup>

One of the most sensitive areas was the reform of the electoral system. The CPD originally proposed to replace it with a proportional system of representation, but the right wing was simply not willing to discuss the topic.<sup>175</sup> By 2005, the CPD and the opposition in congress had still not reached an agreement regarding the subject.<sup>176</sup> As a way to demonstrate his own commitment to change, President Lagos began to pressure political actors to reform the electoral system.<sup>177</sup>

Negotiations ended with the *Alianza* accepting the transfer of the issue to the binomial system, which meant that the issue of electoral reform would no longer be considered a constitutional issue but would be addressed under the rules of organic law.<sup>178</sup> This changed the supermajority required for approval of an eventual reform from three-fifths to four-sevenths.<sup>179</sup> However, the new version of the constitution also dictates the number of deputies in the chamber.<sup>180</sup> As a result, any significant change to the electoral system (anything that would alter the total number of deputies) would be considered a constitutional reform and would require three-fifths of the votes.<sup>181</sup> In President Lagos’s words,

I did not consider it acceptable that [the reference to] the binomial system would be in the constitution. And we chose the typical Chilean way: it is not in the constitution, but changing it is as difficult

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Segundo Informe Comisión de Constitución [Second Constitutional Commission Report] (Mar. 18, 2003), in *HISTORIA*, *supra* note 138, at 995, 1001–02, 1021–33 (stating that representatives of indigenous organizations were specifically invited to speak with the Commission, and summarizing their comments); Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), in *HISTORIA*, *supra* note 138, at 28, 255–62 (noting that the Commission heard from the heads of various professional associations); *id.* at 255, 257–58 (summarizing the comments of the College of Journalists before the Commission).

172. *Discusión en Sala* [Discussion in Chambers] (Nov. 14, 2001), in *HISTORIA*, *supra* note 138, at 697, 735–37 (statements of Senator Bitar).

173. *Discusión en Sala* [Discussion in Chambers] (Apr. 29, 2003), in *HISTORIA*, *supra* note 138, at 1437, 1460–62 (statements of Senator Gazmuri).

174. *See* *Discusión en Sala* [Discussion in Chambers] (June 11, 2003), in *HISTORIA*, *supra* note 138, at 1526, 1526 (introducing for discussion a version of article 4 that contained this language).

175. Interview with Jorge Burgos, *supra* note 149.

176. Interview with Gonzalo García, *supra* note 138.

177. Interview with Ricardo Lagos Escobar, *supra* note 137.

178. *Id.*

179. *See supra* note 90 and accompanying text.

180. C.P. arts. 47, 49 (Chile).

181. *Id.* art. 127.

as if it were in the constitution. . . . What I did not like about this part is that incumbents made constitutional reforms with a calculator.<sup>182</sup>

Overall, during the Lagos administration the executive branch was particularly proactive about collaborating with the opposition on a legislative agreement. The administration invested the time and resources needed to reach an agreement and to advance a substantial transformation of the constitution. The executive branch acted as co-legislator, taking advantage of the political circumstances, setting the agenda, limiting the scope of topics to be discussed, and promoting agreements through formal and informal mechanisms of consensus building among political actors.

### B. *Expectations of the Opposition*

Obviously, the outcome of the story also depended on the willingness of those with veto power to accept a change to the status quo. Why did the opposition accept the proposed constitutional changes? We already noticed that the balance of power in congress has not changed dramatically since the transition to democracy. I claim that some key actors within the right-wing opposition decided to start negotiations with the government using a “forward-looking” strategy.

The 1999 presidential election was a key moment for the opposition. In December 1999, the right-wing candidate Joaquin Lavin almost tied candidate Ricardo Lagos in the first round and trailed by 2.62% of the votes in the second round (a difference of approximately 190,000 votes).<sup>183</sup> At the same time, public opinion supported the reformation of the armed forces’ role because the arrest of General Pinochet in London had substantially increased support for human rights and diminished military prestige.<sup>184</sup>

Table 8. Results of 1999 Presidential Elections (%)

	First Round (Dec. 1999)	Second Round (Jan. 2000)
Ricardo Lagos, CPD	47.96	51.31
Joaquin Lavin, <i>Alianza</i>	47.51	48.69
Other candidates	4.53	-

Source: Ministerio del Interior [Ministry of the Interior], Gobierno de Chile [Government of Chile], *Resultado Electoral 2009* [Electoral Results 2009], SITIO HISTÓRICO ELECTORAL [HISTORICAL ELECTORAL SITE], <http://www.elecciones.gob.cl/>.

182. Interview with Ricardo Lagos Escobar, *supra* note 137.

183. See *infra* Table 8.

184. FUENTES SAAVEDRA, *supra* note 132, at 120.



Programmatically, it was hard for the *Alianza* to support reforms in subjects they had defended since the beginning of the transition.<sup>185</sup> The *Alianza* also faced internal pressure from former collaborators of the military regime, such as UDI senator Sergio Fernandez (former Minister of the Interior), and military officers appointed as senators in 1998, such as former Chief of the Navy Jorge Martinez-Busch, former Chief of the Air Force Ramon Vega, former General Julio Canessa, and former Director of the Police Fernando Cordero.<sup>186</sup>

However, key leaders from both of the parties comprising the *Alianza* (*Renovación Nacional* and UDI) decided to support reforms in critical areas, such as the reduction of military power and the elimination of appointment power over senators.<sup>187</sup> From a political perspective, approving these reforms would put *Alianza* more in tune with overall public opinion, which had called for the reduction of military powers and demanded recognition of the human rights abuses committed during the military regime.<sup>188</sup> Between 2000 and 2004, three critical factors made the *Alianza* distance itself from the armed forces and particularly from General Pinochet. First, a 2001 roundtable on human rights sponsored by the government established several important recommendations.<sup>189</sup> One of these was that the armed forces provide more information on the location of thousands of detained citizens who had disappeared during the military regime.<sup>190</sup> Second, the Lagos administration established a second presidential commission on torture and imprisonment.<sup>191</sup> The commission's final report had a significant public impact on the national debate on human rights.<sup>192</sup> Finally, General Pinochet's reputation was seriously damaged after an investigation was carried out in the United States.<sup>193</sup> The investigation revealed that Pinochet had more than USD13 million in several bank accounts at the Riggs Bank in Washington, D.C.<sup>194</sup>

The *Alianza* also considered eventual shifts in the future balance of power in congress. After the initial appointment of senators by General Pinochet (nine were appointed in 1990), the balance of power gradually

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185. See *id.* at 63–96 (chronicling the right wing's support for Pinochet and the military, as well as its opposition to the recognition of human rights throughout the 1990s and on into the 2000s).

186. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), in *HISTORIA*, *supra* note 138, at 28, 576–635 (detailing the different proposals and positions taken regarding reforms to the armed forces, areas of order, and public safety).

187. See *supra* note 101 and accompanying text.

188. See *supra* note 184 and accompanying text.

189. FUENTES SAAVEDRA, *supra* note 132, at 86.

190. *Id.*

191. See *id.* at 123–24 (describing President Lagos's 2003 agenda on human rights and describing the National Commission on Political Imprisonment and Torture that was established in late 2003).

192. *Id.* at 124.

193. *Id.* at 90.

194. See *id.* (noting that the account contained the equivalent of CLP10 billion).

started favoring the center–left coalition.<sup>195</sup> If the trend continued, by 2005, President Lagos would have been able to appoint three of his supporters directly to the senate. Lagos, along with former President Frei, would also merit the personal right to serve as senators for life.<sup>196</sup> Even though this shift would not be sufficient enough to promote constitutional reforms, it would eventually give the majority of the senate to the *Concertación*.

*Alianza* representatives quickly understood the new political reality. In June 2000, they publicly recognized the nation’s political mood: “In our opinion, ending this period of transition would allow us to respond to the message sent to us by the majority of the electorate in the last presidential elections, which is the demand to reestablish social peace in this country.”<sup>197</sup> Following the party’s new message, Senator Andres Chadwick stated that “[our political] sector has reconsidered some of its positions, as political circumstances now favor new steps [of constitutional reform].”<sup>198</sup>

Thus, within right-wing parties, a forward-looking decision-making process was at play. Because of the political context, the right wing was more open to reducing the power of the armed forces. It was also more open to critical reforms related to the Pinochet regime’s legacy. The most sensitive of these issues was the institution of appointed senators, which the right wing was willing to eliminate as early as 2000.<sup>199</sup> The *Alianza*’s strategy was to accept the elimination of some authoritarian enclaves (appointed senators and reduction of military powers); increase the legislature’s oversight of the executive branch; and reduce some of the executive branch’s fiscal powers, such as its ability to reallocate resources.<sup>200</sup>

The final outcome of the reform was less than what the CPD had aimed for, but certainly more than what right-wing parties originally proposed in 2000. Overall, the outcome can be explained by the combination of a proactive executive branch and key actors within the opposition who were willing to transform the status quo.

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195. See Patricio Navia, *Bachelet’s Election in Chile: The 2006 Presidential Contest*, REVISTA: HARV. REV. LATIN AM., Spring/Summer 2006, at 9, 9, 11 (noting that the center–left coalition “has ruled Chile since 1990 and eventually gained a majority in the senate in 2005”).

196. See C.P. art. 45 (Chile) (providing former presidents who served six years or more the right to serve as senators for life).

197. Moción Parlamentaria [Parliamentary Motion] (June 4, 2000), in HISTORIA, *supra* note 138, at 5, 5 (Bulletin No. 2.536-07).

198. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), in HISTORIA, *supra* note 138, at 28, 65 (statement of Senator Andrés Chadwick).

199. Mark Falcoff, *AEI Outlook Series: Chile Moves On*, AEI ONLINE, Apr. 2000, <http://www.aei.org/outlook/11413>.

200. See, e.g., Moción Parlamentaria [Parliamentary Motion] (July 4, 2000), in HISTORIA, *supra* note 138, at 5, 5–17 (motion of Senators Andrés Chadwick, Sergio Diez Urzúa, Hernán Larraín Fernández, and Sergio Romero Pizarro) (proposing constitutional reforms that, among other changes, would do away with appointed senators, eliminate appointed senators, increase legislative oversight of the executive, and ensure legal certainty for pending cases dealing with human rights and the armed forces).

#### IV. Conclusion

What can we learn from this case that would be relevant to building a theory of constitutional change in democratic societies? First, it is reasonable to expect that if the original constitutional structure was drafted by a minority and if this arrangement distributes power unevenly, then once there is a relevant political shift, new authorities will try to modify the status quo. But the total replacement of the constitution is not always an automatic option for democratic forces. In a transitional period, leaders may choose strategies that are less confrontational, depending on what they consider the most relevant issues to be addressed and the perceived balance of power.

Second, in presidential systems, a crucial agent of change is the executive branch. Actors within this branch have important political and institutional tools for influencing political outcomes. The Chilean case illustrates just how powerful informal and formal mechanisms are for building consensus within a highly constrained political environment.

Third, it seems that inclusion is particularly relevant at two points in the process of constitutional change: at the moment a constitution is drafted and also at any point when a constitution is amended. In Chile, an extensive but highly elitist process of reforming the constitution in 1989 and 2005 has led to a new period of reform proposals. The political actors represented in congress have initiated more intensive discussions in several areas concerning the constitution. It seems that the gradual reform strategy has a paradoxical effect; it promotes a never-ending process of redefining the rules of the game.