


RESEARCH ARTICLE

Constitutions as moving targets

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Abstract

Constitutions change in different ways, and some constitutions – such as the Chilean Constitution – change often. The significant changes to the Chilean Constitution have been frequent and fast, and they have accompanied the failed constitution-making processes of the previous years. Examples include crucial sub-constitutional statutes such as the electoral system regulation and same-sex marriage, political practices challenging the power of the president in the law-making process, constitutional rules such as term limits for legislators, judicial practices such as the enforcement of social rights and the amendment procedures of the Constitution itself. Despite the successful attempts at reforming the Constitution and the failed attempts at replacing it, Chileans are still trying to replace the constitutional document. However, the constitutional framework has become unstable, making it harder to agree on what exactly is wrong with it. This article seeks to open a conversation in the constitutional literature. It argues that constitutions can become *moving targets* and uses the Chilean case to show the need to theorize more about the moving target problem.

Keywords: Chile; Chilean Constitution; constitutional change; constitution-making; constitutional framework; moving target constitution

I. Introduction

Many observers think of constitution-making processes as linear events taking place step by step. For example, they can start with round-table negotiations, enacting an interim constitution, setting up a writing organ such as an assembly and confirming the final proposal in a referendum.¹ Scholars also usually focus on the replacement process and its context, but they sometimes do not delve much into other parallel or related reforms. However, constitution-making processes are not always linear; there are pushbacks and circular procedures, and simultaneous reforms can affect constitutional politics in relevant ways. The problems that populism possesses for democratic procedures

¹See examples in Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford University Press, Oxford, 2016).

regarding approving policies in instantaneous and simultaneous ways,² sometimes circumventing representative institutions, can also occur during constitution-making processes. Opportunistic politicians can use their amending powers to advance parallel agendas, judges can change the meaning of constitutional provisions, interim constitutions can become unstable and reforms can bring new actors into the constitution-replacement debates.

The Chilean attempts at replacing the Constitution are good examples of non-linear processes that take place simultaneously with relevant reforms.³ As the debates on the process for constitutional replacement have continued to deepen in Chile, Chileans have passed significant amendments and developed practices reforming core constitutional aspects. These changes, even though they have been less noticed by non-Chilean observers, have accompanied the failed constitution-making processes that have taken place in previous years – that is, Bachelet’s 2017 proposal and the Constitutional Convention’s 2022 project – and they have affected each other in ways that remain under-theorized in the literature.

The Chilean experience suggests that there can be two parallel tracks for constitutional change: the attempts at replacing and reforming the Constitution – including amendments and means of informal constitutional change.⁴ Both levels of change involve constitutional politics, both can create overlapping or contradictory norms and their procedures can affect each other. There has been much theorization on democratic dualism and the difference between *ordinary* politics and politics;⁵ nevertheless, the Chilean case suggests a puzzle in which *constitutional* politics can occur in two separate but simultaneous tracks. Other jurisdictions have experimented with concurrent agendas of reform and replacement – Turkey seems a plausible example⁶ – but more research needs to be done to know whether the problems of the Chilean Constitution are also applicable there, and this article is the first attempt to understand those problems.

Despite the successful attempts at amending the Constitution and the failed attempts at replacing it, the demand for a constitutional replacement remains high among Chileans.⁷ The experience of the recent Convention shows that, despite the broad support for replacing the Constitution, there were no agreements on what precisely the new constitution should do in critical areas such as the political system,⁸ and it advanced demands connected to agendas that had already been (at least partly) implemented or that were already on their way to be approved. Examples include judges making social rights enforceable, legislators approving Bills on issues such as abortion and same-sex marriage, electoral reforms and constitutional amendments establishing term limits for legislators. As a result, some justifications for constitutional replacement focused on outdated

²Ming-Sung Kuo, ‘Against Instantaneous Democracy’ (2019) 17(2) *International Journal of Constitutional Law* 554–75.

³Both constitutional reform and constitutional replacement entail modifying constitutional norms. However, while replacement consists in substituting the full constitutional document, reforms only target a specific part of the constitution.

⁴See a mapping of types of informal constitutional change in Carlos Bernal, ‘Informal Constitutional Change: A Critical Introduction and Appraisal’ (2014) 62(3) *American Journal of Comparative Law* 493–513.

⁵See, for example, William Partlett and Zim Nwokora, ‘The Foundations of Democratic Dualism: Why Constitutional Politics and Ordinary Politics Are Different’ (2019) 26(2) *Constellations* 177–93.

⁶See <<https://apnews.com/article/middle-east-business-europe-97230ecc5224435e1dc606bef03f268f>>

⁷See <https://cadem.cl/plaza-publicaz>.

⁸See Palanza and Sotomayor in this special issue.

arguments targeting constitutional norms that had already changed. As the Constitution has changed, so the criticisms against it should change. Otherwise, achieving a holistic diagnosis of what is wrong with the constitutional framework becomes difficult.

The problem is that the Chilean Constitution itself has become an unstable document subject to frequent reforms that are surprisingly easy to pass. The Constitution serves both as an interim constitution for the replacement processes⁹ and as the main constitutional framework of the permanent political system. But it has failed in triggering an actual replacement – its interim nature has therefore failed – and it has not been able to provide stable and predictable norms due to its volatile content. In other words, the Chilean Constitution has become a *moving target*. Moving target constitutions can become hard to replace due to the political effects of their changing nature, elevating the transaction costs of large constitutional consensus. The literature has yet to fully theorize what a moving target constitution entails. This article seeks to open a conversation using the Chilean experience to identify some of its problems.

I will claim that moving target constitutions can present additional challenges to constitutional actors trying to replace them because their unstable content makes it harder to identify what exactly is wrong with it. Besides the sin of origin that the Chilean Constitution has – it was originally enacted during the Pinochet dictatorship – the content-related problems have changed and become less clear over time. In this context, the ground for opportunistic politicians using the amendment powers to advance their goals, and the replacement channels to exclude their rivals, seem to be fertile ground to raise the stakes of the constitution-making debates.

Part II of the article will explain what a moving target constitution is, connecting it to the problems mentioned above. The following parts focus on Chile. Parts III and IV summarize the period from the 1980s to 2005 while identifying the existing changes and the main criticisms against the Pinochet Constitution. Parts V and VI focus on the post-2005 constitutional changes while identifying how the reasons supporting constitutional replacement have evolved and how constitutional reform has taken place. They show that some reasons have become outdated and that the Convention lacked a shared diagnosis of what was wrong with the political system. These parts also explain how the amending and replacement powers were weaponized to advance specific rival agendas.

II. The moving target constitution

A moving target constitution consists of an unstable and changing constitutional framework that is also the object of total replacement attempts. In other words, a moving target constitution is the object of frequent reforms and serious replacement projects. The reforms must be substantive enough to claim that a constitution has been transformed in its relevant content, but not symbolically strong enough to placate the demand for a constitutional replacement. The modifications of the moving target constitution can also be produced by political and judicial practices shaping constitutional content, even to the point of modifying it. Many constitutions are changed in frequent ways, but they are not necessarily moving target constitutions. In addition to frequent constitutional changes, moving target constitutions need to become unstable in their content and to be subject to

⁹Marcela Prieto and Sergio Verdugo, 'How Political Narratives Affect the Self-Enforcing Nature of Interim Constitutions' (2021) 13 *Hague Journal on the Rule of Law* 265–93.

attempts at constitutional replacement. In other words, constitution-makers are trying to shoot an unstable and moving target.

Sometimes reforms and replacements need to take place in separate procedures – reforms typically follow pre-established procedures while replacements are less frequently regulated. It is not uncontroversial to say that the difference between replacement and reform says little about the substance and depth of the change.¹⁰ Indeed, sometimes constitutional reforms change aspects that are so crucial for the constitutional framework that the political community perceives the reform to in fact be a new constitution. For that reason, many Argentinians consider that their Constitution – which dates to 1853 – is actually the *1994 Constitution* due to the importance of the 1994 reform,¹¹ and some believe the reconstruction amendments in the United States were part of a deeper transformative constitutional moment.¹² The difference between replacement and reform is nonetheless relevant.

First, reforms can set up the conditions for the replacement. For example, in Bolivia the 2004 reform to the 1967 Constitution allowed former President Evo Morales to promote the enactment of a law in 2006 that initiated the process that ended up establishing a constituent assembly to replace the 1967 Constitution. Second, the symbolism of the reform may not be enough to signal a ‘new beginning’¹³ or a reset of the constitutional framework. A good example is the 2005 Chilean reform. The former Chilean President, Ricardo Lagos – one of the most prominent socialist critics against the Pinochet dictatorship – had presented that reform as a ‘new constitutional order’ that would leave the Pinochet Constitution behind,¹⁴ but all Chilean political parties denied Lagos’s symbolic gesture and perceived the revised version of the Chilean Constitution as the ‘Pinochet Constitution’.¹⁵ In other words, despite the examples of the 1994 Argentinian reform and the US reconstruction amendments, a formal replacement may offer a more attractive symbolism for politicians seeking to signal a drastic break from the past.

The Chilean example I examine in this article shows that the difference between replacement and reform also becomes relevant for understanding how simultaneous reforms and replacement attempts can affect each other. Unlike the Bolivian example, in which the reform was used to set up the conditions for the replacement, in Chile the processes of reform and the attempts at replacement have also occurred following parallel and opposing agendas. The content of the Constitution has become unstable, and the *moving target* problem needs to be addressed for the replacement procedures to be successful. Political actors promoting the replacement need to offer arguments for the replacement that typically take the form of criticisms against the existing Constitution.

¹⁰See also Richard Albert, ‘Constitutional Amendment and Dismemberment’ (2018) 43(1) *The Yale Journal of International Law*, available at <https://bpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/8/1581/files/2018/02/1_Constitutional-Amendment-and-Dismemberment-20mkw92.pdf>.

¹¹Gabriel Negretto, *Making Constitutions. Presidents, Parties, and Institutional Choice in Latin America* (Cambridge University Press, New York, 2013) 164.

¹²Bruce Ackerman, *We the People: Transformations, Vol. 2* (Harvard University Press, Cambridge, MA, 2000).

¹³I borrowed the term from Bruce Ackerman, ‘The Rise of World Constitutionalism’ (1997) 83 *Virginia Law Review* 771–97.

¹⁴Ricardo Lagos Escobar, ‘Una Constitución Para El Bicentenario’, in *Reforma Constitucional*, edited by Francisco Zúñiga Urbina (Lexis Nexis, Santiago, 2005) 19–30.

¹⁵See Cristóbal Bellolio, *Pinochet, Lagos & Nosotros. Ensayos Sobre La Cuestión Constituyente* (Debate, Santiago, 2015); Patricio Zapata Larrain, La Casa de Todos. *La Nueva Constitución Que Chile Merece y Necesita* (Ediciones Universidad Católica de Chile, Santiago, 2015).

However, when the Constitution is a moving target, those criticisms need to adapt to the last version of the Constitution and consider the effects triggered by the constitutional framework, including all the latest combined reforms. Otherwise, their proposals may fail to identify what exactly is wrong with the Constitution. The norms raising the problems criticized by constitution-makers may have already changed when the replacement becomes feasible, and the reasons for constitutional replacement may also change or become outdated. This is not to say that constitution makers may not find other reasons to justify the constitution-replacement agenda – at least they can say that the replacement is essential for symbolic reasons – but the content-related reasons justifying the replacement may weaken or shift over time. It is also possible that the open and feasible possibility of amending the Constitution will give a less-costly alternative to constitutional change than following the replacement agenda. Of course, this possibility will depend on how rigid the amending procedure is.

III. Against the Pinochet Constitution

The Junta approved the Constitution in 1980, which was confirmed in a referendum held under undemocratic conditions. Before the 1973 coup, Chile's democratization route had consisted of empowering elected presidents, expanding political and social rights, building a competitive multiparty democracy and having weak courts that were generally deferential to the political branches. Chile's history also included a constant problem: frequent conflicts between presidents and congresses. The 1980 Constitution tried to solve that problem by authoritarian means¹⁶ and interrupted relevant parts of Chile's constitutional tradition.¹⁷

Previous constitutional changes had tried to manage those conflicts by different means. For example, the 1925 Constitution attempted to make the Supreme Court an inter-branch arbiter, and the 1970 constitutional amendment tried to do the same with a newly created constitutional court while strengthening the president's legislative powers. But those solutions failed. None of those courts became relevant inter-branch arbiters.¹⁸ The presidents' supporting coalitions rarely got a majority in Congress, nor did they succeed in entirely controlling the legislative agenda in the pre-Pinochet era. Logrolling and rent-seeking legislation were frequent, and legislative deadlock was a permanent possibility.¹⁹

The 1980 Constitution addressed those issues in authoritarian ways. It created a more powerful Constitutional Court with ex-ante judicial review powers aimed at legitimizing the legislative powers of the junta and restraining the power of the future elected Congress. It created a powerful president who, along with an electoral system aimed at building two stable and disciplined political coalitions, was supposed to maintain the status quo. Changes were only possible if multipartisan agreements were achieved and

¹⁶See generally Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (Cambridge University Press, New York, 2002).

¹⁷Pablo Ruiz-Tagle, *Cinco Repúblicas y Una Tradición. Constitucionalismo Chileno y Comparado* (LOM, Santiago, 2016); Juan Luis Ossa, *Chile Constitucional* (Fondo de Cultura Económica, Santiago, 2020).

¹⁸Sergio Verdugo, 'How Constitutional Review Experiments Can Fail. Lessons from the Chilean 1925 Constitution' (2021) 19(3) *International Journal of Constitutional Law* 1062–83; Sergio Verdugo, 'Birth and Decay of the Chilean Constitutional Tribunal (1970–1973): The Irony of a Wrong Electoral Prediction' (2017) 15(2) *International Journal of Constitutional Law* 469–94.

¹⁹See Guillermo Piedrabuena, *La Reforma Constitucional* (Ediciones Encina, Santiago, 1970).

the heirs of the Pinochet regime were part of them. The *authoritarian enclaves* secured the veto power of the right-wing coalition by, for example, having a group of non-elected Senators and establishing supermajority rules for approving important pieces of legislation and for constitutional reforms. The Constitution also embedded rules inspired by the national security doctrine, which put the military as a sort of platonic guardian of the political system: elected politicians could not remove the heads of the armed forces, and a newly created National Security Council had consequential powers. The Constitution also helped to build the bases of a market-oriented economy in which private companies primarily provided social rights. The constitutional framework was accompanied by sub-constitutional reforms and privatization in areas such as healthcare, education and social security.

The first criticisms against the Constitution came from a group of left-leaning scholars called the Grupo de los 24. This group published a set of influential documents that shaped the constitutional debates of that time.²⁰ Perhaps the strongest criticisms targeted the tremendous power of the military and the president. For example, the documents explained how the emergency powers were unbalanced, how the military could directly or indirectly control the appointments of the constitutional judges and how the executive branch's powers were authoritarian. Many of those criticisms coincided with the content of the 1985 'National Accord' (the Acuerdo Nacional para la Transición a la Democracia),²¹ which was endorsed by politicians from the left and part of the right to reform the Constitution in relevant ways. Although the Pinochet regime rejected the National Accord, its content served as a blueprint for later politicians seeking reforms.

After Pinochet was defeated in the 1988 plebiscite and the return to democratic rule became inevitable, the Junta decided to amend the Constitution probably to secure that it would stick after the Junta was dissolved. The amendments changed 54 articles of the Constitution. They softened some of the authoritarian enclaves – for example, by securing that the composition of the National Security Council included more civilians – but also strengthened the military's autonomy.²² Even though most politicians agreed with the amendments,²³ as they initiated the mixed and slow democratization route of the Chilean Constitution, later commentators would claim that full democracy did not return to Chile in 1989.

Although some calls for a constituent assembly existed during this time, and some questioned the validity of the 1980 Constitution,²⁴ those calls did not become predominant within the left. Led by politicians such as Patricio Aylwin, the left tolerated the

²⁰Grupo de los 24, 'Informe Del Grupo de "Los 24"' (Hoy, October, 1979); Grupo de los 24, 'Las Críticas Del Grupo de Los 24', 1981; Grupo de los 24, *Las Propuestas Democráticas Del Grupo de Los 24*, edited by Patricio Chaparro (Corporación Grupo de Estudios Constitucionales, Santiago, 1992). Also see Francisco Cumplido, *¿Estado de Derecho En Chile?* (Instituto Chileno de Estudios Humanísticos, Santiago, 1983).

²¹Matías Tagle D. (ed.), *El Acuerdo Nacional. Significados y Perspectivas* (Corporación Justicia y Democracia, Santiago, 1995).

²²Claudia Heiss and Patricio Navia, 'You Win, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy' (2007) 49(3) *Latin American Politics and Society* 163–90; Fredrik Uggla, "'For a Few Senators More'? Negotiating Constitutional Changes During Chile's Transition to Democracy' (2005) 47(2) *Latin American Politics and Society* 51–75.

²³Carlos Andrade Geywitz, *Reforma de La Constitución Política de La República de Chile de 1980* (Editorial Jurídica de Chile, Santiago, 1991).

²⁴Lautaro Ríos Álvarez, 'Razón y Fuerza de La Constitución de 1980' (1989) 16 *Revista Chilena de Derecho* 325–36.

existence of the Pinochet Constitution and accepted it as an inevitable fact – a price to pay for the return of democracy. They promoted an incremental democratization process using the amending procedure.²⁵ In other words, they agreed with the criticisms against the Constitution, but acted pragmatically and decided to win elections first and amend the Constitution later. Due to how hard amending the Constitution was, they had initiated a slow and consensual route for democratization that would later set the bases for Burkean-type arguments promoting minimalist and gradual reforms.²⁶

V. Against Chile's protected democracy

A new era started when the *Concertación* – a centre-left alliance that had opposed the Pinochet Regime – elected four consecutive presidents: Aylwin (1990–94), Frei (1994–2000), Lagos (2000–06) and Bachelet (2006–10). The right-wing coalition was still strong due to the authoritarian enclaves. The Constitutional Court had used its powers to prevent Chile from empowering the International Criminal Court, the presidents could not control the armed forces and the combination of institutional arrangements described above forced the left to focus on more modest agendas. Some constitutional amendments were still approved, though – for example, rules to elect mayors and modifying the Supreme Court's appointment mechanisms could pass in the 1990s.

After Pinochet started to lose influence and the authoritarian enclaves started to benefit the left (e.g. former President Frei could become a lifetime senator), a reform opportunity opened up.²⁷ The 2005 reform was an elite bipartisan pact that modified the emergency regimes regulations, made the National Security Council irrelevant, allowed the presidents to remove the heads of the armed forces and made sure that all the senators were elected. It also reformed the constitutional judges' appointment mechanisms and removed crucial electoral rules from the Constitution, thus enabling future legislators to pass electoral reforms. Along with targeting the authoritarian enclaves, the 2005 reform changed the presidential term limits. Presidents in Chile were supposed to serve for six years, and the new rule stated a non-renewable four-year term in which presidents were elected simultaneously with the lower chamber of Congress and half of the Senate. This new regulation would change Chile's political landscape in relevant ways.

The 2005 reform amended more than 50 articles but, as explained above, it failed to convince the political parties about a symbolic *new beginning*. Political parties approved the 2005 amendment, but considered it a mere amendment to the dictatorship's political project. Later polls showed that the demand for a new constitution remained high.²⁸

Former President Frei was running again for a second but not consecutive term, and proposed a constitutional replacement in 2009. Even though he lost the election against President Piñera – a centre-right politician who did not want to replace the Constitution – Bachelet would later campaign again in favour of a replacement. Meanwhile, the route of

²⁵For example, Patricio Aylwin, 'Exposición Del Señor Patricio Aylwin Azócar', in *Una Salida Política Constitucional Para Chile*, edited by José Polanco Varas and Ana María Torres (Instituto Chileno de Estudios Humanísticos, Santiago, 1985).

²⁶José Francisco García, 'Minimalismo e Incrementalismo Constitucional' (2014) 41(1) *Revista Chilena de Derecho* 267–302.

²⁷On the politics of the 2005 reform, see Claudio Fuentes, 'Shifting the Status Quo: Constitutional Reforms in Chile' (2015) 57(1) *Latin American Politics and Society* 99–122.

²⁸PNUD, *Opinión Ciudadana y Cambio Constitucional. Análisis Desde La Opinión Pública, Más y Mejor Democracia* (Programa de Naciones Unidas Para el Desarrollo, Santiago, 2015).

gradual and incremental amendments resumed. The post-2005 era included, between 2007 and May 2023, 50 constitutional amendments: nineteen related to the political system, nine referred to new rights, ten set the bases for the constitution-making processes, and the others concerned issues such as the COVID-19 pandemic.²⁹ Early examples included the amendment empowering the International Criminal Court,³⁰ the strengthening of the regionalization agenda, the improvement of due process standards for criminal procedure and the advancement of the autonomy of the territories of Easter Island (Rapa Nui) and the Juan Fernández island, among others.

V. Against the *cheating* constitution

Despite the depth and extension of the 2005 reforms, some scholars complained that the Constitution had ‘pending’ items for reform. Some pointed to social rights and others to issues such as the electoral regime for the Congress – a matter now regulated by sub-constitutional norms.³¹ Pablo Ruiz-Tagle argued that the constitution had ‘changed without changing’,³² Carlos Huneeus complained that Chile still lived under a ‘semi-sovereign democracy’³³ and Fernando Atria popularized the idea that the Constitution was, in fact, a *cheating* constitution.³⁴ Atria pointed out three specific rules that needed change – electoral rules, supermajority rules to approve special legislation and the review powers of the Constitutional Court – and one master rule protecting the others: the rigid procedure to amend the Constitution. If these features were changed, a new constitution would exist.

Atria’s diagnosis was not new – the same points had been made earlier by the Grupo de los 24 – but his proposals became popular. They were endorsed by leaders from the students’ movement, intellectuals and politicians trying to influence the constitutional agenda. The core idea was to remove the rules Atria had identified to later focus on issues such as the reform of the political regime.³⁵ After the student protests challenged the right-wing government of Sebastián Piñera (2010–14), the then-candidate Bachelet – who was running to serve as a president for a second but non-consecutive term – campaigned on strengthening rights, particularly rights to education and women’s rights, and proposed a constitutional replacement that could take on all the social demands that were identified before. After being elected, she attempted to appeal directly to the citizens while bypassing Congress, probably expecting the parties to join later. Bachelet combined the results of citizens’ roundtables with top-down consultation processes praised by some constitutional scholars³⁶ to draft a constitutional proposal. Bachelet succeeded in

²⁹I built this data with information from <https://www.bcn.cl/leychile/consulta/vinculaciones/modificacion?idNorma=242302&fechaVigencia=2023-05-04&clase_vinculacion=MODIFICACION>.

³⁰Tribunal Constitucional 1415-2009.

³¹See, for example, Javier Couso and Alberto Coddou, ‘Las Asignaturas Pendientes de La Reforma Constitucional Chilena’, in *En El Nombre Del Pueblo*, edited by Claudio Fuentes (ICSO, Santiago, 2010) 191–215.

³²Pablo Ruiz-Tagle, ‘La Trampa Del Neopresidencialismo: La Constitución “Gatopardo”’, in *La República En Chile. Teoría y Práctica Del Constitucionalismo Republicano* (LOM, Santiago, 2006) 197–218.

³³Carlos Huneeus, *La Democracia Semisoberana. Chile Después de Pinochet* (Taurus, Santiago, 2014).

³⁴Fernando Atria, *La Constitución Tramposa* (LOM, Santiago 2013).

³⁵Fernando Atria et al., *El Otro Modelo* (Debate, Santiago, 2013).

³⁶For example, Antoni Abati Ninet, *Constitutional Crowdsourcing. Democratizing Original and Derived Constituent Power in the Network Society* (Edward Elgar, Cheltenham, 2021).

presenting a proposal to Congress only after becoming a lame-duck president and following political scandals that weakened her popularity. Even though Congress dropped the proposal,³⁷ many of the ideas she promoted became popular.³⁸

Parallel to her constitution-making efforts, Bachelet also succeeded in making crucial reforms. First, she passed a statute allowing abortion in narrow situations that are nonetheless relevant to the generally conservative Chilean political landscape. Even though the statute was formally a sub-constitutional norm, it rejected the pro-life interpretation of Article 19, Section 1 of the Constitution. Even if the Constitutional Court forced the statute to allow institutions not to be obliged to perform abortion,³⁹ the constitutional rubber-stamping of the valid causes for abortion implied a rereading of the Constitution, triggering relevant informal constitutional change.

Second, Bachelet succeeded in reforming the infamous electoral system for electing legislators, ending the Pinochet-era rules that had benefited the two main political coalitions, particularly the right.⁴⁰ The new electoral system included a proportional representation rule, allowed legislators to be elected with lower thresholds, increased the number of legislators and seats per district, and lowered the entry costs for creating new (and smaller) political parties. That reform changed Chile's political landscape, establishing a multi-party system that operated in a way that benefited smaller and less disciplined parties.⁴¹ This reform, which added to the previous political changes, successfully removed the authoritarian ways in which the Pinochet Constitution had initially tried to control the conflicts between the president and the Congress. This enabled the Constitution to finally leave behind the political system favoured by the dictatorship – although without the 'new beginning' symbol – and to initiate a new era in Chilean politics.

Third, Bachelet passed a crucial reform to secure funding for higher education, initially included in her budget law Bill. Until then, Chile's higher education model was funded mostly by student tuition and different funding sources directed to higher institutions – mainly public universities – but the number of scholarships available was limited, and the existing loans – which date back to the Lagos administration – were highly criticized. The Constitution recognized the freedom to educate and the right to education. Still, strong criticisms existed against how the right to education was influenced by market-based ideas and lacked 'genuine' social rights content.⁴² The student movement's demands for universal and free access to higher education had constitutional speed bumps,⁴³ as crucial norms of the system could only be modified by an organic law, which required four-sevenths of Congress and approval by the Constitutional Court. Bachelet took the highly popular demand from the student movement and succeeded in passing a new budget for

³⁷See Sergio Verdugo and Jorge Contesse, 'Auge y Caída de un Proceso Constituyente: Lecciones del Experimento Chileno y del Fracaso del Proyecto de Bachelet' (2018) 4(1) *Derecho y Crítica Social* 139–48.

³⁸See García's contribution to this symposium.

³⁹STC 3729-3751/2017.

⁴⁰See Daniel Pastor, 'Origins of the Chilean Binominal Election System' (2004) 24(1) *Revista de Ciencia Política* 38–57.

⁴¹Kenneth Bunker, 'La elección de 2017 y el fraccionamiento del sistema de partidos en Chile', *Revista Chilena de Derecho y Ciencia Política*, 7 December 2018, 202–25.

⁴²Fernando Atria, *Derechos Sociales y Educación: Un Nuevo Paradigma de Lo Público* (LOM, Santiago, 2014).

⁴³Constanza Salgado, 'El Derecho a La Educación', in *La Constitución Chilena. Una Revisión Crítica a Su Práctica Política*, edited by Jaime Bassa, Juan Carlos Ferrada and Christian Viera (LOM, Santiago, 2015) 77–97.

higher education, securing tuition fee-free access to education. The Constitutional Court reviewed the Bill and removed some requirements,⁴⁴ expanding the number of institutions that could be part of the free-tuition system.⁴⁵ The reform overcame constitutional limitations and arguably advanced a new understanding of the right to education.

VI. Old problems, outdated solutions

The new era of Chile's political landscape brought problems that partly meant returning to the constant historical issue of Chilean politics: legislative gridlock and elevated inter-branch conflict.⁴⁶ Presidents with short tenures and without the possibility of re-election, along with a minority and undisciplined coalition that made it hard to navigate the waters of a fragmented Congress and legislators with little incentives to pact with the executive branch, incentivized politicians to ignore large problems with little promise of compromise (such as social security, healthcare and migration) and focus on other issues that made them look good in the short term (such as the international agenda). A related problem that existed during the pre-Pinochet era also came back: the rise of impeachment procedures against secretaries of state, elevating the stakes of the political conflict.⁴⁷

Despite the relevant changes made during the Bachelet administration, Atria's arguments remained the basis for the criticisms against the Constitution. Justifications existed: despite the existence of a new political era, supermajority rules for approving critical pieces of legislation remained, and the rise of a right-leaning Constitutional Court – partly influenced by the appointments made by former President Piñera and the Supreme Court – served as speed bumps for some of President Bachelet's key projects. Indeed, the court had declared the unconstitutionality of parts of her labour law reform and consumer protection proposal,⁴⁸ which meant not strengthening the rights of workers and consumers.

Although the appointment of new judges had more to do with the 2005 amendment than with the 1980 Constitution, the court temporarily became a relevant veto power that the right (and also the left)⁴⁹ could use to defend its interests – at least in specific cases. The court's composition changed drastically after the 2022 appointments made by President Boric, but the jurisprudence of the court during the Bachelet administration (2014–18) helped make Atria's criticisms more visible. Along with the points made by Atria, a new set of rights was connected to the demand for a new constitution, partly due to Bachelet's promises. Education was already part of the platform,⁵⁰ and social

⁴⁴STC 2935-2015.

⁴⁵Also see José Manuel Díaz de Valdés, 'La Gratuidad Discriminatoria', *Sentencias Destacadas 2015* (Centro de Justicia Constitucional, Santiago, 2016) 235–61.

⁴⁶Sergio Verdugo, 'On the Protests and Riots in Chile: Why Chile Should Modify Its Presidential System' (2019) *International Journal of Constitutional Law Blog*, 29 October, available at <<http://www.iconnectblog.com/2019/10/on-the-protests-and-riots-in-chile-why-chile-should-modify-its-presidential-system>>; Rosalind Dixon and Sergio Verdugo, 'Los derechos sociales y la reforma constitucional en Chile: hacia una implementación híbrida, legislativa y judicial' (2021) 162 *Estudios Públicos* 31–73.

⁴⁷For example, legislators tried to impeach nine senior officers of the Piñera administration, as well as trying to impeach the president twice: see <<https://observatoriocongreso.cl/acusaciones-constitucionales>>.

⁴⁸Fernando Atria, Constanza Salgado and Javier Wilenmann, *Constitución y Neutralización. Origen, Desarrollo y Solución de La Crisis Constitucional* (LOM, Santiago, 2017).

⁴⁹Observatorio Judicial, 'Las Coaliciones Frente al Tribunal Constitucional', 2017.

⁵⁰Jean Grugel and Jewellord Nem Singh, 'Protest, Citizenship and Democratic Renewal: The Student Movement in Chile' (2015) 19(3) *Citizenship Studies* 353–66.

security would soon be added, particularly due to the protests against the privately run pension regime that Chile had adopted during the dictatorship.⁵¹ That regime was partly modified to help low-income people, but it was still inegalitarian and reproduced the labour market problems.

In October 2019, massive protests took over the streets to claim social rights expansions. The protests started with a specific demand – the increased cost of the Santiago metro ticket – but other demands such as healthcare and social security were soon included, and environmental, feminist and Indigenous groups also joined. During that time, Atria and others went on to morning TV shows, appeared on radio programs and wrote newspaper articles blaming the Constitution for the crisis. They strongly targeted the court, the regulation of social rights and the supermajority requirements to approve some pieces of legislation. For them, the Constitution was still a *cheating* Constitution, but it was now also a Constitution allowing abuses against the vulnerable – *Constitución de los abusos*.⁵² Instead of seriously discussing how the new era of Chilean politics had implied a return to gridlock, fragmentation and legislative inertia, constitutional commentators and politicians insisted on criticisms that could easily connect with the criticisms against the authoritarian enclaves that existed in the pre-2005 era.

The political parties offered a constitution-making process that tried to channel the demands into an institutional discussion, partly because the right-wing coalition was cornered.⁵³ They did not need to offer immediate changes to the actual issues that had people protesting – healthcare, transportation and social security, among others. The promise of constitutional replacement could centralize all those demands into a single process, postponing the problem with a relatively credible commitment⁵⁴ and using the Constitution as sort of scapegoat for the insufficient social rights expansions.⁵⁵ Even though they designed a post-sovereign process that attempted to avoid both the Pinochet model and the radical leftist projects of countries such as Venezuela,⁵⁶ the parties would later lose control of the process.⁵⁷ The problem of Chile's new flawed political party system remained. When the 2021–22 Constitutional Convention had the chance to correct the problems of the party system, it failed to offer a solution.⁵⁸ The anti-party narratives that predominated during its functioning, which were partly boosted by the election of several independent candidates that could veto proposals within the

⁵¹Joaquín Rozas Bugueño and Antoine Maillet, 'Entre Marchas, Plebiscitos e Iniciativas de Ley: Innovación En El Repertorio de Estrategias Del Movimiento No Más AFP En Chile (2014–2018)' (2019) 48 *Izquierdas* 1–21.

⁵²See, for example, <<https://www.youtube.com/watch?v=7rKKdwr22cY>>.

⁵³On the politics of the compromise that opened the constitution-making process, see María Cristina Escudero, 'Making a Constituent Assembly in Chile: The Shifting Costs of Opposing Change' (2022) 41(4) *Bulletin of Latin American Research* 641–56.

⁵⁴I have criticized this approach elsewhere. See Sergio Verdugo, 'The Chilean Political Crisis and Constitutions as Magic Bullets' (2019) *VerfBlog*, available at <<https://doi.org/10.17176/20191104-162816-0>>.

⁵⁵See Chilton, Versteeg and Eyzaguirre in this special issue.

⁵⁶Sergio Verdugo and Marcela Prieto, 'The Dual Aversion of Chile's Constitution Making Process: Between Bolivarian Constitutionalism and the Pinochet Constitution' (2021) 19(1) *International Journal of Constitutional Law* 149–68.

⁵⁷See Verdugo and García-Huidobro in this special issue.

⁵⁸Samuel Issacharoff and Sergio Verdugo, 'The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond' (2023) 78(1) *University of Miami Law Review* forthcoming, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4323864>.

Convention, made it impossible to use the constitution-making process as an opportunity to target the main problem of Chile's political regime. Instead, the Convention's proposal was the product of intense and inconsistent negotiations among constitution-makers that also lacked a shared diagnosis of the problem.⁵⁹ Along with path-dependent explanations, ideological disagreements and the existence of independent constitution-makers with little incentives to strengthen the party system, it was hard to expect the Convention to solve the party system problem.

The Convention did advance a project focusing on other relevant areas for the social movements participating in the 2019 protests. They advanced social and environmental rights, even though critical jurisprudential changes had changed their meaning and enforcement capabilities.⁶⁰ Also, notable changes in healthcare and labour rights existed,⁶¹ and the Constitutional Court itself had become an enemy of the private and for-profit health insurance companies created during the Pinochet regime. These informal changes made by judicial practices were important because they challenged the idea that the Constitution was supposed to serve neoliberal ends and protect the private sector. Even though it is still possible to make a textual argument suggesting that the design of the social rights in the Constitution prevents the establishment of a public and universal healthcare and social security system,⁶² arguments suggesting that the 'subsidiarity' prevents the protection of social rights in favour of a market-oriented economy are less persuasive.⁶³ If the problem were the Constitutional Court's composition, President Boric would end it with the new appointments. The Convention did not consider, of course, that the reforms Chile was experiencing were enough and speeded up not the democratization of the Constitution, but the need to turn the Constitution into a progressive and left-leaning mechanism. This idea was strongly resisted by other institutions, such as the Senate,⁶⁴ and even by average voters,⁶⁵ who rejected the proposal in the exit referendum.

The electoral campaigns calling to approve or reject the proposal tried to make use of the amendment mechanisms to benefit their interests. Conscious of the fact that the proposal was going beyond the median voters' preferences, Boric's supporting coalition – campaigning in favour of approving the proposal – developed a narrative suggesting that Chileans needed to decide whether they wanted to keep Pinochet's Constitution or should accept the proposal. To lower the costs of voting in favour of a proposal many disliked, the campaign in favour of approving it offered to amend the new Constitution after its approval (*Apruebo para Reformar*) as a way to signal that regular amendment channels could address the flaws of the constitutional draft, even

⁵⁹José Francisco García, 'Reshaping the Chilean Political Regime: Three Acts and a Funeral' (2022) *ConstitutionNet*, *Internacional IDEA*, available at <<https://constitutionnet.org/news/reshaping-chilean-political-regime-three-acts-and-funeral>>.

⁶⁰José Francisco García and Sergio Verdugo, *Activismo Judicial En Chile. ¿Hacia El Gobierno de Los Jueces?* (Ediciones LyD, Santiago, 2013).

⁶¹Jaime Bassa Mercado and Bruno Aste Leiva, 'Mutación en los Criterios Jurisprudenciales de Protección de los Derechos a la Salud y al Trabajo en Chile' (2015) 42(1) *Revista Chilena de Derecho* 215–44.

⁶²Eduardo Arenas Catalán, 'Chile's New Constitution: What Right to Health?' (2021) 13 *Hague Journal on the Rule of Law* 295–314.

⁶³José García and Sergio Verdugo, 'Subsidiariedad: Mitos y Realidades En Torno a Su Teoría y Práctica Constitucional', in *Subsidiariedad. Más Allá Del Estado y Del Mercado*, edited by Pablo Ortúzar (Instituto de Estudios de la Sociedad (IES), Santiago, 2015) 205–25.

⁶⁴See Escudero's contribution to this symposium.

⁶⁵See polling data in Sergio Verdugo, 'El Poder Constituyente Impopular' (2022) 46 *Actualidad* 207–46.

though leaders of the Communist Party put it into question the day after.⁶⁶ Voters did not buy it.

The proponents of the ‘reject’ vote had the dilemma of not defending the Pinochet Constitution if they wanted to win the referendum – many voters would never endorse that Constitution. They knew the Constitution was unpopular, and they needed to convince voters that voting against the proposal did not necessarily mean keeping the Pinochet Constitution. For that reason, they amended one of the main bases of the Pinochet Constitution: the amendment procedure. As they succeeded in finding the majority in Congress, legislators opposing the Convention’s proposal passed a parallel reform that lowered the supermajority requirements to reform the Constitution, making the promise of a future amendment (*rechazo para reformar*) or replacement (*rechazo por una nueva y buena constitución*) more credible. That way, they reduced the costs of voting against the Convention’s proposal to those who still disagreed with the current version of the Pinochet Constitution.⁶⁷

This was not the only promise that constitutional amenders achieved. They had also ensured citizens that a true renewal of the political elite was happening and approved the term limits for legislators to make that promise credible. Other political reforms included reducing the supermajority requirements to modify the organic laws – which involved ending with most of the rules that Atria had identified as wrong – and making voting mandatory – expanding the electoral base enormously. Also, the president’s legislative powers weakened drastically due to the pandemic-related measures that Congress imposed on President Piñera via constitutional amendments, introducing unprecedented political practices in Chile.⁶⁸

The cumulative effects of the political reforms added to the previous changes into something new. Far behind was the Pinochet-era dream of having only two disciplined and stable coalitions making decisions in consensual ways. Polarization, the rise of extreme parties and the existence of several small parties all suggest that a reorganization of the party system is still evolving, and may end up elevating the problems of legislative inertia and gridlock. The left-wing coalition is now fragmented, a new far-right party is now one of the biggest parties in the country and a new centre that had opposed the Convention’s proposal is emerging, though it is still weak.

Along with reorganizing the political system, the existing pressures also involved advancing substantive reforms. The centre-right President Piñera passed the Same-Sex Marriage Act in 2021 and approved a universal pension scheme adding to the private-run pension system. During President Boric’s mandate, the Supreme Court released a set of judicial decisions that could end the private insurance companies that run part of the healthcare system.⁶⁹ In other words, social rights enforcement may end up putting an end to the healthcare system designed by Pinochet’s collaborators.

⁶⁶See Sergio Verdugo, ‘On the Democratic (but Limited) Virtues of the Chilean Exit Referendum’ (2022) *IACL-AIDC Blog*, available at <<https://blog-iacl-aidc.org/new-blog-3/2022/10/4/on-the-democratic-but-limited-virtues-of-the-chilean-exit-referendum>>.

⁶⁷I have developed these ideas elsewhere: Sergio Verdugo, ‘Referéndum y Proceso Constituyente: ¿Extorsión Electoral o Veto Ciudadano?’ (2023) 47 *Actualidad Jurídica*, available at <<https://derecho.udd.cl/actualidad-juridica/articulos/referendum-y-procesos-constituyentes-extorsion-electoral-o-veto-ciudadano>>.

⁶⁸See Marianne Poehls and Sergio Verdugo, ‘Auge y Caída de las Reformas Constitucionales Inconstitucionales en Chile. Comentario a las Sentencias del Tribunal Constitucional roles 9797-2020 y 10.774-2021’ (2022) *Anuario de Derecho Público UDP* 263–88.

⁶⁹See <<https://observatoriojudicial.org/2023/06/observatorio-judicial-y-fallo-de-las-isapres>>.

It is not easy to predict how constitutional change will continue in Chile, but one thing is certain: Chile's Constitution has changed drastically, it is unstable and we are yet to fully understand what the consequences of the new constitutional framework will be. In the meantime, a newly elected Constitutional Council dominated by the right-wing coalition – in which the far-right party has a majority – is controlling the channels of constitutional replacement, and some key players have already promoted using the new constitution to protect the Pinochet-era policies that are challenged either by the Supreme Court and legislators.⁷⁰ They are promoting an agenda that seems disconnected from all the previous criticisms against the Chilean Constitution by emphasizing the need to approve norms following a law-and-order narrative,⁷¹ strengthening the police and the armed forces, discouraging immigration and fighting corruption. After all, sitting constitution-makers are still influenced primarily by the contextual politics of their time, and times have changed in Chile. If that happens, pressure for constitutional change will be unlikely to appease, and many will find good reasons not to support the Council's constitutional proposal.

VII. Conclusion

The literature on comparative constitutional change has yet to fully understand the implications of a moving target constitution. The examination of the Chilean case suggests that identifying two separate but parallel channels of constitutional change (reform and replacement) can help us to nuance the classical distinction between ordinary and constitutional politics. The distance between the two types of politics may reduce if the constitutional content becomes easy to amend, and the channels of constitutional reform become more complicated when different procedures operate simultaneously – even affecting each other. Rival politicians may weaponize their amending or replacement powers to raise the stakes of the political conflict, relevant changes may remain unnoticed and the constitutional framework may become volatile. The reasons for constitutional replacement may weaken or change over time. Diagnosing the issues that need reform may also become hard when many modifications take place quickly and frequently, causing difficulties in forming a shared understanding of the future paths of reform and harming the possibility of achieving multiparty compromises on substantive issues.

Acknowledgements. I thank Luis Eugenio García-Huidobro, Francisco Urbina, Amal Sethi, Sam Issacharoff and José Francisco García for useful comments on previous drafts of this article.

⁷⁰See <<https://www.latercera.com/la-tercera-pm/noticia/regulacion-en-salud-y-prevision-social-paridad-y-otras-normativas-del-anteproyecto-constitucional-que-disgustan-a-los-republicanos/JANNVCVZ6NCVHJSZL6LKWGXLI>>.

⁷¹See Sergio Verdugo, 'Chile's New Constitutional Proposal: A Balance Between Change and Continuity?' (2023) *ConstitutionNet*, *International IDEA*, 30 June, available at <<https://constitutionnet.org/news/chiles-new-constitutional-proposal-balance-between-change-and-continuity>>.