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# Democratic Erosion and Constitution-Making Moments: The Role of International Law

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# Democratic Erosion and Constitution-Making Moments: The Role of International Law

David Landau\*

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Recent scholarship has brought into focus the downside risks of constitution making moments. Ideally, constitution making would help to establish or rejuvenate a democratic order. But across a range of recent cases, constitution making has helped to erode democracy or to increase political tension, rather than strengthening the democratic order and bridging political and social divisions. Would be authoritarian actors and movements can use a number of different devices to undermine democracy, including the tools of constitutional change.<sup>1</sup> Replacement of the existing constitution may be a particularly efficient way for powerful actors

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1. See David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 191 (2013) [hereinafter Landau, *Abusive*].

to entrench themselves, to weaken institutions intended to check their power and protect minority rights, and to marginalize political opposition groups.

There are several well studied recent examples. In both Venezuela and Ecuador, powerful presidents (Hugo Chavez and Rafael Correa) rewrote constitutions shortly after taking office and used the constitution making process as a way to weaken opposition groups and undermine democracy.<sup>2</sup> In both cases, the constitution making process excluded the opposition and the resulting constitutions strengthened presidential power while weakening the power of other institutions.<sup>3</sup> Similarly, in Hungary, the Fidesz party used its two thirds majority in Parliament to replace the existing constitution after having previously passed a series of amendments designed to weaken the judiciary and otherwise undermine checks on its power.<sup>4</sup> The resulting constitution has again been criticized for entrenching the ruling party and weakening institutions designed to limit its power.<sup>5</sup>

The high risks associated with constitution making moments are related to the difficulties of constraint at the domestic level. Constitution making usually takes place during periods of crisis or transition at which domestic institutions have broken down or become broadly illegitimate; powerful leaders can take advantage of the resulting vacuums to consolidate power in a durable way. A legal/conceptual problem compounds this issue: leading theories of constitution making hold that it can properly take place outside of the existing constitutional order, via institutions that cannot be controlled by existing institutions. Thus, not only does constitution making usually take place at moments of domestic institutional weakness, but actors can plausibly wield legal theories of constitution making that undermine domestic institutions even further. Even where risks of democratic erosion do not materialize, the resulting uncertainty in even the basic legal framework can lead to a constitution making environment exacerbating rather than lessening social and political tension.

The frequent absence of domestic legal constraint during constitution making moments may create a *prima facie* case for some form of supra national intervention. At the least, they demonstrate that such involvement might be useful. However, achieving effective international involvement as a solution to abusive constitution making seems much easier said than done. Strong international norms governing constitution making do not exist, may never exist, and perhaps should not exist. Other approaches at the international or regional level are similarly either inchoate or flawed. As a first step, the goal of this article is to survey the range of possibilities and their potential for development, recognizing both the potential utility and drawbacks of each approach.

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2. ALLAN BREWER-CARIAS, *THE DISMANTLING OF DEMOCRACY IN VENEZUELA* 39–40 (2010); David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 939–40, 971 (2013) [hereinafter Landau, *Gone Wrong*].

3. BREWER-CARIAS, *supra* note 2, at 57–60.

4. Miklós Bánkuti, Gábor Halmai, & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138, 138–40 (2012).

5. *Id.* at 142–44.

Part I of this article frames the problem of constraint at the domestic level during constitution making processes. While acknowledging that the issue is not universal, it argues that the absence of effective constraint from domestic institutions is a common one and that this absence is associated with a range of longer term problems including the erosion of democracy and the increase in political tension associated with “failed” constitution making. Part II considers the strengths and drawbacks of four distinct models of international intervention: (1) democracy clauses requiring that states abide by their own domestic mechanisms of constitutional change, (2) international norms directly governing the procedure or substance of constitution making, (3) international organizations or NGOs wielding “best practices,” and (4) review of constitution making processes and texts by advisory bodies at the supranational level. Part III concludes by arguing that since the problem of abusive constitution making is particularly difficult to solve at either the domestic or international levels, the most feasible approach involves making some use of all of these distinct tools while recognizing each of their limitations.

## I. CONSTITUTION MAKING AND DOMESTIC INSTITUTIONS

This Part argues that constitution making moments often occur during unique moments of stress and weakness for the domestic institutional order and, indeed themselves can tend to contribute significantly to this stress on existing institutions. Section A argues that constitution making, whether undertaken during periods of regime transition or within a democratic regime, is often associated with deep crises that render existing institutions weak, illegitimate, or both. Section B argues that prevailing legal and political theories of constitution making tend to compound this tendency by envisioning constitution making as an act by “the people” outside of existing constitutional and legal constraints. The effect of these dynamics is to make constitution making an activity that is particularly difficult to regulate at the domestic level. As Section C notes, this absence of effective domestic constraint can have very problematic consequences.

### *A. Institutional Dynamics*

The first problem is practical: the political environment in which constitution making is usually undertaken is one where existing institutions are either eroded, have collapsed completely, or are badly tainted by association with the prior regime. As Elster notes, the normal situation in which constitution making occurs is not where things are going well, but instead where some deep crisis necessitates the creation of a new constitution.<sup>6</sup> This is of course not inevitable: Chile represents an ongoing case of a country seeking to rewrite its constitution during periods of

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6. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 370 (1995).

relative institutional normalcy.<sup>7</sup> And even where a crisis is occurring, as for example recently in Iceland, political institutions may maintain sufficient force to block or shape the constitution making process.<sup>8</sup> But very often, the crisis that spurs constitution making will also have undermined domestic political institutions.

This is easiest to see in cases of constitution making during regime transition. Some recent instances of constitution making have occurred after the fall of authoritarian regimes, and as a part of a transition process that would supposedly end in a democratic order. In these instances, the problem is that all the old institutions: courts, legislatures, bureaucracies, the military, etc. may be tainted by association with the existing regime. In some cases, they may also have collapsed or been gravely weakened through the dynamics preceding and contemporaneous with the transition process. Scholarship suggests various ways in which actors might work around this problem. Arato, for example, suggests a model of roundtable talks followed by temporary constitutions that structure the transition process.<sup>9</sup> This model essentially makes use of authoritarian era institutions and constitutions (as often occurred in Eastern Europe), but breathes new life into them through the results of the roundtable talks and gradually phases out old for new institutions.<sup>10</sup> The institutions created by the new temporary constitution should have more authority to restrain constitution makers than would the institutions associated with the old authoritarian regime.

But in many transitional cases, the preconditions for roundtable talks may not be met: contending groups affiliated with both the old and new orders may not agree on the basic contours of the process. In those conditions, the ability of the authoritarian era institutions to shape constitution making may be very problematic. In Egypt, for example, the military and the courts, holdovers from the old order, tried to play a significant role in restraining constitution making that was controlled by two newly constituted institutions: the Parliament and the presidency.<sup>11</sup> As examples, the military sought to insert substantive principles into the process (with which any final constitution would need to comply), and the courts issued significant decisions governing the composition of the Constituent Assembly and dissolving it when it did not meet constitutional and legal requirements.<sup>12</sup> Ideally, the judiciary would be seen as an impartial arbitrator. But in the Egyptian case, members of the judiciary were viewed as allies of interests

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7. See Ryan Dube, *Chile's President Vows to Tackle Corruption, Rewrite Constitution*, WALL ST. J. (Apr. 29, 2015, 11:23 AM), <http://www.wsj.com/articles/chiles-president-vows-to-tackle-corruption-rewrite-constitution-1430321012>.

8. See H el ene Landemore, *Inclusive Constitution-Making: The Icelandic Experiment*, 23 J. POL. PHIL. 166, 167–70 (2015).

9. ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION, AND LEGITIMACY 149–50 (2000).

10. See *id.* at 145–48.

11. Kristen R. Stilt, *The End of "One Hand": The Egyptian Constitutional Declaration and the Rift between the "People" and the Supreme Council of the Armed Forces*, 16 Y.B. ISLAMIC & MIDDLE EASTERN L. 43, 44–49 (2012).

12. *Id.* at 56–58.

associated with the old order (as well as promoters of its own corporatist interests), which hampered its ability to impose legitimate constraints on the constitution making process.<sup>13</sup>

Often overlooked is the similarity between transitional and democratic constitution making with respect to the weak or tainted nature of existing institutions. Democratic constitutional replacement also tends to occur in moments where institutions have either collapsed, been gravely weakened, or lost legitimacy. The Andean region of Latin America—Colombia, Ecuador, Venezuela, and Bolivia—offers a recent example. Since 1991, a period in which each of these countries has been consistently democratic, all four of them have adopted new constitutions (twice in the case of Ecuador).<sup>14</sup> In all of these cases, constitution making was conducted in an environment of political crisis, in which existing political institutions were seen as at least partly accountable. In Colombia in 1991, Venezuela in 1999, and Bolivia beginning in 2006 and ending in 2009, constitution making broadly took place as part of the end of “pacted” regimes or power sharing arrangements between rival parties.<sup>15</sup> In all cases (although to varying degrees), these political arrangements were once seen as working fairly well but in recent years were seen as increasingly corrupt as well as incapable of channeling social demands and divergent social forces and providing public goods like stability and growth. In Ecuador, both the 1998 and 2008 constitutions were preceded by periods of extraordinary political instability in which, for example, democratically elected presidents were irregularly removed and could not complete their terms.<sup>16</sup>

By the time constitution making was undertaken in these cases, and again to varying degrees, the legitimacy of many existing political institutions was thus suspect in all of them. In some, such as Colombia in 1991, ordinary political institutions maintained some ability to influence the constitution making process (although the Constituent Assembly would eventually revoke the mandate of the existing Congress).<sup>17</sup> In others, like Venezuela, the old order had basically collapsed by the time constitution making occurred.<sup>18</sup> After Hugo Chavez won the presidency in 1998, he faced opposition control (from the residuals of the old pacted regime) of most other institutions in the country (the Congress, the Supreme Court, and most local governments, for example). But these institutions were able to exercise virtually no influence over the constitution making process which was entirely

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13. *Id.* at 58.

14. BREWER-CALAIS, *supra* note 2, at 60, 72–73; Manuel Jose Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 549 (2004); Catherine M. Conaghan, *Ecuador: Correa's Plebiscitary Presidency*, 19 J. DEMOCRACY 46 (2008); Eduardo A. Gamarra, *Bolivia: Evo Morales and Democracy*, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA 124, 139, 148–51 (Jorge I. Dominguez & Michael Shifter, eds., 3d ed. 2008).

15. *See* BREWER-CARIAS, *supra* note 2, at 42–46; Cepeda-Espinosa, *supra* note 14, at 540–42, 548–49; Gamarra, *supra* note 14, at 127; Landau, *Gone Wrong*, *supra* note 2, at 963–64.

16. Conaghan, *supra* note 14, at 48.

17. *See* Landau, *Abusive*, *supra* note 1, at 200–03.

18. *See* Landau, *Gone Wrong*, *supra* note 2, at 939–40.

controlled by Chavez's forces. Indeed, as explained in more detail below, these opposition controlled institutions were eventually shut down or cleansed by the Chavez controlled Assembly.<sup>19</sup> Similar dynamics occurred in Ecuador in 2008, where the newly ascendant President Correa and his allies were able to argue that the existing institutional order was a large part of the national problem and needed to be swept away.<sup>20</sup> The broad point, then, is that in democratic constitution making as in transitional constitution making, the institutional order is often very weak.

### B. *Conceptual Dynamics*

Beyond the fact that institutions during constitution making are often weak, tainted, or both, theories of constitution making also often contribute to making it a process that is difficult to restrain. Perhaps the leading theory of constitution making, building off Sieyes and Schmitt, is built around "constituent power."<sup>21</sup> The basic idea here is that "the people" retain the ultimate power to remake their institutional order. In writing a constitution, they delegate some of their power to "constituted powers," or ordinary political institutions. These institutions have the power to make ordinary political decisions and even to carry out exercises of constitutional change that fall short of constitutional replacement, for example by using textual mechanisms for amendment. All of these acts are restrained by the existing constitutional order. But the ultimate act of constitutional replacement can be done by "the people" at any time, and can take place outside of the existing constitutional order.

The basic theory of constituent power has some ramifications for the design of constitution making processes. Since constitution making is supposed to take place outside of the normal institutional rules, specialized bodies like constituent assemblies may make more sense as constitution makers than ordinary institutions like legislatures. Moreover, these specialized institutions are not bound by the rules and restraints put on them by other political institutions, but instead can define their own operating rules and competencies. They cannot be regulated by the existing constitutional rules or the existing institutional order. Indeed, since the Constituent Assembly, once constituted, represents the sovereign power of the people, it can limit or shut down the power of other institutions at will.

Some recent constitution making experiences in the Andes represent a fairly clear illustration of the constituent power approach. In Colombia (1991), Venezuela (1999), and Ecuador (2008), political actors evoked the constituent power theory to remake the institutional order.<sup>22</sup> In all of these cases, designers followed processes for constitutional replacement that were outside of the existing constitutional

19. BREWER-CARIAS, *supra* note 2, at 73–74.

20. Conaghan, *supra* note 14, at 51–52, 54–56.

21. See, e.g., JOEL COLON-RIOS, WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER 84–86 (2012); see also Mark Tushnet, *Peasants with Pitchforks, or Toilers with Twitter*, 13 INT'L J. CONST. L. 639, 645–46 (2014).

22. Landau, *Abusive*, *supra* note 1, at 207; Landau, *Gone Wrong*, *supra* note 2, at 941–43, 951–54.

order.<sup>23</sup> In each case, presidents called referenda on whether specialized constituent assemblies should be called to rewrite constitutions. The assemblies, once constituted, were not bound by any limitations that may have been placed on them by the existing institutional order. And indeed, in all three cases they shut down ordinary institutions so they could be remade or reconstituted.<sup>24</sup>

The Venezuelan case is perhaps emblematic: the newly elected President Hugo Chavez (who was the driving force behind the assembly), went before it and laid down his mandate, stating that he would only continue in office if ratified by the Assembly (which of course he was, overwhelmingly).<sup>25</sup> The assembly then used its “original constituent power” to limit the power and composition of the Congress, shut down the Supreme Court, and remove hostile local and union officials.<sup>26</sup> It also issued legislation directly. But constituent assemblies across all three countries worked under similar dynamics. The only real difference was the political context. Colombian constitution making was extra textual but based on a broad consensus between political forces, while constitution making in both Ecuador and Venezuela was dominated by unilateral political forces associated with newly elected presidents in each case.<sup>27</sup>

Constitution making under “constituent power” theories tends to make restraint at the domestic level problematic. The reason is obvious: if constitution making occurs outside, rather than inside, existing constitutional frameworks, then existing political institutions may have limited or no ability to restrain constitution making bodies. Indeed, the Constituent Assembly can plausibly claim an ability to shut down any institution that interferes with its decisions. As much recent work has argued, this may raise the risk of majoritarian constitution making, where a text is imposed by a bare majority on minority groups. Or it may allow for abusive constitution making by a powerful individual or party claiming to act on behalf of the people.<sup>28</sup> That constitution maker, able to unilaterally remake the constitution, may be able to entrench themselves in power and weaken institutions intended to check their power. The result may be a regime that is less than fully democratic.

The risk of this outcome does not result from stepping outside of the existing institutional order as such. Indeed, the act of stepping outside of the existing constitutional order can be either useful or necessary for successful constitution making. In transition cases, there may be little or no existing institutional order to fall back on and restrained constitution making may require bargains with actors

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23. See Maxwell A. Cameron & Kenneth E. Sharpe, *Andean Left Turns: Constituent Power and Constitution-Making*, in *LATIN AMERICA'S LEFT TURNS: POLITICS, POLICIES, & TRAJECTORIES OF CHANGE* 61, 62 (Maxwell A. Cameron & Eric Hershberg, eds., 2010).

24. *Id.* at 66–69; Landau, *Abusive*, *supra* note 1, at 192.

25. See BREWER-CARIAS, *supra* note 2, at 49–50.

26. See *id.* at 57–59.

27. For example, the Colombian Assembly also revoked the mandate of the legislature and called for new elections, and the Ecuadorian Assembly revoked the mandate of various institutions. See Landau, *Abusive*, *supra* note 1, at 207.

28. See *id.* at 191.



that are too tainted by affiliation with the authoritarian regime. Even in democratic cases, constituent power theory can provide a useful exit in situations where the existing institutional order threatens to freeze or block important changes—both Colombia and Venezuela, which were pact regimes that had run their course, offer plausible examples.<sup>29</sup> More recently, Iceland offers a plausible example of a case where political elites blocked a needed constitutional replacement, and constitution makers thus may have been better off proceeding via extra-constitutional rather than constitutional channels.<sup>30</sup> The exit function of constitution making via constituent power theory can be a true advantage.

The problem instead may be that once constitution makers step outside of the existing political order, there is no other obvious source of restraint. Political leaders may choose, or be forced because of circumstances, to form multi-party agreements or act by relative consensus. The 1991 Constituent Assembly in Colombia offers an example: the process took place outside of the existing constitutional framework but was governed by a multi-party pact between major political forces.<sup>31</sup> In contrast, in the Venezuelan and Ecuadorian cases powerful, political actors—in both cases the president—largely acted unilaterally and marginalized opposition political forces.<sup>32</sup>

Theorists have discussed various ways in which restraint might exist within a constituent power framework. One possibility is to allow political actors to step outside of the existing constitutional framework but to allow or require regulation by existing political institutions. This has been the tradition, for example, in many of the U.S. states, where limited constituent assemblies governed by rules set by legislatures have been fairly common.<sup>33</sup> Another possibility is to have courts or other domestic institutions use the theoretical construct of “constituent power” to limit abusive exercises of constitution making. Not just any act of power is plausibly in the name of “the people.” Courts might step in, for example, to verify that sufficient support exists to call an assembly, or to ensure that the process itself reflects a sufficient level of consensus.<sup>34</sup> The Venezuelan Supreme Court attempted mild restrictions along these lines, although with little success.<sup>35</sup> Suffice it to say that in comparative terms, restrictions along either line appear to be fairly difficult to impose on constitution making processes, even if they are theoretically possible. The theory tends to marginalize existing political institutions (as noted above), and

29. See Landau, *Gone Wrong*, *supra* note 2, at 963–64; Renata Segura & Ana Maria Bejarano, *Ni una asamblea mas sin nosotros! Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes*, 11 CONSTITUTIONS 217, 219–20 (2004).

30. See Landemore, *supra* note 8, at 167–70.

31. See Cepeda-Espinosa, *supra* note 14, at 540–42, 548–49.

32. See Landau, *Gone Wrong*, *supra* note 2.

33. See William Partlett, *The American Tradition of Constituent Power* (unpublished manuscript, on file with author).

34. See David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 WAKE FOR. L. REV. 859, 876–79 (2015).

35. See *id.*; see also Joshua Braver, *Hannah Arendt in Venezuela: The Supreme Court Battles Hugo Chávez Over the Creation of the 1999 Constitution*, 14 INT’L J. CONST. L. 555, 557 (2016).

it may provide relatively little guidance as to what levels of support are necessary for constitution making. For example, it may not be able to easily adjudicate between a majoritarian and a consensus based constitution making process, since either kind of process can plausibly claim to represent “popular will.”

Constituent power theory is not, of course, the only theory under which recent constitution making has occurred. One might call an alternative theory a “rule of law” approach, which is in a sense the opposite of the constituent power approach.<sup>36</sup> Rather than being carried out outside of the existing constitutional order, constitution making occurs inside and is restrained by the existing constitutional text. Some constitutions, for example, contain replacement clauses that govern the process by which new constitutions can be made: some acts of constitution making turn to these clauses and in other cases, political actors get together and agree on changes to the existing constitution that will govern a foreseen act of new constitution making. Comparative evidence suggests that this form of constitution making is also fairly common.<sup>37</sup> Nonetheless, I do not think it provides a cure all for the problems identified with constituent power theory, for several reasons.

First, replacement clauses appear to be uncommon. Most constitutions appear to say nothing about their own replacement: they contain amendment mechanisms but do not regulate the constitution making process.<sup>38</sup> Such a constitutional text might, of course, be interpreted so as to disallow wholesale replacement, a position that might prove unstable. Or they can collapse into a constituent power approach, in which case the regulated approach becomes unregulated. Furthermore, even where replacement clauses or similar devices exist, they often seem to be unstable and contestable. The regulation, rather than serving as a focal point or object of consensus, can become a tool wielded by one side (generally a minority group or threatened elite), while the other side argues that the regulation is not binding because of the nature of the constitution making process. Rather than stabilizing constitution making processes, in other words, regulations can, under certain conditions, destabilize them.

The example of Bolivia is an interesting one in this respect. There a president installed a replacement clause in 2004, during a deep political crisis, which essentially required a special congressional law approved by two thirds of the Congress to trigger and regulate a constitution making process by constituent assembly.<sup>39</sup> A short time but two crisis laden presidencies later, President Evo Morales took power at the head of an insurgent political party backed by indigenous movements and other traditionally excluded groups.<sup>40</sup> Morales sought constitutional

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36. See Richard Stacey, *Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-making Process*, 9 J. INT'L CONST. L. 587, 599 (2011).

37. Landau, *Gone Wrong*, *supra* note 2, at 961.

38. See *id.*

39. See generally, Fabrice Lehoucq, *Bolivia's Constitutional Breakdown*, 19 J. DEMOCRACY 110 (2008).

40. *Id.*

replacement, as did broad sectors of the opposition. The two sides initially agreed on a special law to regulate the process, which among other things called for a two thirds vote in the resulting Constituent Assembly to approve any constitutional draft.<sup>41</sup> But as the process dragged on, battles erupted between the allies of President Morales (who had a majority but lacked a two thirds supermajority in the assembly), and the opposition. The former insisted that the assembly had “original constituent power” and thus could adopt rules and procedures that differed from those found in the congressional enabling law, while the latter argued that the process was a regulated one that must be carried out within existing constitutional and legal rules.<sup>42</sup> The result was a process in which the rules influenced the text but were constantly in danger of being bent or ignored.<sup>43</sup> A constitution was finally adopted after a tortured three year process, but the final draft was hammered out by negotiations in the Congress.<sup>44</sup>

The constituent power doctrine has in recent years been particularly influential in the Andes. But the threat of “constituent power” or similar discourses to regulated constitution making processes appears to be a global phenomenon. Take two examples of constitution making during political transition. In Russia, the legislature and high courts likewise attempted to regulate a constitution making process that would be carried out within existing constitutional rules.<sup>45</sup> However, President Yeltsin eventually won, using the results of a referendum to lift the process out of these ordinary institutions and placing it instead in a Constituent Assembly appointed by him.<sup>46</sup> Critics of the Russian process have argued that the resulting constitution helped shaped Russia into a hybrid regime that was less than fully democratic.<sup>47</sup>

Similarly and more recently, the Egyptian constitution making process in 2012 emerged at times as a battle between the military and the courts, which sought to place the constitution making process under the regulation of the existing constitution and ordinary laws (by for example imposing “constitutional principles” on the process and by dissolving the Assembly when the judiciary determined it had been improperly conformed), and the majoritarian political forces surrounding President Mohamed Morsi, who argued that the sweeping electoral mandate of them and their allies should legitimate the process.<sup>48</sup> The Morsi side eventually pushed through the constitution using “constituent power” logic: it immunized the work of the Assembly from any judicial challenges, enabling to finish the draft.

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41. Ley Especial de Convocatoria a la Asamblea Constituyente, Mar. 6, 2006, <http://www.lexivox.org/norms/BO-L-3364.pdf>.

42. For a summary, see Landau, *Gone Wrong*, *supra* note 2.

43. See generally Lehoucq, *supra* note 40.

44. See Landau, *Gone Wrong*, *supra* note 2, at 939.

45. William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT'L L. 193 (2012).

46. See *id.*

47. See *id.*

48. See Nathan Brown, *Tracking the Arab Spring: Egypt's Failed Transition*, 24 J. DEMOCRACY 45 (2013).

However, the Morsi government was shortly thereafter removed in a coup.<sup>49</sup> The point here is not to evaluate any particular constitution making process: in some of these cases the end result was at least passable (as in Bolivia), while in others the dynamic was plausibly disastrous (as in Egypt). The point instead is that even in a supposedly “regulated” constitution making process, the ideology surrounding it can put pressure on the basic institutional rules.

One final point is also worth noting: even where replacement clauses exist and are adhered to, they may do relatively little to ensure that the values one would want to achieve in a constitution making process are met. That is, regulation is far from assurance that a constitution making process is a “good” one. Take the example of Hungary. During the transition to democracy, parties used the amendment rules found in the old, communist era constitution: a two thirds majority.<sup>50</sup> The new constitutional text was thought to be temporary, however, and to exist only until a wholly new constitution could be written. In 1995, the parliament added a clause requiring that the permanent constitution be approved by a four fifths vote.<sup>51</sup> The Fidesz party won over two thirds of seats with just over a majority of votes in 2009; this vote total gave them the ability to amend the constitution unilaterally.<sup>52</sup> Using their supermajority, they amended many parts of the constitution, including provisions dealing with judicial power.<sup>53</sup> They also repealed the four fifths clause, and then used a two thirds vote to completely replace the existing constitution with a new one in 2011.<sup>54</sup>

Depending on the legal status of the four fifths clause, of course, the legitimacy of this process could be contested.<sup>55</sup> (It makes little conceptual sense to allow legislative actors to remove a more entrenched provision with a lesser vote). But even assuming Fidesz acted properly, the two thirds clause would have failed to ensure that the process was consensual and deliberative. The scholarly consensus instead is that the text was rushed through parliament unilaterally with virtually no debate and no participation or input from opposition groups.<sup>56</sup> One problem with replacement clauses is that they may have very different effects depending on the exact contours of the political system. A threshold that might require broad consensus in some political environments (such as where fragmentation is high and parties are fluid, which was the case shortly after the Hungarian transition), might work very differently in other political contexts where one political party is able to

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49. *See id.*

50. *See* Andrew Arato, *Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure*, 26 S. AFR. J. HUM. RTS. 19 (2010).

51. There is some debate about whether this clause had a sunset date or, once added, was permanent. *See* Andrew Arato, *Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure*, 26 S. AFR. J. HUM. RTS. 19 (2010).

52. *Id.* at 29.

53. Miklós Bánkuti, et al., *Disabling the Constitution*, 23 J. DEMOCRACY 138, 139 (2012).

54. *See* Arato, *supra* note 52.

55. Bánkuti, et al., *Disabling the Constitution*, 23 J. DEMOCRACY 138, 139 (2012).

56. *See id.*

gain broad power. The insensitivity of replacement clauses to changes in political context might make them particularly problematic as time passes.<sup>57</sup>

*C. Problems Caused by an Absence of Domestic Institutional Constraint*

The link between process and outcome is notoriously difficult to draw with respect to constitution making, even for basic variables like levels of public participation and inclusion.<sup>58</sup> The ability to draw causal inferences of the effect of a particular constitution making process is plagued both by problems of endogeneity (the constitution making process is not randomly selected, but is likely to reflect preexisting patterns of political support) and context dependence (the effect of any particular design choice is likely to depend heavily on many other features of the political and social context). Nonetheless, the absence of effective domestic constraints appears to be associated with two kinds of problems across a range of cases. These problems are not inevitable: in some cases, despite the absence of domestic legal regulation, the parties may agree on the process or otherwise reach a good outcome. But they appear to be common enough to warrant concern.

The first potential problem is unilateral control of constitution making processes by particular individuals or parties, which can lead to “abusive” forms of constitution making that undermine democracy. Much recent work, drawn from a range of sources including Venezuela, Russia, and Hungary, has argued that unilateral domination of the constitution making process can undermine an existing or nascent democratic order.<sup>59</sup> The hegemonic actor who controls that process may be able to shape the constitutional text so that they are more difficult to dislodge, tilting the playing field in any future elections. They may also be able to weaken or pack control institutions that are designed to limit their power and to protect the rights of minority groups. Finally, constitution making may act as a critical juncture that allows ascendant political actors to weaken the power of their political opponents by rapidly removing them from institutional power bases. Put simply, in certain political contexts unrestrained constitution making raises significant risks of democratic erosion.<sup>60</sup>

A second problem is related to an increased risk of political and social conflict because of an absence of clear ground rules. During moments of ordinary political contestation, contending actors may disagree on their programs but agree on which channels and methods may be used to seek power, as well as which institutions are charged with making decisions in the event of political disagreement. A peculiar feature of constitution making can be to weaken or eliminate the institutions that

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57. For a similar critique of amendment rules giving special protection to certain clauses, see Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. L. 606 (2015).

58. See, e.g., Tom Ginsburg, et al., *Does the Process of Constitution-Making Matter?* 5 ANN. REV. L. & SOC. SCI. 201 (2009); and Gabriel Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 L. & SOC’Y REV. 749 (2012).

59. See Landau, *Gone Wrong*, *supra* note 2, at 940.

60. See Landau, *Abusive*, *supra* note 1, at 191.

normally channel these disagreements. Given that constitution making also normally takes place in an atmosphere of political crisis, the inability to agree even on basic ground rules can heighten tensions between competing groups.

The Bolivian case referred to above offers one example of such a dynamic. At the outset of the constitution making process in Bolivia, there were significant tensions between the forces of the new President Morales and the opposition.<sup>61</sup> These tensions were based on region, ethnicity, centralization vs. decentralization, and economics, among other issues.<sup>62</sup> But both sides agreed on the need for a new constitution, and their goals may not have been so distinct as to make agreement impossible. The process of constitution making was greatly inflamed by disputes about whether the Constituent Assembly had original constituent power, who would get to determine its rules, and how these rules should be interpreted.<sup>63</sup> The process ended up heightening political tension between the two groups rather than enabling compromise.<sup>64</sup> Similarly, in Egypt, debates about the basic parameters of the process, and particularly whether the Assembly was subject to legal control from the judiciary, inflamed disputes between competing groups and plausibly made it more difficult for the political parties who held a democratic majority to compromise with elements of the old regime and democratic minorities.<sup>65</sup>

## II. CONSTITUTION MAKING AND INTERNATIONAL LAW: A CRITICAL REVIEW OF APPROACHES

The prior part argued that domestic institutions are particularly weak during constitution making moments, which may make the existence of supra national support especially useful. This part surveys existing approaches that might help provide such support. It considers several different possibilities: (1) “democracy clauses” that police whether a state has followed its own rules; (2) international norms governing the procedure or substance of constitution making; (3) international organizations and NGOs carrying best practices; and (4) advisory institutions at the international level. The analysis concludes that each of these approaches may have some promise at limiting abusive acts of constitution making, but that all also have serious pitfalls. In the end, scholars and constitutional designers may achieve the best results from an approach that seeks modest gains from several different models.

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61. *Id.*

62. *See generally* Lehoucq, *supra* note 39.

63. *Id.*

64. *See* Landau, *Gone Wrong*, *supra* note 2, at 971. Indeed, at one point the tension became so bad that the process broke down completely over a peripheral but emotional issue: a proposal to move the capital to Sucre, where the Constituent Assembly was sitting.

65. *See generally* Brown, *supra* note 48.

*A. Democracy Clauses and Legality*

Perhaps the most straightforward approach would be an order that domestic actors need to follow their own rules. This approach has several advantages. Most importantly, it is most consonant with what already exists: several regional organizations, including Latin America and Africa, have democracy clauses.<sup>66</sup> These are normally tied to the constitutionality of action taken. The Latin American clause, found in article 20 of the Inter American Democratic Charter, allows for the suspension of member states in the event of an “unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state”<sup>67</sup> Similarly, article 25 of the African Charter on Democracy, Elections, and Governance calls for suspension in the event of an “unconstitutional change of government,”<sup>68</sup> and the Commonwealth nations similarly commit to action after an “unconstitutional overthrow of a democratically elected government.”<sup>69</sup> Thus, many regions have a clause that requires that certain fundamental actions—changes in regime or governance—be handled in a constitutional manner.<sup>70</sup>

This kind of approach is also consonant with some proposals for bringing fundamental issues of domestic constitutional governance into the international realm. Ex Tunisian President Moncef Marzouki’s proposal for an International Constitutional Court, for example, referred to “abuse” of political power by domestic actors and the prevention of “illegitimate, bogus elections.”<sup>71</sup> Marzouki’s suggestion is that at least a large part of the Court’s work would be in preventing political leaders from taking actions that violate their own domestic rules.

The normative attractiveness of such an approach stems from the fact that it does not require international actors to construct a set of procedural or substantive norms, but instead simply requires that countries abide by rules they have already set in place. In that sense, this approach seeks to close the gap between the way national leaders say they will behave and the way they actually behave. However, at least when it comes to constitution making, the normative attractiveness of the model is often overcome by two crippling problems: (1) the difficulty of figuring

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66. See generally Theodore J. Piccone, *International Mechanisms for Protecting Democracy*, in *PROTECTING DEMOCRACY: INTERNATIONAL RESPONSES* 101 (Morton H. Halperin & Mirna Galic, eds., 2005).

67. Inter-American Democratic Charter art. 20, Sept. 11, 2001, [https://www.oas.org/en/democratic-charter/pdf/demcharter\\_en.pdf](https://www.oas.org/en/democratic-charter/pdf/demcharter_en.pdf).

68. African Charter on Elections, Democracy, and Governance art. 25, Jan. 30, 2007, <http://au.int/en/sites/default/files/treaties/7790-file-african-charter-on-democracy-elections-and-governance.pdf>

69. Millbrook Commonwealth Action Programme on the Harare Declaration art. 3, Nov. 12, 1995, <http://thecommonwealth.org/sites/default/files/history-items/documents/millbrook%20declaration.pdf>

70. The Andean Community and Mercosur also include such clauses. See Piccone, *supra* note 66, at 108–09.

71. Press Release, General Assembly, General Assembly Session Pivotal If World Leaders Ensure Effective Custodianship of Environment, Economic Justice, Social Responsibility, Speaker Says in Debate, U.N. Press Release GA/11562 (Sept. 25, 2014), <http://www.un.org/press/en/2014/ga11562.doc.htm>.

out when a country has violated its own constitutional rules, and (2) the potential irrelevance of whether a country has followed its settled rules on the question of constitution making

The first problem afflicts any act of what Dixon and Jackson call “extraterritorial constitutional interpretation.”<sup>72</sup> While judging the constitutionality of an act may be fairly easy at times (a military coup is a paradigmatic example), very often it requires difficult issues in judgment. In those cases, actors tend to accept the decisions of final constitutional interpreters such as high courts not because they are definitely correct, but simply because of their procedural position. External interpreters lack the formal procedural authority to act as final constitutional interpreters. They also may lack necessary knowledge about the rules and legal culture of a system in which they were not trained and have not practiced.<sup>73</sup>

These problems tend to be particularly acute in exercises of constitutional change and constitution making. The reasons why the problems tend to be particularly acute were reviewed in the prior part. Constitutional texts often say little or nothing about their own replacement. Moreover, whether they are silent or not, political leaders may be able to use constituent power doctrine to carry out an act of constitution making outside of the existing constitutional framework.<sup>74</sup> Whether a given act of constitution making is thus “legal” or “constitutional” will often involve highly contestable theoretical judgments about the scope of the constituent power doctrine in a given context.

An example from Honduras may be helpful to make this more concrete. In 2009, then President Manuel Zelaya announced that he would seek a process of constitutional replacement of the existing 1982 constitution. Zelaya sought a plebiscite, which he later renamed a “nonbinding poll,” on whether to move forward with the replacement of the existing constitution.<sup>75</sup> Since Zelaya did not enjoy congressional support, he tried to move forward unilaterally.<sup>76</sup> The results of the poll would be counted by the National Institute of Statistics (not the Electoral Courts as with ordinary elections) and used to leverage the Congress into approving binding steps to move towards a possible constituent assembly.<sup>77</sup>

The administrative, electoral, and civil courts all issued decisions at different points holding that Zelaya could not move forward with the nonbinding poll.<sup>78</sup> Their core reasoning was that Zelaya lacked the authority to go forward with a non

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72. Vicki C. Jackson & Rosalind Dixon, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, 48 WAKE FOREST L. REV. 149 (2013).

73. *See id.*

74. Landau, *Gone Wrong*, *supra* note 2, at 962.

75. *See generally* Noah Feldman et al., REPORT TO THE COMMISSION ON TRUTH AND RECONCILIATION OF HONDURAS: CONSTITUTIONAL ISSUES (Mar. 19, 2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1915214](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1915214).

76. *See id.* at 5.

77. *See id.*

78. *See id.* at 30.



binding poll, since such an instrument did not exist under Honduran law.<sup>79</sup> Critics outside of the courts, which included virtually all of the domestic political class, also made a much broader argument: that although he was not explicit on the point, Zelaya was actually trying to change the country's one term limit, which was textually unamendable by any means, and therefore that the entire process of constitutional replacement was unconstitutional regardless of what route would be taken.<sup>80</sup> After Zelaya nonetheless moved forward with preparations, high military officials came to his house in the morning several days before the poll and put him on a plane to Costa Rica. Congress met later that day and named the president of Congress as the new national president; Zelaya was never restored to power.<sup>81</sup>

The Organization of American States ("OAS") activated the democracy clause in response to the military coup removing Zelaya, suspending Honduras from the organization for two years as a result.<sup>82</sup> Some analysts have argued that the OAS also should have utilized or threatened to activate the democracy clause in response to the actions of President Zelaya before the coup.<sup>83</sup> One problem, though, is that while it was reasonable to suppose the Zelaya's actions may have posed a threat of democratic erosion, it was more difficult to determine whether his actions were "constitutional" or "unconstitutional." The sequence of events proposed by Zelaya to carry out constitutional replacement was somewhat like that which had been proposed and carried out in Colombia in 1991, although under very different political conditions: a non binding poll carried out outside of the legal order, followed by a binding referendum, followed by a constituent assembly.<sup>84</sup> Whether preexisting legal authority was necessary for each of these steps is a difficult legal question. Even more difficult is the underlying question of whether the

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79. *See id.*

80. *See id.* at 92.

81. *See id.* at 61.

82. Interestingly, the removal triggered a non-trivial debate about the legality of the actions of the military. Those who supported the removal of Zelaya made various arguments: they argued that an arrest warrant for the president had already been issued by the Supreme Court, which is explicitly given the power to try, suspend, and remove the president under the Honduran constitution, and that the military was a proper entity to serve that warrant given the president's stature. They also argued that the president violated a special constitutional provision stating that anyone seeking to change the country's strict one-term presidential term limit would "immediately cease in office." *See id.*; *see also* CONST. HOND. art. 239 (prohibiting anyone who has previously served as president from serving again and stating that "[h]e who br[eaks] this provision or propose[s] its reform, as well as those who support directly or indirectly [that effort], [will] . . . immediately [cease to occupy] . . . their respective positions. . ."). While I was part of a team that rejected these arguments during the Truth and Reconciliation process, the fact that they could be made shows that even judging the constitutionality of military coups – the classic form of extraconstitutional act – may not always be simple. *See also* Jackson & Dixon, *supra* note 72, at 1–76 (arguing that the legality of those who removed Zelaya was at least contestable).

83. *See* JAVIER EL-HAGE, HUMAN RIGHTS FOUNDATION, THE FACTS AND THE LAW BEHIND THE DEMOCRATIC CRISIS OF HONDURAS, 2009: A CONSTITUTIONAL AND INTERNATIONAL DEMOCRACY LAW ANALYSIS 158 (March 2010) [http://humanrightsfoundation.org/uploads/The\\_Facts\\_And\\_The\\_Law\\_Honduras\\_2009.pdf](http://humanrightsfoundation.org/uploads/The_Facts_And_The_Law_Honduras_2009.pdf)

84. *See* Cepeda-Espinosa, *supra* note 14, at 540–42.

“unamendable” one term limit could be removed or rewritten via constitutional replacement. It is certainly plausible to argue that the petrified clause could not be changed via the textual mechanisms of constitutional amendment, but making it untouchable even by constituent assembly, effectively cutting off any route of change, is a different thing.<sup>85</sup>

This leaves one key argument: Zelaya’s actions were different from those of other contexts where extra constitutional mechanisms were used – like Venezuela, Colombia, and Ecuador – because the courts in those other countries either approved the mechanisms or were silent, while the Honduran courts issued several orders for Zelaya to stand down.<sup>86</sup> These judicial orders are certainly relevant, but they do not make the problem of extraterritorial constitutional interpretation go away, even where relevant judgments have been issued (often courts will simply avoid weighing in). The problem in the Honduran case is that virtually the entire judiciary was aligned with other members of the political elite and against Zelaya. Indeed, after the coup, the president of the Supreme Court gave interviews to the national and international press defending it, and the court issued several decisions legitimating the coup under Honduran constitutional law.<sup>87</sup> At least in circumstances like those, which are fairly common during moments of constitution making, the international community cannot without further examination accept the verdict of the domestic courts as the last word on the matter. They are participants, not simply arbitrators.

Even putting aside the difficulties with extraterritorial constitutional interpretation during moments of constitution making, there is a separate problem: whether a system follows its own rules may be basically orthogonal to the underlying procedural values that one would want to promote. The dangers to democracy that are posed by a process of constitutional replacement may not depend precisely on whether or not that process is “legal” under the existing constitutional order. Insisting on legality may in some cases be used as a tool to block a desirable process, while in other cases adherence to the formal procedural rules may do little to ensure

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85. The complexities of the interpretation of the petrified clause were made clear several years later – in a 2015 decision, the Honduran Supreme Court held that the one-term limit, as well as the clause making it unamendable by any means, were themselves unconstitutional and it excised them from the constitutional text. Among other arguments, the Court found that the petrified clause threatened to prevent any peaceful mechanism of constitutional change. See David Landau, *Honduras: Term Limits Drama 2.0 - How the Supreme Court Declared the Constitution Unconstitutional*, CONSTITUTIONNET (May 27, 2015), <http://www.constitutionnet.org/news/honduras-term-limits-drama-20-how-supreme-court-declared-constitution-unconstitutional>.

86. See BREWER-CARIAS, *supra* note 2, at 73; William C. Banks & Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender?*, 23 U. MIAMI INTER-AM. L. REV. 39, 59–60 (1991); FELDMAN ET AL., *supra* note 75, at 38; David Landau, *Term Limits Manipulation Across Latin America - and What Constitutional Design Could Do About it*, CONSTITUTIONNET, (Jul. 21, 2015), <http://www.constitutionnet.org/news/term-limits-manipulation-across-latin-america-and-what-constitutional-design-could-do-about-it>

87. For details, see Feldman, *supra* note 75, at 19.

such a process. Even a relatively close monitoring of legality or constitutionality may thus do little to improve outcomes.

The Colombian case offers a good example: as already noted, in 1991 the political elite used extra textual means to replace the 1886 constitution, since the existing text contained no provision whatsoever allowing for a constituent assembly.<sup>88</sup> Indeed, in a prior case from the 1970s the Supreme Court had struck down an attempt to delegate certain powers of constitutional change to such an assembly, holding that the method of constitutional change found in the constitution (approval by congress in two separate sessions by first a simple and then an absolute majority) was exclusive.<sup>89</sup> In the lead up to the Constituent Assembly of 1991, the Supreme Court changed its doctrine and allowed the sequence of events resulting in the calling of the Constituent Assembly on the grounds of original constituent power.<sup>90</sup>

Imagine, however, a counterfactual scenario in which the Court had struck down the Assembly and the political elite had moved forward anyway, or in which an international body had believed the action to be “unconstitutional” despite the legitimation of the country’s high court. A decision blocking the constitutional process would have likely prevented an exit from a deep political crisis, since the Congress and Supreme Court had stopped many previous efforts at constitutional change, leading critics to call Colombia in the 1980s a “blocked society.”<sup>91</sup> And it would have stopped a process that, despite using extra textual mechanisms, was highly consensual rather than unilateral: the resulting text was the result of broad agreement between various political movements, representing both the old party system and new insurgents. It also included input from a wide range of civil society groups. Finally, the resulting constitution has been widely praised as strengthening rather than weakening Colombian democracy.<sup>92</sup>

Alternatively, there are cases where procedural rules have been followed but the process nonetheless raised significant risks of democratic erosion. The Hungarian case mentioned above is a good example – the Fidesz party arguably followed the relevant rules by gaining a two thirds vote, but those rules allowed it to unilaterally dominate the process of constitutional replacement, resulting in a process that was neither deliberative nor inclusive, and which arguably worked a significant erosion of democracy in that country.<sup>93</sup>

The fact that democracy clauses will sometimes be of little use in regulating constitution making need not mean that this will always be the case. The point is simply that the attractiveness and feasibility of insisting on adherence to legality is

88. See Cepeda-Espinosa, *supra* note 14, at 545–47.

89. See MARIO CAJAS SARRIA, *EL CONTROL JUDICIAL A LA REFORMA CONSTITUCIONAL: COLOMBIA, 1910–2007* (2008).

90. See *id.*

91. See Mario Latorre Rueda, *Colombia: una sociedad bloqueada*, in *PARTIDOS Y ELECCIONES EN COLOMBIA* 173 (Felipe Botero, ed., 2011).

92. See Segura & Bejarano, *supra* note 29, at 232.

93. See Bánkuti et al., *supra* note 4, at 139–40.

very contextual. Imagine, for example, a case where the major political actors agree on a roadmap for a constitution making process just before such a process is initiated. During the process, however, one of the actors (for example, a powerful president or party) reneges on the deal and changes the process in some substantial respect. In such a case, where domestic institutions are too weak to stop this action, it may make sense for international actors to insist that the existing legal roadmap be followed. Any legal claim to make a unilateral break with such a recently enacted procedural norm is probably weak, and the roadmap itself seems likely associated with positive normative values (democracy and social peace, for example) that could be imperiled by unilateral constitution making. Even this use, however, would be a substantial expansion of the clauses beyond their current focus on military coups and similarly flagrantly illegal devices.<sup>94</sup>

### B. *Procedural or Substantive International Norms*

Some work has suggested that norms are emerging at the international level to govern either the process of constitution making or the substance of constitutional texts. While it is possible that at some stage such norms would emerge, it is clear that we are far from such a situation. Moreover, it is unclear whether international norms of this type would be ineffective or even counterproductive.

The most commonly cited norm said to be emerging to govern the process of constitution making, based both on treaties and custom, is one in favor of public participation.<sup>95</sup> It is not clear, though, how far such a norm would extend or what exactly it would encompass. Hart, for example, argues that the right could plausibly include three clusters of activities: electing representatives, voting in referenda, and offering input into the constitutional text.<sup>96</sup> She notes that there is no clear guidance as to which mix of these forms of participation is appropriate in different circumstances.<sup>97</sup> I will not, at any rate, analyze the question of whether such a norm exists or is emerging at the international level; I will instead simply point out that even if it were in the process of formation, it may not be an unalloyed good for domestic constitution making.

Many commentators have focused on the ambiguity in the concept of public participation in constitution making. It encompasses a range of different activities, some more “active” and others more “passive.”<sup>98</sup> Moreover, it appears to be easy to design popular participation mechanisms so that they appear to be robust, but

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94. See Piccone, *supra* note 66, at 233.

95. See Thomas M. Franck & Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 3, 3 (Laurel E. Miller, ed., 2010); see also Vivien Hart, *Constitution Making and the Right to Take Part in a Public Affair*, *supra*, at 20; Abrak Saati, *Participatory Constitution-Making as a Transnational Legal Norm: Why Does It “Stick” in Some Contexts and Not in Others?*, 2 U.C. IRVINE J. INT’L TRANSNAT’L AND COMP. L. 113 (2017).

96. See Hart, *supra* note 95, at 42–44.

97. See *id.*

98. See, e.g., Ginsburg & Elkins, *supra* note 58, at 214–19.

actually play a function that is closer to window dressing. Referenda or elections are of course very sensitive to the precise voting rules chosen, and can also be manipulated through outright fraud or subtler forms of influence. More active forms of participation, such as holding consultation sessions or encouraging popular input into the constitutional text, also vary widely. In some cases these may exercise significant influence on the final constitutional text. In others, however, their actual influence may be slight. In yet a third case, popularly supported provisions, such as those governing constitutional rights, may actually be used as compensation for other provisions that support authoritarianism.<sup>99</sup> So a mere requirement of participation, without much greater teeth, may do little to improve the outcomes of constitution making.

In fairness, those supporting the emergence of such a requirement acknowledge its ambiguity—they argue that further practice will be needed to define its contours. But even a well developed right to popular participation may involve tradeoffs that have not fully been processed in existing work. The empirical literature gives little guidance as to which aspects of constitution making actually result in more desirable outcomes. Some recent work suggests that public participation is correlated with those outcomes, while other work suggests more skepticism about their effect. At least in some cases, for example, inclusion of a full range of political elites—all or most major parties or movements—at the bargaining table may be more important than the level or type of popular participation in the constitution making process. In those cases, an international mandate for popular participation may overshadow more important concerns.

More dramatically, pushing towards popular participation may actually make it less likely that designers of a process will achieve other goals. Some recent empirical work suggests that levels of popular participation are actually used to compensate for low levels of inclusion: when key sectors of political elite are excluded from a constitution making process, constitutional designers compensate for this shortcoming by including passive forms of participation, like referenda, or more active forms, like popular input into the text.<sup>100</sup> Although participation and inclusion may act as substitutes for constitutional designers seeking legitimacy, they are not necessarily equivalent in terms of their effect on outcomes: leaving out a significant sector of the political elite may be especially destabilizing. Furthermore, as Elster points out, some forms of participation may also make it more difficult to reach elite consensus because different factions will be forced to play to their political bases rather than deliberating and compromising privately.<sup>101</sup> Many of the Eastern European constitutions in the 1990s were written with relatively low levels

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99. Something like this may have happened in the 2008 constitution-making process in Ecuador, which both contained a large number of rights and instantiated a competitive authoritarian regime led by President Correa.

100. See Negretto, *supra* note 58.

101. See Elster, *supra* note 6, at 388.

of public participation but high levels of inclusion through round table talks and similar devices, in part because of this perceived need.<sup>102</sup>

None of this is meant to argue that popular participation in constitution making is a bad thing. Some empirical work suggests that it does improve outcomes, although too little to make any definitive claims.<sup>103</sup> It may also be possible to design participation so that trade offs do not materialize or are less sharp. Some analysts have argued, for example, for an hour glass shaped form of participation in which levels are high at the beginning of the process (to activate it and determine its basic procedural and substantive shape) and the end (to legitimate it), but lower in the middle to allow elite bargaining.<sup>104</sup> In particular contexts, this proposal or another one may make sense. But the imposition of a robust and more specific “participation” norm at the international level is at best premature and at worst may impose too much uniformity on design choices that should properly be dependent on context. We have not yet developed a plausible list of best practices in constitution making, if such a list is even feasible.

Perhaps even more difficult would be the emergence of substantive norms or practices governing the content of constitutional texts. Given that democratic governance itself is not an international right, the possibility of international norms governing aspects of constitutional texts may seem very unlikely at least at the international rather than the regional level. But even if the emergence of such norms were more imaginable, it is doubtful that they could be designed in an effective way.

The main reason lies in the dynamics of modern “hybrid” or “competitive authoritarian” regimes, which seem to rest on particular combinations of formal and informal norms. First, those regimes often seem to rely on particularly problematic combinations of formal norms, rather than any single provision operating independently.<sup>105</sup> Scheppele has argued that the new Hungarian constitution created a “Frankenstate” composed of the aggregation of a large number of different elements that existed in other democratic states, although as problematic rather than salutary features.<sup>106</sup> The Hungarian constitution amalgamated all of these features—such as gerrymandering, restrictions on judicial jurisdiction, and less independent appointment procedures for courts and checking institutions—into a particularly virulent combination.

A related point is that the negative effects of new constitutions may rest heavily on contextual features, or on the interaction between formal and informal norms, rather than on isolated features of the text. In Venezuela, for example, President Chávez’s constitution in 1999 did increase presidential power, but merely

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102. See Jon Elster, *Constitution-making in Eastern Europe: Rebuilding the Boat in the Open Sea*, 71 PUB. ADMIN. 169, 188–92 (1993).

103. See Todd A. Eisenstadt et al., *When Talk Trumps Text: The Democratizing Effects of Deliberation during Constitution-Making, 1974–2011*, 109 AM. POL. SCI. REV. 592 (2015).

104. See *id.*

105. See Kim L. Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559 (2013).

106. *Id.* at 560–62.

took a presidency that was perhaps the weakest in the region and made it one of the stronger ones, although still well within Latin American norms. The greatly increased effect of presidential power was caused by these formal changes coupled with other aspects of the constitution where the president warped or worked around formal norms; for example, by declining to effectively implement a civil society commission that was supposed to exercise a significant role over judicial appointments.<sup>107</sup> By working around the commission, Chávez was able to control those appointments unilaterally.<sup>108</sup>

In some cases, these problems may be overcome, although probably much more readily at the regional than the international level. It is imaginable, for example, that Latin America or Africa might eventually reach some consensus on the question of presidential term limits. Unlike many other parts of a constitutional text, the terms limits issue can arguably be analyzed in isolation, and at least within broad parameters in a universal way. Term limits at least in presidential regimes may exercise a clear influence on the political order irrespective of the content of the rest of the constitution. Although Latin America currently seems to be going the other way (more countries are currently removing term limits than adding them) one could imagine the region eventually determining that at least some designs, like allowing presidents to serve for life with no break, were too dangerous or too associated with authoritarianism to be permissible.<sup>109</sup> Even if some such norms eventually emerge, however, they are unlikely to play a major role in preventing democratic erosion.

### C. *International Civil Society and Best Practices*

This leaves a set of possibilities that are more advisory in scope. First, many commentators have noted the rise of involvement of international organizations and NGOs in constitution making over the past several decades. In some circumstances, these groups can exercise a significant influence over the shape of constitutional process and the resulting constitutional text. For example, the international community has been heavily involved in constitution making in some post conflict situations. Across many other cases, international civil society groups have played a significant advisory role in the constitution making process. An extreme example of this is the constitution of Bosnia and Herzegovina, where the constitution itself was drafted as part of an international peace agreement.<sup>110</sup>

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107. See BREWER-CARIAS, *supra* note 2, at 226–44.

108. *Id.*

109. Both Honduras and Ecuador, for example, removed term limits in 2015, in the Ecuadorian case through constitutional amendment and in the case of Honduras through a Supreme Court decision.

110. See James C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 332, 332 (Laurel E. Miller, ed., 2010) (“A key feature of the peace agreement that settled the conflict was a new constitution for the new country, drafted by international mediators and negotiated by a handful of wartime leader in the conference rooms of a U.S. Air Force base in Dayton, Ohio.”).

The involvement of international organizations has plausibly improved constitution making across a range of cases. That said, there are a few cautions to concluding that the involvement of these actors have effectively “internationalized” constitution making and ameliorated the problems noted in Part I. The first is simply a point about selection. International involvement is not evenly distributed or a part of every constitution making process: these entities are heavily involved in some processes but much less involved in others. The involvement of international actors may to some degree be endogenous to other characteristics of the domestic and international political landscape.

In part, levels of international involvement seem to depend on the interests of international actors and the perceived importance of the country in question. At the domestic level, involvement of international actors will often depend on the goals of dominant political actors. In the ongoing process in Chile, for example, the government has invited in a broad range of international actors, perhaps as a way to increase domestic legitimacy and support despite right wing opposition.<sup>111</sup> But in both Hungary (2011) and Venezuela (1999), international actors played virtually no role in discussions around constitutional process and text.<sup>112</sup> In both cases, political leaders who had engineered a rapid and exclusionary process plausibly viewed international involvement as an obstacle to their aims. Those cases where democratic erosion is most possible may also be cases where international involvement tends to be slight.

The other major caution is about the state of the field, or the existing and perhaps inevitable gaps in our levels of knowledge. International involvement can without question be helpful in showing domestic designers the full range of comparative experience and in demonstrating the pitfalls and promise of approaches tried elsewhere. Still, best practices are sometimes formulated without a sufficient empirical base, or on a small number of case studies. The popular participation norm, for example, is one often pushed by international actors, sometimes based on the paradigmatic case of South Africa.<sup>113</sup> However, as noted in the prior section, the empirical evidence for the impact of participation is mixed, and we still do not fully understand its tradeoffs with other aspects of the constitutional process. There are real limits to the advice that can plausibly be given by international organizations and NGOs.

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111. See, e.g., *Field & HQ Update: Chile*, 5 THE U.N. CONSTITUTIONAL 10 (2015) (discussing U.N. advisory involvement and support for the Chilean constitution-making process), [http://peacemaker.un.org/sites/peacemaker.un.org/files/TheUNConstitutional Edition5 Summer2 016.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/TheUNConstitutional%20Edition5%20Summer2016.pdf).

112. See Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. OF DEMOC. 138, 141–42 (2012); see also BREWER-CARIAS, *supra* note 2, at 62.

113. See generally Franck & Thiruvengadam, *supra* note 95; see also Hart, *supra* note 95, at 20.



D. *Advisory Bodies*

Finally, in some cases advisory organizations at the international level have played a role in monitoring constitutional change and constitution making. A good example is the Venice Commission of the Council of Europe, which has become a relevant actor in some of the recent threats to democracy in Eastern Europe. The Commission's mandate is advisory: it has the ability to review legal measures and other instruments and to make recommendations in order to move towards "the dissemination and consolidation of a common constitutional heritage" in Europe.<sup>114</sup>

Since 2010, for example, the Commission has offered several opinions reviewing the new Hungarian constitution as well as laws intended to implement it. In a 2011 opinion, the Commission critiqued the exclusionary, non participatory, and rapid and non transparent nature of the constitution making process.<sup>115</sup> It also expressed concerns over some of the substantive provisions of the new constitution, such as the limitations on the jurisdiction of the Constitutional Court. The Commission also issued opinions reviewing several of the "cardinal laws" intended to implement key parts of the constitution: it critiqued several aspects of the laws regulating the judiciary, Constitutional Court, and prosecution service.<sup>116</sup>

The Venice Commission's work in the Hungarian case, as well as other recent Eastern European episodes, has been subject to criticism.<sup>117</sup> Critics have argued, for example, that the Commission's analyses have tended to take pieces of legislation in isolation, rather than holistically—a variant of the "Frankenstate" problem noted above. They have also argued that the Commission has demonstrated insufficient knowledge of the facts on the ground.<sup>118</sup> But at least potentially, an advisory commission approach offers advantages over other models on both scores. A body like the Venice Commission is not restricted to determining whether domestic actors have followed their own rules, or analyzing aspects of procedure or substance in isolation. It can instead potentially make a relatively holistic review of the effect

114. <http://www.venice.coe.int/WebForms/pages/?p=01> Presentation (last visited Jan. 12, 2017).

115. See European Commission for Democracy through Law (Venice Commission), *Opinion on the New Constitution of Hungary*, Op. No. 621/2011, (Jun. 20, 2011).

116. See European Commission for Democracy through Law (Venice Commission), *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, Op. No. 663/2012 (Mar. 19, 2012); see also European Commission for Democracy through Law (Venice Commission), *Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecution Employees and the Prosecution Career of Hungary*, Op. No. 668/2012 (Jun. 19, 2012); see also European Commission for Democracy through Law (Venice Commission), *Opinion on the Cardinal Acts on the Judiciary that were Amended Following the Adoption of Opinion CDL-AD(2012)001 on Hungary*, Op. No. 683/2012, (Oct. 15, 2012).

117. See, e.g., Joakim Nergelius, *The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW, AND POLITICS IN HUNGARY AND ROMANIA 291, 291 (Armin von Bogdandy & Pál Sonnevend, eds., 2015).

118. See Armin von Bogdandy & Pál Sonnevend, *Preface*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW, AND POLITICS IN HUNGARY AND ROMANIA, *supra* note 117, at vii.

of procedure or substantive provisions, and one based on the impact actions and provisions in practice, rather than simply on paper. Moreover, the Venice Commission is not restricted to identifying violations of domestic and international law, but can instead push states towards best procedural and substantive practices, in light of common European constitutional heritage.<sup>119</sup>

Of course, the advisory nature of the Commission's review may limit its effectiveness, which is another common critique.<sup>120</sup> The Hungarian government made some legal changes in response to the Commission's recommendations, but it did not change its approach; the changes were generally cosmetic.<sup>121</sup> The review of an advisory body like the Commission could gain more teeth if it was utilized by other international actors with binding authority to sanction a noncompliant state. In Europe, this is at least a theoretical possibility because of the existence of actors like the European Commission. In 2014 The European Commission adopted a multi step procedure for responding to threats to the rule of law, but it is too soon to know whether it will take effective action in response to significant problems noted by the Venice Commission.<sup>122</sup> Advisory bodies may also influence constitution making through other routes: they might, for example, embolden domestic institutions like courts to take tougher stances against abusive constitution making practices.

One could imagine seeking to generalize advisory bodies like the Venice Commission outside of the European context. President Marzouki's International Constitutional Court proposal envisioned an advisory role for the Court in developing best practices and analyzing national legal changes, in addition to an adjudicative role.<sup>123</sup> But it would be very difficult to develop international best practices, at least in terms of constitution making, for the reasons noted above. Perhaps more feasible would be the expansion of advisory bodies at the regional level, where problems of reaching substantive and procedural consensus might be less dire, if still complex.

Take Latin America as a potential case study. Although significant human rights and other regional institutions do exist in the region, the overall network of international institutions is much less dense than what is found in Europe, and those that do exist are less effective. It may not be easy for regional states to agree even on an advisory commission to govern domestic constitutional and legal design. Moreover, even if states did agree on such a body, it is unclear what a "Latin American heritage" in constitutional and legal design would look like.

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119. See Nergelius, *supra* note 117, at 308.

120. See *id.* at 300.

121. See *id.* at 293–96.

122. See, e.g., Tomasz T. Konciewicz, *Of Constitutional Defiance, Migration and Borrowing of Unconstitutional Tactics and European Resistance*, INT'L J. CONST. L. BLOG, (Aug. 17, 2016), <http://www.icconnectblog.com/2016/08/of-constitutional-defiance-migration-and-borrowing-of-unconstitutional-tactics-and-european-resistance> (analyzing these provisions with respect to Poland).

123. U.N. GAOR, 69th Sess., 9th plen. mtg. at 13–14.

The recent constitution making experiences in the Andes, for example, offer both a procedural and substantive challenge to prevailing liberal models. From a procedural perspective, they permit exclusion of prevailing political elite in return for participatory processes that offer input to historically marginalized groups.<sup>124</sup> From a substantive perspective, they perhaps weaken horizontal institutions of accountability in return for strengthening direct popular control over the governing class via devices like recalls and referenda and the inclusion of new forms of rights.<sup>125</sup> In both cases, the basic idea is that liberal democratic models can stand as obstacles to the achievement of social transformation and the inclusion of marginalized groups. The existence of this model shows that even within a region where there is broad agreement on basic norms of democracy, broad divergence in both the process and substance of constitution making can persist. This disagreement does not make the establishment of advisory bodies impossible, but it does significantly complicate the task.

### III. CONCLUSION

This article had two major goals. The first was to argue that the particular institutional and legal circumstances of constitution making mean that domestic restraint is often problematic, and this absence of restraint is associated with significant common problems: the erosion of democracy and increase in political tension. The second was to suggest that international actors give some additional attention to this problem, by reviewing the ways various existing models could be strengthened to take better account of it.

The review of potential international solutions in Part II suggests that abusive constitution making is a very difficult issue to tackle at the international level. All of the plausible solutions—democracy clauses, international norms, best practices, and advisory bodies—have substantial drawbacks. Some are very difficult to deepen; others might threaten to do more harm to domestic constitution making than good, either by privileging the wrong goals or by imposing uniform models on what is a very contextual process. But flawed is, in this context, a long way from useless. Given the importance of the threat posed by some acts of constitution making, the most sensible solution is to seek realistic and incremental progress across a range of the models reviewed here.

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124. See Cameron & Sharpe, *supra* note 23, at 101–02.

125. See, e.g., Jennifer McCoy, *Venezuela Under Chávez: Beyond Liberalism*, in *LATIN AMERICA'S LEFT TURNS: POLITICS, POLICIES, AND TRAJECTORIES OF CHANGE* 81, 93–94 (Maxwell A. Cameron & Eric Hershberg, eds., 2010).