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Article

Constitutional Rights as Bribes

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Constitutions worldwide protect an increasingly long list of rights. Constitutional scholars point to a variety of top-down and bottom-up explanations for this pattern of rights expansion. This Article, however, identifies an additional, underexplored dynamic underpinning this pattern in certain countries: the pairing of constitutional rights with various forms of structural constitutional change as part of a trade between civil society and dominant political actors in their aspirations, or support, for constitutional change. This form of trade, the Article further suggests, has potential troubling consequences for democracy: it can pave the way for the consolidation of dominant-party or presidential rule in ways that limit the effectiveness of rights-based constitutional changes themselves and pose a major threat to the institutional "minimum core" necessary for a true democracy. This, the Article argues, suggests a greater need for caution on the part of civil society before accepting rights as a form of "bribe," or inducement, to support certain forms of structural constitutional change. For democratic constitutional designers, it also points to the advantages of "unbundling" different forms of constitutional change. The Article explores these arguments by reference to two recent examples of constitutional change, in Ecuador and Fiji, involving the combination of rights-based change with increasingly noncompetitive forms of democratic rule.

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Constitutional Rights as Bribes

ROSALIND DIXON *

INTRODUCTION

Most constitutions around the world now contain a long and generous list of rights. In 2006, ninety-seven constitutions worldwide expressly protected rights to freedom of expression, religion, and equality, while 70 percent recognized a total of twenty-five or more "generic" constitutional rights.[1] In 1946, in contrast, only 71 percent of countries recognized expression, religion, and equality as protected rights, and 10 percent of countries recognized the same core set of civil and political rights.[2]

Comparative constitutional scholars point to a range of "top-down" and "bottom-up" dynamics as underpinning the recent expansion in the constitutional protection of rights. On the one hand, processes of decolonization and democratization have encouraged outgoing political elites to seek increased forms of legal and political "insurance," while globalization has encouraged national elites to "signal" to international investors their willingness to respect rights to private property and contract.[3] On the other hand, progressive waves of popular mobilization have led to the greater demand for constitutional rights protection in a range of areas: first, in the form of various civil rights guarantees; and later, in the form of

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[1] David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 773 (2012).

[2] *Id.* at 773–75.

[3] *See, e.g.*, TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003) (arguing that judicial review facilitates democracy by putting constraints on government and is sought as a solution to the problem of uncertainty in constitutional design); Rosalind Dixon & Tom Ginsburg, *The South African Constitutional Court and Socio-economic Rights as "Insurance Swaps,"* 4 CONST. CT. REV. 1, 4 (2011) (discussing the central role socioeconomic rights play in constitutional adjudication in new democracies); Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, INT'L J. CONST. L. (forthcoming 2017); Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 85 (2002) (arguing that enforcement of human rights may act as an indicator to encourage investors and thereby indirectly foster economic growth).

guarantees of reproductive freedom, gender equality, and gay and lesbian rights. More recent waves of popular mobilization have also seen the demand for increased constitutional protection for indigenous peoples and the environment.[4]

For the most part, constitutional scholars have taken a relatively sanguine view of this trend toward increasing constitutional rights protection. Some scholars, such as Ran Hirschl, have adopted a more critical approach, suggesting that often the expansion of constitutional rights will simply amount to a form of antidemocratic self-entrenchment or hegemonic preservation by endangered elites.[5] Scholars such as Samuel Moyn, in turn, have offered an historical account that sees bottom-up movements for constitutional rights protection as distinctly ambivalent in character—i.e., as effectively a form of surrender by the left of a more radical vision of legal and political change.[6] The general response of comparative scholars and the international human rights community, however, has been to celebrate the increasing connection between international human rights law and constitutional rights.[7]

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[4] *See, e.g.*, Guillermo Peña, *A New Mexican Nationalism? Indigenous Rights, Constitutional Reform and the Conflicting Means of Multiculturalism*, 12 NATIONS & NATIONALISM 279, 280 (2006) (discussing the recent Mexican controversy surrounding the legal status of the indigenous population and the nature of nationalism); Marc Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, 38 LATIN AM. PERSP. 47, 52 (2011) (discussing the complicated relationship the indigenous social movement faced when pursuing revolutionary changes within a constitutional framework); Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1588 (2011) (explaining the constitutional changes made and the challenges they pose to democracy and constitutional thinking); Bradford C. Mank & Suzanne Smith, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, 35 HUM. RTS. Q. 1021, 1022 (2013) (book review); DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT (2011) (arguing that constitutionalizing environmental protection has the power to make sustainability a reality); Maria Akchurin, *Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador*, 40 L. & SOC. INQ. 937, 939 (2015) (discussing the power of indigenous organizations and their demands to respect the environment).

[5] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004) (arguing that the trend toward constitutionalization is driven by a self-interested coalition of legal innovators who determine the timing, extent, and nature of constitutional reform).

[6] *See* SAMUEL MOYN, THE LAST UTOPIA (2010) (arguing that human rights achieved contemporary prominence on the ruins of earlier political ideal utopias such as radical communism and nationalism).

[7] *See, e.g.*, Reyneck Matemba, *Incorporation of International and Regional Human Rights Instruments: Comparative Analyses of Methods of Incorporation and the Impact That Human Rights Instruments Have in a National Legal Order*, 37 COMMONWEALTH L. BULL. 435, 436 (2011) (discussing the impact of select international human rights instruments in the national legal order); David Sloss, *How International Human Rights Transformed the U.S. Constitution*, 38 HUM. RTS. Q. 426, 449 (2016) (discussing the origins of U.S. anti-discrimination law as an outgrowth of the creation of modern international human rights law); Colin J. Beck et. al, *World Influences on Human Rights Language in Constitutions: A Cross-National Study*, 27 INT'L SOC. 483 (2012) (arguing that national constitutions are imprinted with global social conditions); Michael Kirby, *International Law—The Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 327, 329–30 (2006) (addressing the part international law plays in the constitutional jurisprudence of nation states).

This Article suggests an additional reason for skepticism about processes of constitutional rights expansion. In some cases, the process of constitutionalizing rights may be linked to broader forms of structural constitutional change, which are distinctly *antidemocratic* in character. It is quite common, this Article suggests, for constitutions to contain forms of trade, whereby parties to constitutional negotiations agree to support both structural and rights-based constitutional change. In some cases, however, trades of this kind have a distinctly troubling quality—rights may serve as a form of inducement or "bribe" to national movements to secure their support for constitutional changes that erode commitments to democratic competition or multiparty democracy.

Where rights serve as bribes of this kind, they will also have distinctly ambiguous distributive effects; while all rights-based changes can help advance certain substantive goals or ideals, rights-as-bribes will often tend to do so with limited effect. Rights trades of this kind give democratic leaders few political incentives to honor rights-based commitments, and broad power over the appointment and composition of the independent institutions charged with interpreting and enforcing such guarantees. Further, trades of this kind can often pave the way for *further* processes of antidemocratic change, so that even changes that create a quite modest initial reduction in democratic competition or accountability can sometimes end up creating large-scale forms of democratic backsliding.

This, the Article suggests, also points to two broader lessons for democratic constitutional actors: first, for international government and nongovernment actors, the need for greater caution before supporting national efforts at rights-based change, at least where such change occurs against the backdrop of parallel structural constitutional change; and second, for democratic constitutional designers, the benefits of rules for constitutional amendment, or replacement, that encourage the *unbundling* of certain forms of constitutional change.[8] Rules of this kind may not be a panacea for the dangers identified in the Article, or appropriate in every case. But they may still play some useful role in helping limit, or at least slow down, certain forms of antidemocratic constitutional change that might otherwise rely on rights-based changes to gain support.

The Article explores these arguments by reference to two key case studies of constitutional change involving the expansion of rights protection: the adoption of path-breaking environmental and indigenous rights protections in Ecuador in 2008, and the adoption of social rights, and especially equal voting rights, for Indo-Fijians under the 2013 Fijian Constitution.[9] The connection between rights and antidemocratic forms of

[8] Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301 (2010).

[9] CONSTITUTION OF ECUADOR 2008; CONSTITUTION OF THE REPUBLIC OF FIJI 2013.

constitutional change is potentially much broader. But in focusing on these two countries, the Article provides a detailed exploration of how the dynamics of constitutional rights-as-bribes can operate, in practice.[10]

The remainder of this Article is divided into seven parts following this introduction. Part II surveys existing political science accounts of the origins of constitutional rights protection, especially top-down and bottom-up accounts that focus on the role of constitutional rights in providing insurance to political elites and the basis for social-movement mobilization. Part II outlines how constitutions sometimes change in ways that involve the simultaneous expansion of rights and the concentration of power in a single party or president, and in forms that are inherently antidemocratic in nature, and how this may be explained by the strategic connection of top-down and bottom-up agendas for change to create a form of rights-structure-based constitutional trade. Part III connects this to the idea of a constitutional bribe and the costs to democracy of constitutional trades of this kind. Part VI illustrates these arguments by reference to three key case studies from Ecuador and Fiji. Parts VI–VII consider potential solutions, both at the level of international advocacy and constitutional design, while Part VIII offers a brief conclusion.

I. THEORIES OF CONSTITUTIONAL RIGHTS EXPANSION

The idea of individual rights has a long lineage.[11] In the 20th century, however, ideas about rights increasingly came to be seen through the lens of *human* rights. Scholars such as Michael Ignatieff link this trend to the Holocaust and the resulting desire by Western democracies to enshrine human rights norms as a guarantee against future genocide.[12] Others, such

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[10] *See, e.g.*, Daniel Bonilla Maldonado, *Toward a Constitutionalism of the Global South*, *in* CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 1 (DANIEL BONILLA MALDONADO ED., 2013) (discussing the jurisprudence in three international constitutional courts on access to justice, cultural diversity, and socioeconomic rights).

[11] *See* MOYN, *supra* note 6, at 27–28 (tracing the conceptual development of international human rights and arguing that the modern conception of human rights is distinct from conceptions of human rights from earlier historical periods); *cf.* Pheng Cheah, *Human Rights and the Material Making of Humanity: A Response to Samuel Moyn's* The Last Utopia, 22 QUI PARLE: CRITICAL HUMAN. & SOC. SCI. 55, 56 (2013) (critiquing Moyn's theory of human rights as "empty[ing] them of almost all normative philosophical content"); Justin Zaremby, *On the Uses and Disadvantages of History for Human Rights Law: Reading Samuel Moyn's* The Last Utopia: Human Rights in History, 15 YALE HUM. RTS. & DEV. L.J. 155, 169 (2012) (postulating that the "whig history" of human rights criticized by Moyn could actually function as an effective conceptual tool for human rights advocates); Caroline Anderson, *Human Rights: A Reckoning*, 53 HARV. INT'L L.J. 549, 550–51 (2012) (critiquing Moyn's position as failing to advance a sufficiently detailed definition of human rights).

[12] MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 4–5 (2001). On this kind of "never again" account of the origins of human and constitutional rights, see also ALAN DERSHOWITZ, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS 75–76 (2004) (looking to the Nuremberg trials as an example of a coordinated attempt to establish rights, rather than power, as the basis for governance in response to the Holocaust); Steven G. Calabresi, *Essay on the Origins and Growth*

as Moyn, link it to broader ideological shifts on the left in the latter part of the 20th century. From the 1970s onward, Moyn argues, the left increasingly lost faith in the promise of communism and socialism, and thus turned to international human rights as the "last utopia," or the only plausible remaining vehicle for expressing longstanding commitments to the achievement of equality and freedom for all citizens.[13] Despite Moyn's criticism, few doubt the role of international human rights law, and discourse, as a source of rights-based *constitutional* change.[14]

Overlaid with these ideological shifts have also been a range of global structural changes. Progressive waves of decolonization have increased demands for rights-based protections from prior colonial powers and established the conditions for newly energized and effective social movements at the national level.[15] The end of the Cold War and various waves of democratization have contributed to the expansion of international human rights norms and incorporation of those norms into domestic constitutional law.[16] An increase in the mobility of global capital has

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of Judicial Review (Northwestern Univ. Sch. of Law, Law & Econ. Series, Paper No. 16-18, 2016), http://ssrn.com/abstract=2843823 [https://perma.cc/U56F-WPDV] ("[J]udicial review has emerged in a number of important constitutional democracies as a response to prior totalitarian regimes that grossly deprived their citizens of individual rights. This was the case in the American South in 1868, in Germany after 1945, in Japan after 1945, in Italy after 1945, and in South Africa after 1994."); STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM 4–6 (2013) (reviewing the postwar "rights revolution" in which countries attempted to remediate the constitutional failings believed to be responsible for the atrocities of World War II); *cf.* Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 INT'L J. CONST. L. 296, 300–01 (2003) (citing Germany's postwar constitutional reforms as an example of "aversive constitutionalism," a "backward-looking" project which "flag[ged] the Nazi past as definitively rejected").

[13] MOYN, *supra* note 6, at 4–5.

[14] *See, e.g.*, Law & Versteeg, *supra* note 1, at 768 ("[T]oday's constitution makers look for inspiration not only to other national constitutions, but also to regional and international human rights instruments such as the Universal Declaration of Human Rights and the European Convention on Human Rights."); Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference*, 60 AM. J. POL. SCI. 575, 577 (2016) ("[C]onstitution makers often select from a limited number of standardized rights templates, drawn, for example, from international human rights law.").

[15] *See, e.g.*, ROLAND BURKE, DECOLONIZATION AND THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS 37 (2010) (summarizing the origins of Asian and African decolonization movements as arising out of the demand for the "right to self-determination"); Christian Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, 27 REV. INT'L STUD. 519, 524 (2001) (supporting the notion that, with respect to decolonization, "the generalized nature and speed of European disengagement" can be explained by a rights-based "shift in the sovereignty regime governing international society"); Neil Stammers, *Social Movements and the Social Construction of Human Rights*, 21 HUM. RTS. Q. 980, 987–88 (1990) (arguing that "the construction and use of rights discourses by social movements has played an important and positive role in challenging relations and structures of power").

[16] *See, e.g.*, Tony Evans, *Introduction: Power, Hegemony, and the Universalization of Human Rights*, *in* HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL 2, 8–9 (Tony Evans ed., 1998) (describing the postwar tension between the United States and developing countries who "took the principle of self-determination" advanced by the UN Charter "at face value"); Anne Smith, *Internationalisation and Constitutional Borrowing in Drafting Bills of Rights*, 60 INT'L & COMP. L.Q. 867, 868 (2011) (describing

contributed to increased demands for the constitutional protection of economic rights.[17]

A full account of the expansion of constitutional rights, therefore, would clearly need to account for these important global ideational and structural changes, as well as for similar forms of localized legal and political change. As David Law and Mila Versteeg note, there is now a "generic core" of about twenty-five rights found in 70 percent of constitutions worldwide.[18] But some rights are found in 97 percent of national constitutions, whereas others (such as the right to bear arms) are found in only 2 percent.[19] And there is variation among countries in the degree to which they are moving toward, or away from, this "generic core."[20] This also points to the importance of *localized* legal and political factors in influencing the trajectory of formal constitutional rights protection.

A. *Rights as Political Insurance or Signal*

Comparative constitutional scholars, however, also point to two broad *general* dynamics in national politics as cutting across these ideational and structural changes: first, top-down processes, in which political leaders have turned to constitutional rights as a form of political "insurance," and second, bottom-up processes in which popular social movements have mobilized for the expansion of individual and collective rights.[21]

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the influences of internationalization and modeling of human rights norms during egalitarian reform movements in Canada, South Africa, and Northern Ireland); Jeong-Woo Koo & Francisco O. Ramirez, *National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966–2004*, 87 SOC. FORCES 1321, 1323–24 (2009) (reviewing the rights movements as implemented through national human rights institutions, such as national "truth commissions" in countries with past human rights atrocities); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 315 (1996) (describing the successful demands for democratic and constitutional reforms in post-Soviet and African nations based on the Universal Declaration of Human Rights); Egon Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 53 PROC. AM. SOC'Y INT'L L. AT ITS FIFTY-THIRD ANN. MEETING 217, 220 (1959) (summarizing the various rights-based conventions that developed under the auspices of the United Nations through the 1950s).

[17] *See, e.g.*, David S. Law, *Globalization and the Failure of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1307 (2008) (declaring human rights and property rights to be "necessary preconditions of globalization" due to their liberating effects on capital markets and freedom of movement); Farber, *supra* note 3, at 85–86 (describing the process through which governments can build confidence in foreign investors by ratifying constitutions that safeguard human rights).

[18] Law & Versteeg, *supra* note 1, at 773–75, 779.

[19] *Id*.

[20] *Id*. at 777.

[21] *See* GINSBURG, *supra* note 3, at 10–11 (identifying "the achievements of the human rights movement, the shift toward markets that depend on private property, and the spread of democracy" as factors supporting public demands for "judicial protection of fundamental rights" in new democracies); HIRSCHL, *supra* note 5, at 41 ("By providing 'insurance' to prospective electoral losers, judicial review can facilitate transition to democracy." (footnote omitted)); Farber, *supra* note 3, at 86 ("By agreeing to

One set of theories focuses on the response of political elites to certain kinds of risk—for example, the risks associated with a decline in electoral power or influence. For elites in control of the state, the prospect of future electoral losses carries with it a range of risks: it can undermine core policy commitments, threaten future access to political power, and even raise the prospect of individual punishment for past acts while in political office.[22] A newly elected government, for instance, may seek to undo the key legislative and policy achievements of an outgoing government by immediately repealing its most important legislative achievements.[23] Alternatively, it may use its control of the legislative and executive branches to adopt measures which effectively "lock-out" its opposition from the political process; it may change the formal electoral rules or eligibility requirements, so that existing opposition parties are formally barred from contesting elections.[24] Or it may change the electoral map, or campaign finance or political advertising rules, to favor incumbents, so that opposition forces face a range of informal electoral barriers.[25]

Some newly elected governments may even attempt to deter ongoing electoral competition by punishing members of the outgoing government with individual forms of punishment, such as criminal prosecution for misconduct or corruption while in office, limitations on their freedom of movement, or expropriation of their property.[26] *Non*democratic elites may also face an even greater risk of ex post punishment of this kind; their acts in periods of autocratic rule will often render them liable to various forms of domestic and international criminal accountability.[27]

In all three cases, a logical response by political elites will be to attempt to find some form of political "insurance" against these risks. Constitutions now also provide an obvious means of obtaining such insurance.[28]

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constitutional reforms, the dominant coalition . . . provide[s] itself with a degree of insurance from the fallout resulting from a future loss of influence.").

[22] Dixon & Ginsburg, *The Forms and Limits of Constitutions*, *supra* note 3.

[23] *See, e.g.*, L.C. Russell Hsiao, *Democracy Assistance in Asia and the Role of China*, 65 INT'L J. 583, 590–92 (2010) (describing the pitfalls facing Asian democracies, such as Singapore and South Korea, during their transitions from authoritarian to democratic rule).

[24] *Id.* at 590.

[25] *See, e.g.*, *id.* at 591–92 (describing the many techniques used by "resilient" Asian authoritarian leaders to resist Western-style democratic reforms, including the use of partisan gridlock, subversion of the non-independent judiciary, suppression of freedom of assembly, and open political corruption).

[26] *See* Koo & Ramirez, *supra* note 16, at 1323 (noting that this "prosecutorial approach" by which governments seek retribution for the crimes of previous regimes "continues to this day").

[27] *Id.*

[28] *See* HIRSCHL, *supra* note 5, at 41 (describing the motivations for political actors who expect to lose control over government to seek "insurance" through constitutional designs which protect their interests by facilitating their eventual return to power); SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 271–72 (2015) (describing various constitutional insurance mechanisms by which governments preserve the "electoral uncertainty" which

Constitutions cover an increasing range of topics and issues.[29] Constitutional courts in many countries are also increasingly powerful, playing an increased role in ordinary forms of politics.[30] The original version of the insurance theory was in fact developed, by Mark Ramseyer and others, as an explanation for the rise of independent courts in various countries.[31] Constitutional rights are also a distinct way in which elites may choose to empower independent courts to provide political insurance. Scholars such as Tom Ginsburg and Ran Hirschl further suggest that the idea of constitutional rights as a form of political insurance helps explain the expansion of formal constitutional rights protection in a wide range of jurisdictions.[32] Other scholars also point to dynamics of this kind in Indonesia, Italy, Mexico, Romania, Taiwan, Turkey, and Zimbabwe.[33]

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helps maintain healthy democracy, including "periodic elections, mixed constituencies for upper and lower chambers of bicameral legislatures, and federalist constraints on centralized command").

[29] *See* Law & Versteeg, *supra* note 1, at 775 (describing the accelerating trend of states adopting a set of popular "generic" constitutional rights covering a wide range of topics).

[30] *See* HIRSCHL, *supra* note 5, at 47 ("The transfer of power to the courts may also serve the interests of a supreme court seeking to enhance its political influence . . . . [J]udges . . . are also sophisticated strategic decision-makers who realize that their range of choices is constrained by the preferences and anticipated reaction of the surrounding political sphere." (footnote omitted)); ISSACHAROFF, *supra* note 28, at 272 ("A defining feature of all the new democracies is the creation of a strong form of constitutional court review of the political process. Where political competition lags or fails, these courts are often the only institutional actor capable of challenging an excessive consolidation of power.").

[31] *Compare* J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722 (1994) (illustrating the insurance theory using the "prisoner's dilemma" model, under which rational politicians who do not expect to win every election cycle will tend to support independent courts, but politicians who expect to hold power indefinitely are likely to not support judicial independence), *and* Matthew C. Stephenson, *"When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 85–86 (2003) (theorizing that democratic forms of government often include independent judiciaries because "independent judicial review serves a valuable insurance function for competitors in a stable democracy"), *with* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 240–41 (1979) (suggesting a number of economic and social factors underpinning the movement to abandon the financing of public judicial dispute resolution by private litigants, including the notion that a judiciary lacking financial independence creates inefficiencies in the dispute resolution system).

[32] GINSBURG, *supra* note 3, at 3–4; HIRSCHL, *supra* note 5, at 1–2.

[33] *E.g.*, Silvia Inclán Oseguera, *Judicial Reform in Mexico: Political Insurance or the Search for Political Legitimacy?*, 62 POL. RES. Q. 753, 753–55 (2009); James B. Kelly, *Judicial and Political Review as Limited Insurance: The Functioning of the New Zealand Bill of Rights Act in "Hard" Cases*, 49 COMMONWEALTH & COMP. POL. 295, 295–98 (2011); Stefanus Hendrianto, From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003-2008 (2008) (Ph.D. Thesis, University of Washington) (on file with the University of Washington Library); Stefanus Hendrianto, *The First Ten Years of the Indonesian Constitutional Court: The Unexpected Insurance Role*, CONNECTBLOG (AUG. 25, 2013), http://www.iconnectblog.com/2013/08/the-first-ten-years-of-the-indonesian-constitutional-court-the-unexpected-insurance-role/ [https://perma.cc/YH2V-MG69]; Mary L. Volcansek, *Bargaining Constitutional Design in Italy: Judicial Review as Political Insurance*, 33 WEST EUR. POL. 280, 283, 287, 289 (2010); Liviu Damsa, *Extending the Powers of the Constitutional Court, While Limiting and Focusing the Judicial Review: Some Considerations of the Impact of Recent Romanian Constitutional "Reform" in the Activity of the Constitutional Court and of the Ombudsman* (Fourth International Graduate Legal Research Conference, King's College London, Apr. 15–16, 2010);

A related explanation relates to the desire of political elites to provide a credible signal to risk-averse *private actors*—about the security of their investments. As Dan Farber notes, one way in which political elites can provide reassurance to investors, in this context, is by adopting commitments to entrenched constitutional rights and judicial independence.[34] By adopting an entrenched constitution, political elites effectively signal their "type" as a government hospitable to private investment—i.e., a coalition with a relatively low discount rate, and thus willingness to forego short-term gains for the sake of greater long-term benefits. The very act of adopting a constitution may suggest that "the dominant coalition is sufficiently aware of the long-term benefits of liberalisation to give up some of its own potential power" in a way that sends a positive signal to investors about a dominant coalition's discount rate.[35]

Constitutional rights guarantees are also a particularly powerful signal in this context: if a constitution entrenches various economic rights, it makes it more difficult for legislative and executive actors to limit them in the future. Similarly, it entrenches rights such as freedom of expression, due process, and equality, and this can give individuals and civil society tools for resisting arbitrary forms of expropriation. The willingness to propose or support such guarantees is thus itself a credible signal by current political elites of an intention to honor private property and contract rights in the future.[36]

B. *Rights & Bottom-Up Pressures for Change*

Another important dynamic explaining the expansion of constitutional rights in many democracies is the demand from ordinary citizens and social movements for expanded constitutional rights protections. In some cases, this is a response to experiences of historical injustice and a desire to see the state make explicit commitments to avoid the repetition of past wrongs.[37] In others, it is a belief that constitutional rights offer an important vehicle for advancing legal and political change. Social movements around the world have looked to courts, legislatures, and constitution makers to achieve

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Jen-Cheng Wang, *Politician's Vision and Judicial Independence Reform: The Case of Taiwan* (Annual Meeting for the Western Political Science Association, San Francisco, Apr. 1–3, 2010); Serdar Gülener & Infan Haslak, *Relations Between Politics and Constitutional Review in Turkey with Special Reference to the Referrals of Republic Peoples Party: 2002-2010 Period*, 10 ALTS.: TURKISH J. INT'L REL. 1, 6 (2011); James Tsabora, *Reflections on the Constitutional Regulation of Property and Land Rights under the 2013 Zimbabwean Constitution*, 60 J. AFR. L. 213, 220–21 (2016). For further discussion, see Dixon & Ginsburg, *The Forms and Limits of Constitutions*, *supra* note 3.

[34] Farber, *supra* note 3.

[35] *Id.* at 87.

[36] *Id.* 92–93. On the rights as trumps theory, see, for example, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978). For a weaker definition of rights, see Mark Tushnet, *How Different are Waldron's and Fallon's Core Cases for and Against Judicial Review*, 30 OX. J. LEG. STUD. 49 (2010); Rosalind Dixon, *The Core Case for Weak-Form Judicial Review*, 38 CARDOZO L. REV. 2193, 2207 (2017).

[37] DERSHOWITZ, *supra* note 12; Calabresi, *supra* note 12, at 1–2.

change of this kind in recent decades. They have attempted to persuade constitutional courts to interpret existing rights protections in newly expansive ways and have mobilized for legislative change in ways that have created new forms of quasi-constitutional rights protection. They have also sought to persuade constitutional drafters to adopt an increasingly expansive list of constitutional rights.

There is a vibrant debate among constitutional scholars as to the degree to which this faith in courts and formal constitutional rights protections is justified on the part of social movements. One view is that courts and social movements often work together to produce change of this kind; formal constitutional rights guarantees and courts' role in enforcing them can help create a focal point for social movement mobilization and a discourse that helps persuade ordinary voters about the need for social change.[38] Equally, social movements often play a crucial role in implementing court decisions, so that the meaning of abstract constitutional rights guarantees effectively becomes democratized by processes of social movement contestation.[39]

Another, more skeptical view, is that legal and political forms of change tend to serve more like substitutes rather than complements in this context.[40] The argument by scholars such as Gerald Rosenberg is that the judicial enforcement of constitutional rights tends to have limited impact on the ground.[41] It also tends to distract political activists and social movement actors from a focus on broader forms of political or legislative change. At the very least, scholars such as Tomiko Brown-Nagin have argued it tends to deradicalize social movement politics, so that any social and political gains are distinctly more moderate than if social movements had adopted a purely legislative strategy.[42]

Few U.S.- or comparative-constitutional scholars, however, doubt the importance of social movements to the expansion of constitutional rights protection within the United States and globally. Social movements have clearly played a major role in the global expansion of constitutional protections for racial minorities, women, and more recently, the LGBTIQ community and those with mental and physical disabilities. As the next Part shows, they have also successfully mobilized in recent decades for the constitutional recognition of a range of "second" and "third" generation

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[38] MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

[39] Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, *in* THE CONSTITUTION IN 2020 93, 94–95 (2009); JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 191–93 (1978); Jack M. Balkin, *How Social Movements Change (Or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 33–34 (2005).

[40] *E.g.*, David Landau, *Substitute and Complement Theories of Judicial Review*, 92 IND. L.J. 1283, 1284–87, 1292–96 (2017).

[41] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 157, 167, 169 (1991).

[42] Tomiko Brown-Nagin, *Does Protest Work?*, 56 HOW. L.J. 721, 757–58 (2013).

rights—i.e., rights such as the right to health, housing, food, water, social security, and education, and indigenous and environmental rights.

II. RIGHTS AND ANTIDEMOCRATIC CONSTITUTIONAL CHANGE

While powerful, these existing accounts largely overlook an important dynamic underpinning the adoption of new constitutional rights in certain countries across the globe—i.e., the expansion of constitutional rights by powerful political actors as an inducement, or "*bribe*," to civil society to support parallel processes of *antidemocratic* constitutional change.

The notion of democracy is, of course, itself a contested concept. In the United States and Europe, for instance, there is a longstanding debate about the relationship between rights-based judicial review and democracy. Some scholars, such as Ronald Dworkin, have defended rights-based review as advancing a substantive conception of democracy,[43] whereas others, such as Jeremy Waldron, have suggested that U.S.-style strong-form review is incompatible with a commitment to democratic equality in the process of self-government.[44] In part, this reflects differing views about the scope of *reasonable* disagreement about commitments to freedom, dignity, and equality for all citizens. And, in part, it reflects differences in the degree to which different theorists emphasize the substantive notions of equality and respect among citizens in the process of self-government versus more procedural ideas about universal franchise, political competition, and regular, free, and fair elections.[45]

Almost all theories of democracy, however, agree on a "minimum core" in respect of democracy—i.e., the idea that democracy entails *at the very least* regular, free, and fair elections, with some minimum level of competition between political parties, and a background of political freedom.[46] It is the fact of competition, as Samuel Issacharoff notes, that "assures both accountability of the political elites and legitimacy in the subsequent exercise of state authority" in a democracy.[47]

Rights-based changes are also sometimes paired with changes to a constitution's structure that threaten even this form of "constitutional

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[43] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 29–31 (1996).

[44] Jeremy Waldron, *Judicial Review and the Conditions of Democracy*, 6 J. POL. PHIL. 335, 335–38 (1998).

[45] *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 130–134, 137 (2003) (discussing Concept 1 and 2 democracy).

[46] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269 (3d ed. 1950). *But see* Rosalind Dixon & David Landau, *Competitive Democracy and the Constitutional Minimum Core*, *in* ASSESSING CONSTITUTIONAL PERFORMANCE 268, 268–69 (Tom Ginsburg & Aziz Z. Huq eds., 2016).

[47] Samuel Issacharoff, *Constitutional Courts and Consolidated Power*, 62 AM. J. COMP. L. 585, 595 (2014).

minimum core."[48] They are linked, both legally and politically, to formal constitutional changes that expand the power or prerogatives of dominant political actors, and thereby pave the way for a transition from true multiparty democracy to dominant-party democracy or one-party rule.[49]

What explains this connection between rights-based change and change in the structure of constitutional government? One potential explanation is ideational in nature—some political parties or movements may be ideologically committed both to broad government power and rights-based protections in certain contexts.[50] The adoption of structural and rights-based constitutional changes will thus be a natural incident of the rise of such parties or movements to political power.

Other explanations, however, are more strategic in nature: the formal protection of rights can often increase the perceived legitimacy of a constitutional system, both domestically and internationally. Linking rights to structural change can thus increase the perceived legitimacy to the entire package of constitutional change.[51] At a domestic level, rights may also provide an important means of increasing political support for certain forms of structural change by serving as a form of inducement or "bribe" to national movements to support parallel processes of structural constitutional change.

Democratic political parties and leaders often face a range of structural constraints on their ability to remain in office. They face formal limits on their terms in office, limits on their power to adopt electorally popular policies, or legal and political accountability structures that threaten to expose wrongdoing on their part and thus undermine their electoral

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[48] David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 WAKE FOREST L. REV. 859, 888 (2015).

[49] As Waldron himself notes, this also takes many countries outside the scope of U.S.-focused debates about the legitimacy of judicial review. *See*, *e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1360 (2006); *cf.* Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 INT'L J. CONST. L. 86, at 91 (2011); *see also* Dixon, *supra* note 36, at 2207 (discussing how judicial review can impose and overrule legislative processes to strive for political ends that favor one party's objectives).

[50] *See, e.g.*, CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 55–57 (2004) (explaining the ideological nature of Franklin Delano Roosevelt's "second bill of rights" and the movement's commitment to broad executive power); KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 54–57 (2001) (discussing the broad power of executive orders). *But see* Kirk A. Hawkins, *Who Mobilizes? Participatory Democracy in Chavez's Bolivarian Revolution*, 52 LATIN AM. POL. & SOC'Y 31, 32–33 (2010) (discussing how democracy in Venezuela changed from being viewed as dangerous to celebrated); Cristóbal Valencia Ramirez, *Venezuela's Bolivarian Revolution: Who Are the Chavistas*, 32 LATIN AM. PERSP. 79, 79 (2005) (discussing the reelection of Hugo Chavez); Jose Enrique Molina V., *The Left and the Democratic Stability in Latin America: The Ideology of the Bolivarian Revolution and its Impact on the Political Processes in Venezuela and Latin America*, 35 AM. LATINA HOY 169 (2010).

[51] *E.g.*, Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1722–27 (2015); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 198–200 (2013).

popularity. To retain power, they must therefore find some way of overcoming these constraints.

In some cases, political leaders may attempt to do so via purely extralegal or even illegal mechanisms—e.g., through a full-scale military takeover or by blatant electoral manipulation. The costs of extralegal or illegal action of this kind are clearly increasing for many political leaders; actions of this kind can lead to countries being denied membership in or expelled from key international organizations.[52] They can lead to the suspension or removal of international financial support.[53] And they can lead to adverse judgments about the legality of a regime before national and international tribunals, including the prosecution of individual leaders before the International Criminal Court or other forms of long-arm international criminal jurisdiction.[54] Nonetheless, these extralegal or illegal mechanisms remain as tools relied on by many political leaders worldwide.[55]

Other elites may look to "informal" processes of change to overcome constitutional limitations on their power. In the United States, for instance, almost all constitutional change now occurs via informal rather than formal means, or through common law constitutional interpretation,[56] legislative change (such as via the adoption of "super-statutes"[57]), or legislative or

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[52] *See, e.g.*, Jo-Marie Burt, *Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations*, 3 INT'L J. TRANSITIONAL JUST. 384, 387 (2009) (explaining an illegal third term lead to U.S. government and OAS condemnation).

[53] *See, e.g.*, Varol, *supra* note 51; Robert A. Hart Jr., *Democracy and the Successful Use of Economic Sanctions*, 53 POL. RESEARCH Q. 267 (2000).

[54] *See* Burt, *supra* note 52, at 384 (detailing the conviction of Alberto Fujimori to hold Peru accountable for human rights violations); Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?*, 22 HUM. RTS. Q. 90, 98–99, 106–107 (2000) (discussing International Criminal Court provisions and application); Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 209–210 (2000) (discussing the inadequacies of criminal prosecution).

[55] For example, these mechanisms were used in recent coups in Africa, including Burkina Faso in 2015 and Guinea-Bissau in 2012. *See, e.g.*, Folly Bah Thibault, *Why Are Coups Common in Africa?*, AL JAZEERA (Sept. 18, 2015), http://www.aljazeera.com/programmes/insidestory/2015/09/coups-common-africa-150917161949909.html [https://perma.cc/L5RC-UMYF] (reporting Burkina Faso's coup); Murithi Mutiga, *Coup in Burkina Faso as Military Takes Over Country Ahead of Elections*, THE GUARDIAN (Sep. 17, 2015), https://www.theguardian.com/world/2015/sep/17/burkina-faso-military-confirms-coup-and-dissolves-transitional-government [https://perma.cc/7XV7-M9T2] (describing the specifics of the Burkina Faso coup); John Hudson, *Why Are There So Many Coups in West Africa?*, THE ATLANTIC (Apr. 17, 2012), https://www.theatlantic.com/international/archive/2012/04/why-are-there-so-many-coups-west-africa/329209/ [https://perma.cc/K9JJ-CSSS] (considering factors that contribute to military coups in West Africa).

[56] *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (explaining common law's role in shaping constitutional interpretation by "provid[ing] a far better account of [the United States'] practices").

[57] *See* William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2000) ("A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does 'stick' in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law . . . .").

executive "workaround."[58] Informal mechanisms of this kind are often less well recognized as a legitimate mechanism for change in other countries.[59] They can also be ill-suited to achieving certain kinds of structural change.[60] But they are sometimes used outside the U.S.—including by dominant parties or leaders seeking to expand their own hold on power.[61]

For many democratic parties or leaders, however, the only legal path for continuing in office will be via a process of "formal" constitutional change. To succeed in adopting formal change of this kind, democratic leaders will also often require the support of a broad range of actors, including social movements.[62] Formal processes of constitutional change often require a

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[58] *See* Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1504–1505 (2009) (explaining that without an additional statute, some Congressional acts might be unconstitutional).

[59] *See, e.g.*, Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate*, 74 U.N.S.W.L. RES. SERIES 1, 1–2 (2017) (discussing Japan's aversion to informal constitutional change); Sujit Choudhry, *Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?*, 6 INT'L J. CONST. L. 193, 198 (2008) (exploring Quebec's attitude towards informal constitutional change); Neil Walker, *The Legacy of Europe's Constitutional Moment*, 11 CONSTELLATIONS 368, 378 (2004) (warning against changing informal to formal constitutional reform); Geoffrey P. Miller, *Constitutional Moments, Precommitment, and Fundamental Reform: The Case of Argentina*, 71 WASH. U. L. REV. 1061, 1075 (1993) (discussing Argentinian constitutional reform); *see also* Dennis Baker & Mark D. Jarvis, *The End of Informal Constitutional Change in Canada?*, *in* CONSTITUTIONAL AMENDMENT IN CANADA 185, 194–195 (Emmett Macfarlane ed., 2016) (outlining the role of informal and formal constitutional changes in Quebec's future); Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the "Reinterpretation" of Japan's War Powers*, 40 FORDHAM INT'L L.J. 427, 431–32 (2017) (discussing the role of informal rulemaking in the war powers of the constitution of Japan); Xenophon Contiades, *Constitutional Change Engineering*, *in* ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA 1, 1–2 (2013) (explaining the demystification of constitutions and their role as tools in changing circumstances).

[60] *See* SANFORD LEVINSON, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) <27: Accounting for Constitutional Change*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 13, 17 n.13 (Sanford Levinson ed., 1995) (explaining Donald Lutz's article that argues a formal structure that makes formal amendment too difficult will find other ways of amendment).

[61] *See, e.g.*, 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 [https://perma.cc/8MWT-ZXCA] (discussing Latin American term limit interpretation); ALLAN R. BREWER-CARIAS, DISMANTLING DEMOCRACY IN VENEZUELA: THE CHAVEZ AUTHORITARIAN EXPERIMENT 219–220 (2010) (discussing Venezuelan executive power).

[62] *See* Sidney M. Milkis, Daniel J. Tichenor & Laura Blessing, *"Rallying Force": The Modern Presidency, Social Movements, and the Transformation of American Politics*, 43 PRESIDENTIAL STUDIES Q. 641 (2013); SIDNEY G. TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS (2011). This, of course, is not always the case: in some contexts, a dominant party may have sufficient power in parliament to adopt antidemocratic changes without the need to gain the approval of the people or civil society. *See, e.g.*, Kim Lane Scheppele, *Understanding Hungary's Constitutional Revolution*, *in* CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA 111, 111–112 (Armin von Bogdandy and Pál Sonnevend eds., 2015) (discussing the process by which the Fidesz government, in Hungary, amended the constitution without popular ratification).

strong degree of popular support.[63] Many democratic social movements also have a broad support base that can be mobilized to support candidates or proposals to advance the movement's goals. If social movements decide to support a package of proposed changes, they can thus help encourage higher levels of popular turnout and support for relevant constitutional changes. They can also increase the perceived legitimacy of processes of constitutional change: one of the key determinants of the "sociological" legitimacy of modern constitution-making processes is the degree to which they are perceived as participatory or inclusive in nature,[64] and if social movements play an active role in processes of constitutional change, this will increase the degree to which they are seen to be participatory in nature.[65]

Constitutional rights also provide an obvious basis for trade between democratic leaders and social movements in this context. They are not the *only* basis for trade in this context. Democratic leaders and social movements could instead agree to adopt a broader package of structural constitutional change, which includes changes to the power of the legislative and executive branches, and structural guarantees of a "voice" for certain minorities.[66] They could also agree to a form of subconstitutional trade,

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[63] Almost all modern constitutions require the support of either a majority or super-majority of legislators to amend the constitution, and many require the approval of a majority or super-majority of voters. *See, e.g.*, Rosalind Dixon & Adrienne Stone, *Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW (David Dyzenhaus & Malcolm Thorbun ed., 2016); Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225, 234 (2013). For an overview of data, see the *Comparative Constitutions Project*, http://comparativeconstitutionsproject.org/ [https://perma.cc/4FFF-B8MT].

[64] *See, e.g.*, Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513, 1513–16, 1519 (2008) (explaining that the more inclusive the legislation the more likely it is perceived as legitimate); *see also* Joel Colon-Rios, *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform*, 48 OSGOODE HALL L.J. 199, 199, 209–10, (2010) (explaining that constituent power comes from making the constitution together). For a general overview explaining the notion of "sociological" legitimacy and a more detailed explanation of connections and disjunctions regarding "sociological" legitimacy, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96, 1849 (2005).

[65] This assumes, of course, that social movement mobilization is greater in support of the proposed change, rather than against it. This need not always be the case.

[66] *See, e.g.*, Heather Gerken, *Second-Order Diversity: An Exploration of Decentralization's Egalitarian Possibilities* 3 (Yale L. Sch., Pub. L. Research Paper No. 591), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2868032 [https://perma.cc/HCM7-FKAY] (noting that democratic leaders and social movements could adopt a broad constitutional change—which would change the power of the legislative and executive branch thus, providing a voice for minorities). *Compare Joint Statement in Support of First Nations' Voice to Parliament*, AUSTL. HUM. RTS. COMMISSION (July 24, 2017) https://www.humanrights.gov.au/news/stories/joint-statement-support-first-nations-voice-parliament [https://perma.cc/AMS4-NAXZ] (regarding Australian debates concerning constitutional change and a "voice" for First Nations), *and* Stephen Fitzpatrick, *PM Challenged to Deliver Indigenous Voice, Treaty*, THE AUSTRALIAN (May 27, 2017), http://www.theaustralian.com.au/national-affairs/indigenous/pm-challenged-on-indigenous-voice/news-story/ead303aec944e14727 bdc3475a5cb855 [https://perma.cc/3D99-5Q4U] (providing an example of alternative strategies that create constitutional change while giving a voice to minorities), *with* Dylan Lino, *The Uluru Statement:*

whereby in return for support for formal constitutional changes to the scope of legislative executive power, democratic leaders pledge to use that power to adopt a range of ordinary policies supported by a social movement.

Rights-based forms of change, however, will often provide a relatively *low-cost* basis for trade between democratic leaders and social movements: Many social movements in recent decades have made the expansion of constitutional rights a key objective. The international community has also consistently regarded the expansion of rights as a hallmark of prodemocratic forms of constitutional change.[67] For democratic leaders, offering to expand rights can thus provide a low "transaction cost" to gain social movement support for a broader package of constitutional changes or "reforms."[68]

III. RIGHTS AS BRIBES?

Bribe: *To "directly or indirectly give[], offer[], or promise[] anything of value to any public official [or witness] . . . with intent—to influence any official act."*[69]

How does this form of constitutional trade relate to the idea of rights as a form of "bribe"? The suggestion is certainly not that social movements are acting dishonestly or knowingly engaging in a form of wrongful action when deciding to accept such a trade or support formal constitutional changes that expand the scope of legislative or executive power. Rather, it is that they are effectively being *induced* by political elites to do something that they might not otherwise do in their capacity as constitutional or democratic players—something that we have independent democratic reasons for wanting to prevent.

For ordinary forms of legislative logrolling, political scientists often suggest there is a strong case for interest groups *supporting* trades or bargains of this kind.[70] Logrolling may empower special interest groups in

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Towards Federalism with First Nations, AUSTL. PUB. L. (Jun. 13, 2017), https://auspublaw.org/2017/06/towards-federalism-with-first-nations/ [https://perma.cc/3X6D-L6QC] (using the Uluru Statement as an example of a reform).

[67] *See* Varol, *supra* note 51; Dixon & Landau, *Competitive Democracy and the Constitutional Minimum Core*, *supra* note 46.

[68] *See, e.g.*, Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636, 641–46 (2011) (providing the language and relevance of transaction costs in this context); *see also* R. H. Coase, *The Problem of Social Cost*, 56 J.L. & ECON. 837, 850–53 (2013) (noting low "transaction costs" that can be used in order to gain support).

[69] 18 U.S.C. § 201 (2012).

[70] *See, e.g.*, Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 855 (2006) (arguing that greater representation and lower transaction costs of bargaining will increase the benefit of logrolls); Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 636–37 (1994) (discussing uses of logrolling to achieve beneficial outcomes).

ways that lead to wasteful and distorting forms of political expenditure.[71] But by allowing voters to trade votes across issues, logrolling can provide a means of capturing the intensity of voters' preferences, thereby increasing overall social welfare.[72] By producing a legislative majority in support of certain measures, it can also encourage various socially and economically productive forms of investment.

For bribes, however, the calculus will often look quite different. Bribes can help overcome red tape or broader government inertia in ways that help facilitate socially productive forms of investment.[73] But in other cases, they will simply distort investment toward areas where corruption is less pervasive.[74] They will also increase the costs of forms of productive investment.[75] Overall, therefore, most studies find that bribes, or the presence of economic corruption, have a clear negative effect on overall levels of growth in a democracy.[76]

The same argument arguably applies to rights as bribes: By helping create the conditions for dominant-party or presidential rule, rights-based changes of this kind can have a serious adverse impact on the competitiveness of a democracy, while delivering quite limited forms of rights-based change. They can, in this sense, be quite clearly welfare-*decreasing* over the long-term.

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[71] *See* Gilbert, *supra* note 70, at 854 & n.225 (describing potential harms of particular types of logrolling); John G. Matsusaka, *Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years*, 103 J. POL. ECON. 587, 618–19 (1995) (recounting a theory that logrolling "lead[s] to a familiar problem of overexploitation").

[72] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 125 (1971) (contending that intensity of voter preferences drives the trading of votes via logrolling); Gilbert, *supra* note 70, at 835–36 (suggesting that the more accurately legislators represent the preferences of their constituents, the more likely constituents are to benefit from logrolling).

[73] *See* Mohamed Dridi, *Corruption and Economic Growth: The Transmission Channels*, 4 J. BUS. STUD. Q. 121, 122–23 (2013) (presenting common arguments for the economic benefits of bribes and corruption); Bard Harstad & Jakob Svensson, *Bribes, Lobbying, and Development*, 105 AM. POL. SCI. REV. 46, 52, 55 (2011) (providing quantitative models exploring government incentives to benefit from or curtail corruption); Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 420 (1967) (identifying efficiency gains possible with corruption).

[74] *See* Pierre-Guillaume Méon & Khalid Sekkat, *Does Corruption Grease or Sand the Wheels of Growth*, 122 PUB. CHOICE 69, 73–74 (2005) (noting ways in which corruption distorts investments and transactions).

[75] *See id.* at 71, 75, 90 (arguing that corruption increases costs to investment and growth in countries with strong or weak governance).

[76] *See* Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320, 1341 (1997) (identifying political factors linking corruption and economic harm and recommended solutions); Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 683 (1995) (demonstrating a strong correlation between corruption and decreased economic growth); Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599, 615–16 (1993) (exploring two major reasons why corruption stifles economic growth).

The expansion of constitutional rights will inevitably have *some* capacity to create positive social and political change. Formal constitutional rights guarantees, as Lani Guinier and Gerald Torres note, create new ways of understanding and expressing claims for recognition and justice on the part of marginalized and vulnerable groups in ways that can have an important impact on political debate and practice.[77] "Demosprudential" effects of this kind can also be observed in many dominant-party democracies, including some cases where opportunities for open social and political mobilization on certain issues are limited.[78] Some forms of rights-based trade may also have strong ideational origins, which adds to their democratic credentials or value.

The danger of such changes, however, is that they may contribute to undermining the level of competition or effective number of political parties in ways that ultimately damage both existing *structural* commitments to constitutional democracy and the value of rights-based change.

The level of democracy in a country, as David Law and Mila Versteeg note, is one of the most important predictors of whether governments ultimately choose to comply with constitutional constraints.[79] Strong or competitive democracies are generally associated with "strong" constitutions, while weak or noncompetitive democracies are linked to "weak" constitutions or weakly binding constitutional constraints.[80]

One reason for this is that the competitiveness of democracy affects the political enforcement of the constitution. Constitutional norms, as political scientists have shown, can sometimes be "self-enforcing"—i.e., political actors have incentives to comply with the terms of the constitutional norms independent of their legal force.[81] Incentives of this kind, however, almost always depend on the existence of some degree of competition between

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[77] Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2759–60 (2014) (describing the power of citizens to interpret and shape constitutional rights).

[78] *See, e.g.*, GINSBURG, *supra* note 3, at 13–15 (challenging culturally deterministic views of Asian governments and their capacity to create democratic institutions); Mark Tushnet, *Preserving Judicial Independence in Dominant Party States*, 60 N.Y. L. SCH. L. REV. 107, 118–19 (2015) (explaining that domestic and international communities can pressure a dominant party to protect judicial independence).

[79] David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863, 882–83, 928–29 (2013) (presenting a study examining types of constitutional implementation and the ability of factors to predict constitutional violations).

[80] *Id.* at 919–20 (discussing motivations for democratically accountable governments to recognize constitutional rights and for undemocratic governments to implement sham constitutions).

[81] *See* Tonja Jacobi, Sonia Mittal & Barry R. Weingast, *Creating a Self-Stabilizing Constitution: The Role of the Takings Clause*, 109 NW. U. L. REV. 601, 603–04 (2015) (highlighting the importance of the self-stabilizing elements of the United States Constitution); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 672 (2011) (noting approaches political scientists have applied to evaluate self-enforcing political arrangements).

political parties.[82] In a two-party political system, parties who fail to respect constitutional limits almost always face the prospect of retaliation by the political opposition. If the parties are sufficiently risk averse and have sufficiently low discount rates, they will have a strong incentive to respect constitutional limitations, such as those imposed by an independent judiciary or constitutional separation of powers.[83] In a system in which one party is dominant, by contrast, that party can generally ignore constitutional limitations without any real threat of political retaliation of this same kind. This, in turn, means they also have little *political* incentive to respect constitutional limitations, such as those imposed by an independent judiciary or rights-based norms.[84]

The degree of interparty competition in a democracy can also affect the independence of institutions such as courts: truly dominant-party or presidential rule gives dominant elites broad control over all key government institutions, including courts. The definition of a dominant-party democracy, according to political scientists, is one that has never experienced a true alternation in political power.[85] While democratic elections are nominally free and fair, a single political party is so dominant in ordinary electoral politics that it has held office since the constitutional system came into existence. In dominant-party systems of this kind, the continued reelection of a single party will also mean that that party effectively controls appointments to almost all "independent" agencies including the prosecutorial offices and independent courts.[86]

The same is often true in systems that *transition* from truly competitive democracy to de facto one-party rule. Systems of this kind may not be dominant-party democracies in the classic sense identified by political scientists. But they are systems in which competition is effectively so limited

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[82] *See* Stephenson, *supra* note 31, at 72–73 (concluding that intermediate to high levels of political competition are necessary to maintain judicial independence).

[83] *See id.* at 71, 76 (finding correlations between risk-averseness and low discount rates and support for judicial independence).

[84] *See id.* at 60–61 (exploring political incentives to maintain constitutional protections in the context of judicial independence).

[85] *See* Sujit Choudhry, *'He Had a Mandate'; The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 20 (2009) (articulating a common understanding that "alternation is integral to preventing the abuse of political power"); Frederick C. Engelmann, *Review, Uncommon Democracies: The One-Party Dominant Regimes*, 24 CANADIAN J. POL. SCI. 177, 177–78 (1991) (covering a theory of "the origin and maintenance of one-party dominant regimes"); Kenneth F. Greene, *The Political Economy of Authoritarian Single-Party Dominance*, 43 COMP. POL. STUD. 807, 809 (2010) (defining single-party dominance). For a discussion of dominant-party political theory in practice, see Meltem Müftüler-Baç & E. Fuat Keyman, *The Era of Dominant-Party Politics*, 23 J. DEMOCRACY 85, 86 (2012) (examining the dominance of Turkey's Justice and Development Party).

[86] *See* Tushnet, *Preserving Judicial Independence in Dominant Party States*, *supra* note 78, at 113–15 (illustrating the tendency of dominant-party systems to limit judicial independence).

that they could be considered *newly* dominant democracies.[87] The dominant party or president in such systems will again have broad power over the appointment of formally independent institutions such as courts.

This can also affect the enforcement of existing constitutional limits on *further* processes of antidemocratic change. Some forms of rights-based trades may lead to only quite modest changes in legislative or executive power, which pose limited immediate threat to commitments to democratic competition or multiparty democracy.[88] The key danger to seemingly modest changes of this kind, however, is that they may end up limiting the capacity of a democratic system to resist further processes of antidemocratic constitutional change. By weakening certain kinds of legal and political accountability structures, changes of this kind may mean that even relatively modest initial changes ultimately lead to quite large-scale forms of democratic backsliding.[89]

One way in which democratic backsliding is sometimes resisted by constitutional democracies, for instance, is by courts enforcing limits on antidemocratic legislation or on abusive forms of constitutional amendment. While the U.S. Supreme Court has rejected the idea that an amendment could be held unconstitutional by a court, many courts around the world have embraced some notion of an "unconstitutional constitutional amendment" (UCA) doctrine.[90] As David Landau and I have suggested, a doctrine of this kind can and does sometimes play an important role in helping check formal processes of democratic backsliding or abusive constitutionalism.[91]

For a doctrine of this kind to have this effect, however, two broad preconditions must be met first: first, courts must be relatively independent; and second, there must be social movements or a political opposition capable of mobilizing to enforce such a decision. Antidemocratic forms of constitutional trade can also effectively undermine both these conditions.

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[87] *See* ISSACHAROFF, *supra* note 28, at 242, 246 (describing institutional challenges in new democracies).

[88] *See* Dixon & Landau, *Competitive Democracy and the Constitutional Minimum Core*, *supra* note 46, at 625 (describing the incremental implementation of antidemocratic structures in Hungary that, individually, posed little immediate threat, but on the aggregate proved to be very harmful). Changes to presidential term limits, for example, while potentially weakening political parties and competition could also be seen as compatible with ongoing commitments to multiparty democracy; parliamentary democracies generally allow heads of government to be elected indefinitely, and even presidential systems often allow a president to serve two consecutive terms. *See infra* Part V.B.1 (discussing, in greater depth, the complications of changes to presidential term limits).

[89] David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C. L. REV. 1501, 1506–07 (2014).

[90] Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 660 (2013); Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L J. CONST. L. 460, 461–62 (2006); Dixon & Landau, *Competitive Democracy and the Constitutional Minimum Core*, *supra* note 46, at 607.

[91] Landau, *A Dynamic Theory of Judicial Role*, *supra* note 89, at 1558–59; Dixon & Landau, *Competitive Democracy and the Constitutional Minimum Core*, *supra* note 46, at 609; Landau & Dixon, *supra* note 48, at 859–60.

The same is true for the enforcement of rights-based guarantees: dominant political actors may sometimes choose to implement rights-based guarantees for either principled or pragmatic reasons. But if they choose not to do so, the enforcement of rights will depend on the willingness of courts, and other independent institutions, to engage in enforcement action. By allowing the consolidation of power in a single party or leader, antidemocratic trades will also often undermine the independence of key institutions, such as courts. They will also often limit the effectiveness of popular mobilization against the government—both in the specific context of certain rights guarantees and, more generally, in defense of democracy itself.

If opposition groups, for example, organize a public protest in a truly dominant-party democracy, party leaders can often instruct police and prosecutors to arrest and charge individuals for breaches of public order. Similarly, they can ensure that the judges who preside over the trial of opposition protesters or members are closely aligned with the government. They can also prevent access to the press by opposition and civil society groups and censor comments or arguments critical of the government. Even the possibility of popular enforcement of constitutional rights, therefore, will often be quite limited in a true dominant-party or presidential democracy.

IV. CASE STUDIES

To see how these dynamics can operate in practice, this Part considers two case studies of the expansion of constitutional rights as part of a broader process of antidemocratic constitutional change: in Ecuador via the adoption of the 2008 Constitution, and in Fiji via the adoption of the 2013 Constitution. In Ecuador, the rights involved were indigenous and environmental rights; in Fiji, the rights involved were a mix of social rights and indigenous and nonindigenous (i.e., Indo-Fijian) voting rights.

Some of these rights arguably had ideational origins. Some, for instance, were linked to a broader political narrative about the empowerment of certain groups (i.e., indigenous voters in Ecuador and Indo-Fijians in Fiji).[92] Some rights may also have been adopted with international, rather than domestic, audiences in mind: instead of aiming to increase *domestic* support

[92] *See* Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, *supra* note 4, at 52 (describing the political movement of indigenous activists in Ecuador); Robyn Eversole, *Empowering Institutions: Indigenous Lessons and Policy Perils*, 53 DEV. 77, 78 (2010) (noting common trends of self-empowerment among indigenous political movements); Takele Soboka Bulto, *The Promises of New Constitutional Engineering in Post-Genocide Rwanda*, 8 AFR. HUM. RTS. L.J. 187, 196–97 (2008) (detailing the difficulties in designing a constitution to avoid the creation of permanent minorities, such as the Tutsis); VIJAY NAIDU, FIJI: THE CHALLENGES AND OPPORTUNITIES OF DIVERSITY 29–30 (2013) ("[Indo-Fijians] wanted policies to address access to land, to end separate ethnic local government, to establish an independent judiciary, and to provide sports and recreational facilities to bring different ethnic groups together, and the teaching of vernacular languages in schools.").

for antidemocratic change, powerful political actors may simply have been seeking to increase the perceived *legitimacy* of those changes in the eyes of international actors.[93]

The claim of the Article, however, is simply that constitutional bargaining played *some* role in the expansion of constitutional rights in each case—i.e., that the dynamics of constitutional change were consistent with a form of antidemocratic constitutional trade between democratic or military leaders and national social movements in each case, and not that this is the only way in which to understand each instance of constitutional change.

These examples are also far from exhaustive. Other recent examples where similar dynamics have arguably been at play include constitutional changes adopted in both Ecuador and Bolivia, in 2008–2009, giving increased recognition to LGBTIQ rights and identity;[94] in Bolivia, in 2009, recognizing indigenous rights and expanded forms of presidential power;[95] in Venezuela, in 1999, expanding the powers of the president and the recognition of rights to education, health care, a clean environment, and indigenous rights;[96] and in Turkey, in 2017, expanding rights to religious freedom and the power of the incumbent political party.[97]

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[93] Varol, *supra* note 51, at 1722–27; Landau, *Abusive Constitutionalism*, *supra* note 51, at 198–200 (2013).

[94] *See, e.g.*, W. Alejandro Sanchez, *Ecuador Takes Big Step for LGBT Rights, Recognizing Civil Unions*, LA OPINIÓN (Aug. 27, 2014), https://laopinion.com/2014/08/27/ecuador-takes-big-step-for-lgbt-rights-recognizing-civil-unions/ [https://perma.cc/ES3R-KXME] (describing similar changes in Ecuadorian law); Simeon Tegel, *A Surprising Move on LGBT Rights from a "Macho" South American President*, WASH. POST (July 17, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/07/17/a-surprising-move-on-lgbt-rights-from-a-macho-south-american-president/?utm_term=.01d8f1d1e40d [https://perma.cc/76QM-ELKG] (describing a change in Bolivian law that allows for people to change their gender identity on official documents).

[95] *See* Linda Farthing, *Bolivia Says Goodbye to Term Limits*, NACLA (Dec. 15, 2017) http://nacla.org/news/2017/12/20/bolivia-says-goodbye-term-limits [https://perma.cc/VJ9R-2NY4] (differentiating recent changes to presidential power from constitutional changes made in 2009); Katy Watson, *Indigenous Bolivia begins to shine under Morales*, BBC (Dec. 27, 2014), http://www.bbc.com/news/world-latin-america-29686249 [https://perma.cc/SP89-6L35] (describing changes made by the 2009 constitutional reform that were beneficial to indigenous peoples).

[96] *See, e.g.*, *Venezuela's Chavez Declares Victory in Term-Limits Referendum*, CNN (Feb. 15, 2009, 10:26 PM), http://www.cnn.com/2009/WORLD/americas/02/15/venezuela.referendum/ [https://perma.cc/P9ZZ-37QE] (describing the passage of a referendum in Venezuela in 2009 that abolished presidential term limits).

[97] *See, e.g.*, Diego Cupolo, *The Decline and Fall of Turkish Democracy*, THE ATLANTIC (Apr. 13, 2017), https://www.theatlantic.com/international/archive/2017/04/turkey-referendum-erdogan-kurds/522894/ [https://perma.cc/R7QK-HSLM] (explaining how Turkish constitutional reforms broaden power for the governing party and its position on religion); Gareth H. Jenkins, *Turkey's Constitutional Referendum and Erdogan's Faded Democratic Credentials*, INST. FOR SEC. & DEV. POL'Y (Jun. 1, 2017), http://isdp.eu/publication/turkeys-faded-democratic-credentials/ [https://perma.cc/CZ8A-BRUX] (explaining the autocratic measures the ruling Turkish party employed to pass constitutional reform measures); A. Kadir Yildirim, *How Erdogan Won More Power But Lost Legitimacy in Turkey's Constitutional Referendum*, WASH. POST (Apr. 20, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/20/how-erdogan-won-more-power-but-lost-legitimacy-in-turkeys-

There are also recent arguable examples of antidemocratic forms of rights-based trade at a *quasi*-constitutional level: a notable example is the adoption of freedom of information laws by President Mugabe, in Zimbabwe, in 2013.[98] This change was accompanied by the creation of a new system for press accreditation, which gives the Zimbabwe Media Commission broad power to limit the freedom of the press.[99] While some of these changes had ideational origins,[100] each occurred at the same time as formal changes to the powers and prerogatives of the incumbent party, president, or prime minister. Each also involved active or tacit support from domestic social movements, as well as international actors.

The aim of this Part, therefore, is not to canvass the full extent of rights-based forms of antidemocratic change. Rather, it is to illustrate how a dynamic of this kind may arise or operate.

A. *Ecuador*

1. *The Origins of Constitutional Indigenous and Environmental Rights*

The 2008 Constitution of Ecuador is often celebrated globally for its distinctive approach to indigenous and environmental rights. The preamble to the 2008 Constitution recognizes the indigenous heritage of Ecuador and the indigenous god (Pacha Mama).[101] Article 1 provides for a state that is "social, democratic, sovereign, independent, unitary, *intercultural, multinational* and secular," and Article 2 provides that "Spanish, Kichwa and Shuar are official languages for intercultural ties."[102] Article 56 of the Constitution recognizes "indigenous communities, peoples and nations" as "part of the single and indivisible Ecuadorian State."[103] Likewise, Article 57 lists a range of specific rights, including language rights, the right to be consulted on legislative measures affecting their rights, and the right to "free

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constitutional-referendum/?utm_term=.965adbaf9e26 [https://perma.cc/YP77-HCKN] (explaining how the Turkish reforms strengthen the position of the president and immunize him from prosecution).

[98] *See Freedom of the Press 2014: Zimbabwe*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-press/2014/zimbabwe [https://perma.cc/XA7P-FTP7] (last visited Jan. 20, 2018) (describing Zimbabwe laws limiting press freedom and describing their implementation in 2013); *see also* Cupolo, *supra* note 97 (explaining how Turkish constitutional reforms broaden power for the governing party and its position on religion); Jenkins, *supra* note 97 (explaining how religious voters see the ruling Turkish party as championing their rights).

[99] *Zimbabwe: International Focus*, U.C. LONDON, http://www.ucl.ac.uk/constitution-unit/research/foi/countries/zimbabwe [https://perma.cc/XX7Y-KR7K] (last visited Jan. 20, 2018).

[100] Erdogan, for example, had a broader ideological commitment to expanding the role of religion in Turkish public life. *See* Zia Weise, *Turkey's New Curriculum: More Erdogan, More Islam*, POLITICO (Feb. 15, 2017, 4:50 AM), http://www.politico.eu/article/erdogan-turkey-education-news-coup-analysis-curriculum-history-istanbul/ [https://perma.cc/6E96-ZD9M] (explaining Turkish school curriculum changes and the ideological justification for them as proposed by the government).

[101] CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, pmbl.

[102] *Id.* art 1 (emphasis added); *id.* art. 2.

[103] *Id.* art. 56.

prior informed consultation . . . on the plans and programs for prospecting, producing and marketing non-renewable resources located on their lands . . . ."[104]

The Constitution likewise contains a range of provisions giving express recognition to the environment, and principles of environmental protection and sustainability. Most notably, Article 71 of the Constitution recognizes rights on the part of nature itself (RoNs), providing that nature "has the right to integral respect for its existence and for the maintenance and regeneration of its life-cycle, structure, functions and evolutionary processes," and that "[a]ll persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature."[105] The preamble to the Constitution also recognizes principles of economic and environmental sustainability, or "sumak kawsay" (good life), and the connection between environmental and indigenous rights via references to Pacha Mama as "Mother Earth."[106]

At the same time, the Constitution purports to give broad power to the president, including the power to remain in office for multiple terms. The 1998 Constitution limited the president to a single four-year consecutive term,[107] whereas the 2008 Constitution allowed a president to serve two consecutive four-year terms.[108] President Rafael Correa's supporters further argued that because Correa took office under the old Constitution, his first election for the purposes of the 2008 Constitution would be in 2009, thereby allowing him to serve two years in addition to the ordinary eight years under the Constitution.[109]

The Constitution also gives the president a wide variety of powers, including powers to adopt a "national development plan," dissolve the National Assembly "if it repeatedly without justification obstructs the implementation" of that plan,[110] and "to administer, regulate, monitor and

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[104] *Id.* art. 57 §§ 7, 14, 17.

[105] *Id.* art. 71.

[106] *Id.* pmbl.; *see also* Murat Arsel, *Between 'Marx and Markets'? The State, the 'Left Turn' and Nature in Ecuador*, 103 J. ECON. & SOCIAL GEO. 150, 154–55 (2012) (discussing the Preamble and Article 71 of the Ecuadoran Constitution).

[107] CONSTITUTION OF THE REPUBLIC OF ECUADOR Aug. 11, 1998, art. 164.

[108] CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, art. 144.

[109] *See* Catherine Conaghan & Carlos de la Torre, *The Permanent Campaign of Rafael Correa: Making Ecuador's Plebiscitary Presidency*, 13 INT'L J. PRESS/POL. 267, 270 (2008) (discussing Correa's intent to run for an additional term on the same ballot as the 2008 referendum on the new Constitution).

[110] CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, art. 147; *id.* art. 148; *see also* Mark Tushnet, *The New "Bolivarian" Constitutions: A Textual Analysis*, *in* COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA 126, 140 (Rosalind Dixon & Tom Ginsburg eds., 2017). ("The Ecuadorian provision, though, does have some real bite, because Article 148 gives the president the power to dissolve the National Assembly 'if it repeatedly without justification obstructs implementation' of the National Development Plan.").

manage strategic sectors."[111] These powers also extend to issues affecting indigenous peoples and the environment: Article 313, for example, lists "nonrenewable natural resources, oil and gas transport and refining, biodiversity and genetic heritage . . . water and others as established by law" as strategic sectors.[112] The text of the Constitution is also not clear as to how to resolve these potential conflicts between presidential power and indigenous and environmental rights. Article 407 of the Constitution, for example, states that "[a]ctivities for the extraction of non-renewable natural resources are forbidden in protected areas and in areas declared intangible assets, including forestry production," but that "[e]xceptionally, these resources can be tapped at the substantiated request of the president of the Republic after a declaration of national interest issued by the National Assembly."[113] It also provides no express guidance as to the scope or meaning of what "exceptions" or exceptional circumstances of this kind might involve.

The support of indigenous and environmental groups was also critical to the adoption of the Constitution. Ecuador has had a relatively frequent history of constitutional replacement; as an independent state, it had nineteen Constitutions prior to the 2008 Constitution.[114] This, as Tom Ginsburg, James Melton, and Zachary Elkins have shown, also tends to increase the probability of subsequent successful attempts at constitutional replacement.[115] Indigenous groups had likewise long called for a new constitution that more fully recognized their demands for self-government, linguistic and cultural rights, and rights over land—or a "pluri-national" conception of the state.[116]

There were, however, clear obstacles to any process of successful constitutional change: Correa proposed to adopt a constitution committed to radical economic redistribution, and this necessarily created an economically powerful coalition opposed to such change. Correa and

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[111] CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, art. 313. For a different view, which emphasizes the surprisingly limited nature of the expansion of presidential power in this context, see Tushnet, *The New "Bolivarian" Constitutions: A Textual Analysis*, *supra* note 110, at 140–41. Tushnet, however, himself acknowledges that the question is one of degree, suggesting that the

> largely conventional treatment of presidential power does not mean, of course, that the new constitution[] block[s] the emergence of hyperpresidentialism. The lists of presidential powers are quite extensive, and they are not limited in any obvious way by other provisions . . . . [T]hey enable hyper-presidentialism, but do not require it.

Id. at 141.

[112] CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, art. 313.

[113] *Id.* art. 407.

[114] Arsel, *supra* note 106, at 154.

[115] ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009).

[116] Marc Becker, *The Stormy Relations between Rafael Correa and Social Movements in Ecuador*, 40 LATIN AM. PERSPS. 43, 47 (2013).

indigenous groups also envisaged quite a different *process* of constitutional change.[117] Correa, however, succeeded in winning the support of key indigenous and environmental groups for the ratification of the Constitution—in large part by agreeing to the inclusion of key indigenous and environmental rights. Indigenous organizations, such as Pachaktuik, agreed to support efforts at ratification by organizing meetings across the country.[118] In urging members to ratify the Constitution, indigenous leaders also emphasized the link between constitutional change, inclusive growth, poverty alleviation strategies, the recognition of "communal and individual property," and other aspects of indigenous collective identity.[119]

The international community also responded favorably to the adoption of Article 170. Some scholars, in fact, suggest that Article 170 was a form of "beautiful rhetoric [on the part of Correa] used to entice support for Ecuador from the international community" or a form of *green-washing* by the President and CONAEI designed to "legitimize [their] efforts to pursue and expand an extraction-based economic development model," and thus their own political electoral popularity and political power.[120]

Many commentators suggest that, in supporting the inclusion of indigenous and environmental rights in the Constitution, President Correa was acting strategically, rather than out of any intrinsic commitment to rights of this kind.[121] Correa certainly made some statements linking environmental and indigenous rights to a broader neo-Bolivarian political agenda when he suggested that respect for the environment was linked to the rejection of neoliberalism and the prior economic and political order.[122] There is also a clear strand in Andean political thought that connects respect for nature, indigenous rights, or pluri-nationalism, and the rejection of "Western neoliberal" policies.[123]

Yet Correa himself had little actual history of supporting indigenous or environmental rights in practice. Instead, he had a clear public record of

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[117] *Id*. at 48.

[118] Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, *supra* note 4, at 51.

[119] *Id*.

[120] Louis J. Kotzé & Paolo Villavicencio Calzadilla, *Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador*, 6 TRANSNAT'L ENVTL. L. 401, 426–27 (2017) (noting that the extraction-based policies have been justified by the necessity of achieving social justice and poverty alleviation, which have been key parts of Correa's political success).

[121] Becker, *The Stormy Relations between Rafael Correa and Social Movements in Ecuador*, *supra* note 116, at 48; Mary Elizabeth Whittemore, *The Problems of Enforcing Nature's Rights Under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite*, 20 PAC. RIM L. & POL'Y J. 659, 662 (2011); Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, *supra* note 4, at 51; Paul Dosh & Nicole Kligerman, *Correa vs. Social Movements: Showdown in Ecuador*, 42 NACLA REPORT ON THE AM. Sept. – Oct. 2009, at 21, 23 (2009).

[122] Kotze & Calzadilla, *supra* note 120, at 416.

[123] *Id.* at 417.

clashing with environmental groups: in 2007 he called a leading group of environmental protesters "infantile" and "fundamentalist" for their decision to protest oil exploration in the Yasuní National Park in the Amazon.[124] He also had little history of supporting indigenous peoples and their call for "pluri-nationalism" in Ecuador. The drafting of the Constitution reflected a series of compromises between Correa and indigenous and environmental groups over the scope of relevant rights. Indigenous groups, for instance, argued for the recognition of Kichwa as an official state language, but Correa countered that it was more important to learn English than any indigenous language.[125] In recognizing Kichwa as an official language for "intercultural relations," Article 57 of the Constitution thus represented a clear compromise between groups such as CONAEI and the President's supporters.[126] Indigenous groups likewise argued that indigenous communities should have a right to veto resource extraction on their lands, as implicit in the notion of pluri-nationalism, whereas Correa argued that the state should maintain control over such decisions.[127] The Constitution also again reflected a compromise between these positions: it recognized a right on the part of indigenous groups to informed "consultation," but not a right to veto any development.[128]

2. *Implementing the 2008 Constitution: Presidential Powers v. Environmental Rights*

What, then, has been the record of implementation for these different forms of constitutional change? Correa already enjoyed strong electoral support at the time the Constitution was drafted. Thus, in November 2006, at a run-off presidential election, he received 56 percent of the vote; and in 2007, when the Constitution was drafted, he enjoyed a personal popularity rating between 75 percent and 80 percent.[129] Correa also won reelection on two further occasions after 2008: in 2009, and again in 2015 with 58 percent of the national vote.[130] Correa's political party, PAIS, won the largest

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[124] Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, *supra* note 4, at 56.

[125] *Id.* (citing *Las ONG dejan su huella en Ciudad Alfara*, EL COMERCIO, July 23, 2008).

[126] *Id.* at 56. Becker also notes that Correa succeeded in having Shuar as another official language, thereby arguably undercutting the special status of Kichwa, and expanding his political support in the south-eastern Amazon where Shuar is spoken.

[127] *See* Jennifer Collins, *Rafael Correa and the Struggle for a New Ecuador*, 10 GLOBAL DIALOGUE 37, 44 (2008) (noting the concept of the veto was controversial).

[128] REPÚBLICA DEL ECUADOR CONSTITUCION DE 2008, Ch. 4, art. 57; *see* Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, *supra* note 4, at 58 (detailing the debate between the indigenous communities and Correa).

[129] Collins, *supra* note 127, at 39.

[130] Assoc. Press, *Rafael Correa Re-Elected for Third Term as President of Ecuador*, THE GUARDIAN (Feb. 18, 2013, 4:00 PM), https://www.theguardian.com/world/2013/feb/18/ecuador-election-rafael-correa-victory [https://perma.cc/3D47-WSFL].

number of seats at the 2009 and 2013 national legislative elections.[131] It was only after large-scale public protests that he agreed not to contest the 2017 presidential election, and there is speculation that he will return to seek the presidency in 2021.[132]

The 2008 Constitution, however, also substantially expanded the power of the presidency and Correa's personal electoral dominance. The changes it created did not necessarily *immediately* threaten to undermine a system of competitive, multiparty democracy in Ecuador.[133] In fact, the changes created by the 2008 Constitution were arguably compatible with ongoing commitments to multiparty democracy: parliamentary democracies generally allow heads of government to be elected indefinitely, and even within presidential systems there are many countries that allow the president to serve two terms rather than simply a single consecutive term.[134] Many countries committed to social democracy also give national legislatures or executive actors broad powers over national resources.[135] But in seeking to empower the president and his party to challenge *existing* economic and political arrangements, the Constitution arguably created the potential for new forms of political dominance by the party of Correa and CONNAIE: it gave Correa the potential to remain in office for up ten years in total and, thus, to exert significant control over the composition of almost all independent constitutions in the country.[136] It empowered the president to propose a national development plan and dissolve the National Assembly if

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[131] *Ecuador National Assembly Election Archive: Elections 2009*, INTER-PARLIAMENTARY UNION (Jul. 13, 2009), http://www.ipu.org/parline-e/reports/arc/2095_09.htm [https://perma.cc/QL7H-TQYP]; *More of the Same, Please: Rafael Correa Wins Re-election Comfortably*, THE ECONOMIST (Feb. 18, 2013), https://www.economist.com/blogs/americasview/2013/02/ecuadors-presidential-election [https://perma.cc/XZM4-LPSE].

[132] Taylor Gillan, *Ecuador Lawmakers End Presidential Term Limits*, JURIST (Dec. 4, 2015), http://www.jurist.org/paperchase/2015/12/ecuador-lawmakers-end-presidential-term-limits.php [https://perma.cc/4NVX-54UP] (reporting that Correa would not run in 2017); Martín Pallares, *Ecuador's Political Eruption*, N.Y. TIMES (Sept. 1, 2015), https://www.nytimes.com/2015/09/02/opinion/ecuadors-political-eruption.html [https://perma.cc/V9W4-WW2G]; Simeon Tegel, *President for Life? It Will Be Possible in Ecuador in 2021*, VICE (Dec. 5, 2015), https://news.vice.com/article/president-for-life-it-will-be-possible-in-ecuador-in-2021 [https://perma.cc/7P8F-VWNH]; *Wily Correa*, THE ECONOMIST (Nov. 19, 2015), https://www.economist.com/news/americas/21678835-even-if-he-does-not-stand-re-election-president-may-still-run-country-wily-correa [https://perma.cc/T9Q7-BDJX]; Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 G.W. L. REV. (forthcoming 2017).

[133] Tushnet, *The New "Bolivarian" Constitutions: A Textual Analysis*, *supra* note 110.

[134] Gideon Maltz, *The Case for Presidential Term Limits*, 18 J. DEMOCRACY 128, 139 (2007); *Presidential Terms and Term Limits in Sub-Saharan Africa*, JOURNAL OF DEMOCRACY, http://www.journalofdemocracy.org/sites/default/files/ReyntjensTermLimitsTable-27-3.pdf [https://perma.cc/6BKP-QM47]; LUDGER HELMS, PRESIDENTS, PRIME MINISTERS AND CHANCELLORS: EXECUTIVE LEADERSHIP IN WESTERN DEMOCRACIES 27 (2004).

[135] *But see* Tushnet, *The New "Bolivarian" Constitutions: A Textual Analysis*, *supra* note 110, at 141.

[136] *See* Dixon & Landau, *Competitive Democracy and the Constitutional Minimum Core*, *supra* note 46, at 625 (making a similar argument regarding the dangers of constitutional change in Hungary in 2010–11).

"it repeatedly without justification obstructs the implementation" of that plan.[137] And it gave the president almost unrestricted power over core national resources such as oil and gas (which represent 35 percent of Ecuador's economy),[138] which Correa relied on to reward his support base and undermine the opposition.

Increasing political dominance of this kind also allowed Correa to pass a series of *further* constitutional changes expanding his own power without fear of meaningful political or judicial check. In 2011, for example, Correa successfully sponsored a further set of amendments designed to increase his power over telecommunications and "the radio spectrum," and thus the power to exert significant control over the media.[139] After that, he also consistently used these powers to silence his critics: In 2012, he increased government spending on government-owned media from $2 million to $129 million per year.[140] In 2013, the COPAIE-dominated Congress passed an Organic Law on Communication, significantly expanding controls on the media and freedom of expression.[141] In 2014, police raided journalists' homes, and required a cartoonist to publish a "correction" and pay a large fine. And in 2015, the national media regulator sanctioned another well-known cartoonist and the leading national newspaper for "socio-economic discrimination" for criticism of a newly elected PAIS legislator.[142]

In 2013, Correa proposed changing the 2008 Constitution to remove all presidential term limits and in doing so relied on ordinary procedures for constitutional "amendment" rather than reform.[143] This was challenged by the political opposition in a suit before the Constitutional Court of Ecuador[144] as inconsistent with the provisions of the 2008 Constitution that require "wholescale reforms" of the Constitution to be approved by a national referendum—whereas partial reforms can be passed by a majority of the National Assembly.[145] But the members of the Court had almost all

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[137] CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, art. 148.; Tushnet, *The New "Bolivarian" Constitutions: A Textual Analysis*, *supra* note 110, at 140.

[138] CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, art. 313.

[139] *Id.*

[140] Becker, *The Stormy Relations between Rafael Correa and Social Movements in Ecuador*, *supra* note 116, at 53.

[141] Carolina Silva-Portero, *Chronicle of an Amendment Foretold: Eliminating Presidential Term Limits in Ecuador*, CONSTITUTIONNET (Jan. 20, 2016), http://www.constitutionnet.org/news/chronicle-amendment-foretold-eliminating-presidential-term-limits-ecuador [https://perma.cc/9DJL-ERA5].

[142] Alex Pashley, *Ecuador Going After "Ink Assassin" Over Controversial Political Cartoon*, VICE NEWS (Feb. 17, 2015), https://news.vice.com/article/ecuador-going-after-ink-assassin-over-controversial-political-cartoon [https://perma.cc/LPZ3-CFJB].

[143] Silva-Portero, *supra* note 141.

[144] *Id.*

[145] CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, arts. 441–42. Partial reforms also cannot alter the Constitution's "fundamental structure or the nature and constituent elements of the State."

been appointed by Correa, and the Court ultimately refused to uphold the challenge—finding that the relevant changes could in fact be adopted by way of a simple constitutional amendment.[146]

Conversely, indigenous and environmental groups have often found that they have limited power to enforce the commitments to indigenous consultation and sustainable development enshrined in the Constitution.[147] Some scholars certainly suggest that the constitutionalization of the right to nature has helped give new focus and legitimacy to the environmental rights movement in Ecuador—both domestically and internationally. The movement, however, also has increasingly encountered obstacles when its agenda conflicts with that of the President or his party.

For instance, in 2007, at the time the Constitution was being drafted, a range of environmental groups in Ecuador developed a high-profile plan to protect the Yasuní National Park.[148] The plan was that there would be a moratorium on all oil exploration and extraction in the region—and thereby also a major reduction in global carbon emissions—in return for large-scale international support for more sustainable forms of development in Ecuador.[149] In this sense, it clearly furthered a range of important commitments under the 2008 Constitution, including the environmental rights set out in Article 71. By 2010, European countries had also agreed to provide roughly $3.5 billion over ten years (or half the value of the oil deposits) to support health care, education, and other social programs, if the plan was honored.[150]

Correa, however, unilaterally decided the same year to withdraw Ecuador from the plan—arguing that it constituted a violation of national sovereignty and did not adequately protect Ecuador's rights in the proposed governance structure.[151] This led the Minister for Foreign Affairs to resign and Correa to embark on a new set of negotiations. Eventually he agreed to a new version of the plan, administered by the UNDP, but in 2013 again unilaterally decided to withdraw from the plan[152] and announced a

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[146] Silva-Portero, *supra* note 141.

[147] For statements by prominent Ecuadorians arguing that Correa's actions violate the Constitution in this context, see, for example, Becker, *The Stormy Relations between Rafael Correa and Social Movements in Ecuador*, *supra* note 116, at 55–56; Alberto Acosta, *Siempre mas democracia, nunca menos: a manera de pologo*, *in* EL BUEN VIVIR: UNA VIA PARA EL DESARROLLO 19 (Alberto Acosta & Esperanza Martinez eds. 2009); Carlos Zorrilla, *Large-Scale Mining to Test Rights of Nature in Ecuador*, UPSIDE DOWN WORLD (July 1, 2011), http://upsidedownworld.org/archives/ecuador/large-scale-mining-to-test-rights-of-nature-in-ecuador/ [https://perma.cc/PW5F-43PZ].

[148] Becker, *The Stormy Relations between Rafael Correa and Social Movements in Ecuador*, *supra* note 116, at 56.

[149] *Id.*

[150] *Id.* at 57.

[151] *Id.*

[152] United Nations Development Programme, *Ecuador Yasuni ITT Trust Fund Contributions to be Fully Reimbursed* (Nov. 7 2013), http://www.undp.org/content/undp/en/home/presscenter/articles/

timeframe for exploration and drilling, arguing that the international community had not made adequate financial contributions (at the time only $330 million).[153]

Similarly, in 2009, the interim national congress passed a new mining law, which was widely criticized for failing to adequately protect indigenous rights of consultation and contain adequate environmental safeguards.[154] Correa himself, however, defended the law as necessary to promote a program of pro-poor development.[155] Correa's allies also controlled a clear majority of the Congress.[156] Attempts by civil society to challenge the law under the Constitution were unsuccessful.[157] The Constitutional Court of Ecuador held that, while constitutional environmental rights were potentially engaged by the law, Article 407 of the Constitution granted the state the power to make exceptions to constitutional restrictions on mining environmentally sensitive areas when the government declares it to be in the national interest.[158] The Court found that the legislation was also consistent with this kind of reservation.

Civil society then sought to rely directly on environmental rights under the Constitution to limit new mining developments proposed by the government, such as the "Condor-Mirador" project—a large-scale, open-pit mine to be owned and operated by a Chinese company in the Amazon.[159] A provincial court judge, however, dismissed the challenge, finding that the plaintiffs effectively lacked standing to bring a successful challenge (because their interests were "private," compared to the public interest in pursuing the mine), and the mine did not affect "protected areas" (despite evidence to the contrary from the Ministry of Environment Comptroller).[160] The appeal to the provincial court of Pinchucha also failed.[161]

2013/11/07/ecuador-yasuni-itt-trust-fund-contributions-to-be-fully-reimbursed.html [https://perma.cc/6SAK-WDPM].

[153] Adam Vaughan, *Ecuador Signs Permits for Oil Drilling in Amazon's Yasuni National Park*, THE GUARDIAN (May 23, 2014), https://www.theguardian.com/environment/2014/may/23/ecuador-amazon-yasuni-national-park-oil-drill [https://perma.cc/WQP2-GQWZ.].

[154] Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, *supra* note 4, at 58.

[155] *Id.* at 48.

[156] *Id.* at 46.

[157] Whittemore, *supra* note 121, at 664.

[158] Caso No. 0038-13-IS (2013) (Corte Constitucional del Ecuador); *see also* Craig M. Kauffman & Pamela L. Martin, *Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail* 6, App., Paper Presented at the International Studies Association Annual Convention, Atlanta, GA (Mar. 18, 2016), http://www.earthlawcenter.org/s/Kauffman-Martin-16-Testing-Ecuadors-RoN-Laws.pdf [https://perma.cc/J5S9-NVBY] (discussing the 2009 Mining Law Challenge by CONAIE and community water councils).

[159] Kauffman & Martin, *supra* note 158, at 9.

[160] *Id.* at 10.

[161] *Id.* at 11.

Several commentators have suggested that decisions of this kind were also a direct product of Correa's influence over the courts. Political scientists Craig M. Kauffman and Pamela M. Martin show direct evidence of interference by Correa with the independence of the judiciary in this context: they cite a 2010 memo, allegedly circulated among judges by the National Judicial Secretary, in which Correa explicitly warns that any judge finding public works projects (including mining) unconstitutional would be *personally* liable to the state for "damage and harm" caused by the lost opportunity to pursue the project.[162]

Correa's broader influence over other independent institutions has likewise limited the scope for civil society to mobilize generally in support of the implementation of these rights-based commitments. In 2014, for instance, the Constitutional Court rejected a challenge to the new Organic Law on Communication, which permitted the new media regulator (under changes created by constitutional amendments passed in 2011) to impose significant restrictions on freedom of speech.[163] Correa's control over the lower courts, police, and prosecutors likewise provided a means of suppressing broader social protest against his government. Some organizations, such as the Institute for Indigenous Sciences and Cultures, criticized Correa for using repressive tactics against his opponents even while the Constitution was being drafted.[164] During 2007 protests over possible mining in the Yasuní, Correa imposed a state of emergency and arrested forty-five environmental activists on charges of "terrorism" for attempting to disrupt all extraction in the area.[165] Even after the emergency was lifted, he kept twenty-three individuals in detention, and it was only the actions of the constituent assembly that, in March 2008, led to 357 environmental activists being granted amnesty for charges relating to opposition to mining and oil extraction.[166]

After the adoption of the Constitution, these tactics only accelerated: when CONAIE and Monica Chuji, an indigenous political leader and member of the Constituent Assembly, criticized the interim congress and Correa for their decision to adopt the Mining Law, Correa reportedly labelled his critics "criminals and subversive terrorists."[167] When CONAIE

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[162] *Id.*

[163] *Freedom in the World 2016: Ecuador*, FREEDOM HOUSE (2016), http://freedomhouse.org/report/freedom-world/2016/Ecuador [https://perma.cc/5GN6-JG4N].

[164] Becker, *The Stormy Relations between Rafael Correa and Social Movements in Ecuador*, *supra* note 116, at 57.

[165] *Id.* at 56.

[166] Marc Becker, *Resource Extraction,* Sumak Kawsay*, and Social Movement Resistance in Ecuador Under Rafael Correa*, *in* THE NEW GLOBAL POLITICS: GLOBALIST SOCIAL MOVEMENTS IN THE TWENTY-FIRST CENTURY 61, 66 (Harry E. Vanden et al. eds., 2017).

[167] Becker, *The Stormy Relations between Rafael Correa and Social Movements in Ecuador*, *supra* note 116, at 58 (internal citation omitted).

responded by organizing national protests against the law, protesters were also beaten and arrested.[168] In 2011, when Chuji accused a member of the Correa government of corruption, the government charged her with libel; she was fined $100,000 and sentenced to a year in prison.[169] Other critics of the government also faced similar libel suits: Correa himself bought a libel suit against *El Universo* (one of the largest daily papers in Ecuador) for editorializing against his policies.[170] These attacks on the opposition were also aided by the successful passage of *further* amendments to the Constitution in 2011, which increased the government's control over the media and the courts.[171]

B. *Fiji*

1. *Origins of 2013 Social and Political Rights*

Fiji has a long history of military rule: since independence, it has seen three separate military coups overthrowing a democratic government. The first occurred in 1987, bringing Major General Sitiveni Rabuka to power;[172] the second in 2000, led by General George Speight;[173] and the third in 2006, led by Commodore Frank Bainimarama.[174] In almost every case, pressure has also gradually mounted on the relevant coup leaders to adopt a new constitution, allowing for new democratic elections and/or giving formal legal authority to their government.

In 1987, for example, after seizing power and abrogating the 1970 Constitution, Rabuka was subject to a range of international criticism, including suspension from the Commonwealth and a reduction in aid flows.[175] This led Rabuka to adopt a new constitution and promise new democratic elections based on a communal roll allocating thirty-seven legislative seats to indigenous Fijians, compared to only twenty-seven seats to the (majority) Indo-Fijian population.[176] This Constitution, however, was

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[168] *Id.* Some even allegedly suffered gunshot wounds. *Id.*

[169] Gonzalo Solano, *Correa Pardons Newspaper in Libel Case*, SAN DIEGO UNION-TRIB. (Feb. 27, 2012), http://www.sandiegouniontribune.com/sdut-correa-pardons-newspaper-in-libel-case-2012feb27-story.html [https://perma.cc/H7FU-ABP5].

[170] *Id.*

[171] *Ecuador's Constitutional Referendum: A Close Count*, The ECONOMIST (May 12, 2011), http://www.economist.com/node/18682681 [https://perma.cc/SQ9K-3KG3].

[172] Steven Ratuva, *The Military Coups in Fiji: Reactive and Transformative Tendencies*, 19 ASIAN J. POL. SCI. 96, 104 (2011).

[173] *Id.* at 105.

[174] Brij V. Lal, *'Anxiety, Uncertainty and Fear in Our Land': Fiji's Road to Military Coup, 2006*, *in* THE 2006 MILITARY TAKEOVER IN FIJI: A COUP TO END ALL COUPS? 21 (Jon Fraenkel et al. eds., 2009).

[175] Roderic Alley, *The Coup Crisis in Fiji*, 35 AUSTL. J. POL. SCI. 515, 516, 519–20 (2000).

[176] *See id.* at 516 (explaining that between 1987 and 2000, indigenous Fijians replaced Indo-Fijians as the majority ethnicity of the Fijian population).

itself subject to broad international criticism.[177] Rabuka thus agreed to review the 1990 Constitution and replace it with a new constitution giving more equal representation to indigenous and Indian populations: the 1997 Constitution.[178] This then paved the way for the election of the first Indo-Fijian Prime Minister, Labour leader Mahendra Chaudhry, who faced widespread opposition within the indigenous Fijian community.[179] One of the professed aims of the 2000 coup leader, Speight, was thus to return Fiji to an earlier, 1990-style model of ethnic-nationalism.[180] The interim Prime Minister appointed by Speight, Laisenia Qarase, announced a plan to restore stronger communal representation and affirmative action for indigenous Fijians, and draft a new constitution modeled on the 1990 Constitution.[181]This also led to broad support for Speight and Qarase from within the indigenous Fijian community—including public demonstrations in support of the coup and public statements of support from several chiefs.[182]

Once again, however, pressure mounted on Speight and Qarase to call democratic elections: in 2001, the Court of Appeal of Fiji upheld a lower court decision finding the coup unlawful under the 1997 Constitution.[183] This led Qarase to call elections culminating in the reelection of his government, but with a coalition involving a greater mix of indigenous and Indo-Fijian parties.[184] Once reelected, however, the Qarase government

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[177] *See* Yash Ghai & Jill Cottrell, *A Tale of Three Constitutions: Ethnicity and Politics in Fiji*, 5 INT'L J. CONST. L. 639, 640 (2007) (explaining that the 1990 Constitution was replaced due in part to international pressure); *see also* Robert Norton, *Reconciling Ethnicity and Nation: Contending Discourses in Fiji's Constitutional Reform*, 12 CONTEMP. PAC. 83, 90 (2000) ("Indian protests against the 1990 Constitution were supported by foreign governments (Australia, the United States, New Zealand, and the United Kingdom) . . . .").

[178] This was in addition to six general seats. *See also* Ghai & Cottrell, *supra* note 177, at 653 (explaining that the 1997 Constitution was designed to promote racial harmony and national unity).

[179] *See* Ghai & Cottrell, *supra* note 177, at 664 (discussing the opposition to Prime Minister Chaudhry, orchestrated by George Speight and other defeated politicians).

[180] *See* Norton, *supra* note 177, at 92, 111 (discussing the long-standing tension in Fiji between an ideology of political and ethnic equality and the view that indigenous Fijians are supreme and entitled to a special position of power); Reinout E. De Vries, *Ethnic Tension in Paradise: Explaining Ethnic Supremacy Aspirations in Fiji*, 26 INT'L J. INTERCULTURAL REL. 311, 312, 324 (2002) (arguing that indigenous Fijians have a strong sense of ethnic supremacy, which contributed to multiple coups between 1987 and 2002 intended to restore indigenous Fijian supremacy in politics); Sina Emde, *Feared Rumours and Rumours of Fear: The Politicisation of Ethnicity During the Fiji Coup in May 2000*, 75 OCEANIA 387, 388, 392, 396 (2005) (discussing the use of fear and rumors by Speight and the ethno-nationalists to advance their racially-based political platform and garner support among indigenous Fijians).

[181] STEPHANIE LAWSON, THE FAILURE OF DEMOCRATIC POLITICS IN FIJI 301 (1991).

[182] The only reason that the relevant constitution making process did not occur was that the Court of Appeal held that the coup was unlawful under the 1997 Constitution. This also led Qarase to call fresh democratic elections. *Id.* at 300.

[183] George Williams, *The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji*, 1 OXFORD U. COMMONWEALTH L.J. 73, 84 (2001).

[184] LAWSON, *supra* note 181, at 302, 305; *see also* Jon Fraenkel & Stewart Firth, *The Cycles of Party Politics*, *in* FROM ELECTION TO COUP IN FIJI: THE 2006 CAMPAIGN AND ITS AFTERMATH 64–65

continued to pursue a strongly pro-indigenous legislative agenda.[185] This again paved the way for the next coup led by Bainimarama in 2006: tensions between Qarase and Bainimarama mounted steadily from 2001 onwards.[186] In 2006, the two leaders reached a temporary truce by acceding to an agreement brokered by New Zealand Prime Minister Helen Clark.[187] However, soon afterwards, Bainimarama announced that he had taken over the government under a doctrine of "legal necessity," and became commander of both the military and civilian government.[188]

Following the coup, there was again pressure on the coup leaders to adopt a new constitution, paving the way for a return to democratic rule. In 2009, the Court of Appeal of Fiji (comprised entirely of foreign judges) held that the 1997 Constitution did not authorize the declaration of a state of emergency by Bainimarama, the removal of Prime Minister Qarase, the dissolution of Parliament, or the creation of an interim government led by Bainimarama.[189] The Court thus ordered a return to the terms of the 1997 Constitution through the calling of a general election.[190] Bainimarama, however, responded by abrogating the 1997 Constitution in its entirety.[191]

This led to increasing pressure from the international community to adopt a new constitution and a schedule for fresh democratic elections. In 2006, the Commonwealth suspended Fiji for violation of the Harare Declaration committing member states to democratic rule.[192] The EU found the coup to be in violation of the Contonu Agreement between the EU and Fiji, and following the abrogation of the Constitution in 2009, announced that it would suspend all aid to the Fijian sugar industry.[193] When the

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(Jon Fraenkel & Stewart Firth 2007) (discussing cycles and evolution within and among indigenous and Indo-Fijian political parties from 2001–2006); Brij V. Lal, *'Anxiety, Uncertainty, and Fear in Our Land': Fiji's Road to Military Coup, 2006*, 96 ROUND TABLE 135, 135–36, 140 (2007) (discussing increasing tensions between the Bainimarama-led military and the Qarase-led government, culminating in the election of a multi-ethnic coalition government).

[185] *See* Lal, *supra* note 184, at 142 (explaining that instead of working to build the confidence of Indo-Fijian officials, Qarase rushed through parliament controversial bills that served the interests of indigenous Fijians).

[186] *Id.* at 137, 139.

[187] *Id.* at 146–47.

[188] LAWSON, *supra* note 181, at 303–05.

[189] Sanjay Ramesh, *Constitutionalism and Governance in Fiji*, 99 ROUND TABLE 491, 493 (2010).

[190] *Id.*; *see also* Anita Jowitt, *The* Qarase v. Bainimarama *Appeal Case*, 13 J.S. PAC. L. 24, 24, 29 (2009) (providing general background for *Qarase v. Bainimarama*, including summaries of court cases and events from 1999 to 2009); Anne Twomey, *The Fijian Coup Cases – The Constitution, Reserve Powers and the Doctrine of Necessity*, 1 (Sydney Law Sch. Legal Studies Research Paper No. 09/26, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1399803 [https://perma.cc/AH6E-4CUF] (discussing how Fijian courts deciding the legality of coups have handled the problems of applying the rule of law in a post-coup environment and the possibility that the ruling may endanger public safety).

[191] Ramesh, *supra* note 189, at 492.

[192] *Id.* at 495.

[193] *Id.* at 497.

Bainimarama government refused to commit to holding democratic elections in 2009, Fiji was also suspended from the Pacific Islands Forum.[194]

The question for the military leadership was thus not *whether* there would be a new constitution providing for new democratic elections, but what the terms would be of this transition. The international community and many indigenous Fijian leaders favored early elections, whereas the military favored maximum possible delay.[195] Similarly, the international community and civil society favored a full return to the barracks by the military,[196] while Bainimarama wished to consolidate the powers of both the Prime Minister and the military under a new constitution.[197]

The 2013 Fijian Constitution also ultimately closely reflected Bainimarama's preferred position on these questions: it was adopted a full six years after the 2006 coup, and thus contemplated a seven-year delay between democratic elections. It also adopted a range of provisions consolidating the role of the Prime Minister and the military: Article 92 gives the Prime Minister broad power over the public service, and to assign responsibility for any part of government business to himself or another Minister.[198] Article 131 gives the military a broad role in relation to the "security, defence and well-being of . . . Fijians."[199] Article 6 provides that all rights may be limited by law,[200] and Article 17 that freedom of expression and the press may be limited in the interests of "national security, public safety, public order, public morality, public health or the orderly conduct of elections," or preventing "attacks on . . . respected . . . institutions."[201] And Article 106 gives the attorney general broad power over judicial appointments.[202]

At the same time, the Constitution adopted a range of novel rights-based guarantees.[203] For the first time in Fiji's post-independence history, the 2013 Constitution abolished all forms of communal representation and adopted a

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[194] *Id.* at 492.

[195] Jon Fraenkel, *The Great Roadmap Charade: Electoral Issues in Post-Coup Fiji*, *in* THE 2006 MILITARY TAKEOVER IN FIJI: A COUP TO END ALL COUPS? 155, 161 (Jon Fraenkel et al. eds., 2009).

[196] *See* Jon Fraenkel, *Melanesia in Review: Issues and Events, 2013: Fiji*, 26 CONTEMP. PAC. 476, 480–81 (2014) (reporting that the majority of respondents to a survey wanted the military to restore power to the people).

[197] *Id.* at 480.

[198] CONSTITUTION OF THE REPUBLIC OF FIJI Sept. 7, 2013, art. 92, http://www.paclii.org/fj/Fiji-Constitution-English-2013.pdf [https://perma.cc/A5RH-R85F].

[199] *Id.* art. 131.

[200] *Id.* art. 6.

[201] *Id.* art. 17.

[202] *See id.* art. 106 (providing that the attorney general must be consulted on the appointment of all judges and justices). The constitution also gives an important role to the Judicial Services Commission, but the Attorney-General has a central role in relation to the appointment of the Commission. *Id.* art. 104.

[203] Consistent with the logic of a swap, they also have the potential to conflict with various structural guarantees.

system based purely on open-list, proportional representation.[204] It reduced the voting age for national elections from twenty-one to eighteen, thereby granting new electoral rights to young people.[205] And it adopted a range of social rights, including rights to universal healthcare.[206]

In a press release introducing the draft constitution, the government also strongly emphasized these rights-based commitments—e.g., rights to equal voting and social rights such as education, work, health, housing, and adequate food and water.[207]

There was also little in Bainimarama's own political history to suggest deep support, or ideational origins, to this rights-based change. At the time of the coup, in 2006, Bainimarama made no mention of plans for democratic reform or the need to protect the equal voting rights of Indian Fijians. Instead, he cited an anticorruption rationale and the need to eradicate corruption from the government.[208] Bainimarama's cabinet also contained several ministers with a clear public record of supporting, rather than opposing, ethnic nationalism.[209] Similarly, even while adopting a range of social rights under the Constitution, Bainimarama did not make Fiji a signatory to the International Covenant on Economic, Social, and Cultural Rights.[210]

Yet between 2006 and 2013, Bainimarama increasingly turned to the language of *equal voting rights* to win support from Indo-Fijians for his government and preferred timetable for elections. In 2008, in lieu of calling an immediate general election, Bainimarama began a process of drafting a "People's Charter for Change."[211] This Charter contemplated an ongoing role for the military in national economic development and called for a range of measures designed to appeal to Indo-Fijian voters: a common Fijian identity, electoral reforms, removal of compulsory power-sharing, social justice programs, and an end to discrimination (including affirmative action for ethnic Fijians) at all levels of government.[212] The government also engaged in a process of widespread consultation on the Charter, thereby

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[204] *Id.* art. 53. The constitution preserved indigenous rights only in a quite limited way, de-linked from the electoral and governmental process, as part of the Bill of Rights. *Id.* art. 28.

[205] *Id.* art. 23.

[206] Press Release, Fijian Government, Blueprint for a Better Fiji—The 2013 Constitution is Unveiled (Aug. 22, 2013), http://www.coupfourandahalf.com/2013/08/2013-constitution-unveiled.html [https://perma.cc/52VG-MPB5].

[207] *Id.*

[208] Brij V. Lal, *In Frank Bainimarama's Shadow: Fiji, Elections and the Future*, 49 J. PAC. HIST. 457, 459 (2014).

[209] *Id.*

[210] Dominic O'Brien & Sue Farran, *A New Dawn for Human Rights in Fiji? Learning from Comparative Lessons*, 2 J. INT'L & COMP. L. 227, 257 (2015).

[211] Ramesh, *supra* note 189, at 494.

[212] *Id.* at 497–98.

justifying a further delay in the scheduling of elections.[213] As part of this process, it claimed it had consulted with 424,600 people, representing 80 percent of the national adult population, and had obtained support for the Charter from 92 percent of respondents.[214] It also gained the active support of the Catholic Church and several prominent Indo-Fijian businesspeople and civil society figures.[215]

In commissioning Yash Ghai to lead an independent commission on the drafting of a new constitution, in 2012 Bainimarama also stipulated that the final constitution was to comply with the key principles of the Charter—i.e., a "common and equal citizenry"; a secular state; independent judiciary; the elimination of discrimination; social justice; one person, one vote, one value; the elimination of ethnic voting; proportional representation; and a voting age of eighteen.[216] When the Ghai Commission produced a constitutional draft that threatened the future electoral prospects of Bainimarama and his allies, Bainimarama also cited these principles as a reason for disregarding the Commission's proposal[217]—and radically altering the process for constitutional change.[218] The President then asked the government to draw up a new draft constitution and presented the draft for public "consultation." And after a brief period of consultation, the government adopted the 2013 Constitution without submitting it to either the government-appointed constituent assembly or a popular referendum.[219]

In this sense, Bainimarama effectively reversed the logic of prior coup leaders in Fiji and sought to win support for the overthrow of the democratically elected government by promising to provide new rights to *Indo-Fijians*—i.e., equal voting rights—in place of policies of communal voting and affirmative action. Rights of this kind were also supplemented by a range of social rights, rights for young people, and certain limited

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[213] As part of the Charter, it announced a roadmap for elections to be held on a highly delayed schedule. *See* Brij V. Lal, *The Strange Career of Commodore Frank Bainimarama's 2006 Fiji Coup* 8 (Australian National University, State, Society & Governance in Melanesia, Discussion Paper 2013/8), https://openresearch-repository.anu.edu.au/handle/1885/11319 [https://perma.cc/2FEM-QHMJ] ("The charter consultation process, with all its obvious flaws and faults, had bought Bainimarama valuable time to consolidate his position.").

[214] LAWSON, *supra* note 181, at 309–10.

[215] Jon Fraenkel, *The Origins of Military Autonomy in Fiji: A Tale of Three Coups*, 67 AUST. J. INT'L AFFAIRS 327, 338 (2013).

[216] LAWSON, *supra* note 181, at 310.

[217] This also gave some international legitimacy to the president's actions. *See, e.g.*, Fraenkel, *supra* note 215, at 486 (showing expressions of sympathy by then-Australian Foreign Minister Bob Carr with the Fiji government's ditching of plans for a "largely unelected national people's assembly" and for the "re-creation of an unelected Great Council of Chiefs").

[218] *Id.*; Romitesh Kant, *The Road Map to Democracy and Fiji's 2012 Constitution-Making Process* (Australian National University, In Brief 2014/37). The President even seized all copies of the constitution and ordered that they be banned. Fraenkel, *supra* note 215, at 486.

[219] Kant, *supra* note 218.

indigenous rights under the bill of rights.[220] Rights of this kind also arguably reflected the logic of rights as *bribes*: they represented substantive concessions to Indo-Fijian voters designed to increase domestic political support for the 2013 Constitution and the continued role it allowed, in government, for Bainimarama as Prime Minister.

2. *Implementing the 2013 Constitution: Military Power v. Social and Indo-Fijian Rights*

Bainimarama, of course, enjoyed clear political dominance at the time the 2013 Constitution was enacted.[221] As Commander of the Fijian military, he had longstanding military support. He also enjoyed high levels of popular support, especially among Indo-Fijians: in 2011, a Sydney-based think tank commissioned face-to-face public opinion polling of urban Fijians, which found a public approval rating for Bainimarama of roughly 66 percent.[222] The 2013 Constitution, however, substantially consolidated his power as Prime Minister, and that of his military supporters. In the 2014 elections, Bainimarama's Fiji First party won a total of 59.2 percent of the popular vote, or 32 out of 50 seats in parliament.[223] Bainimarama thus gained the role of democratically elected Prime Minister, not simply coup leader, for a further period of four years.[224]

There has, in contrast, been a quite mixed record of implementation for various constitutional rights guarantees. For some rights, such as the rights to health, water, and housing,[225] the Bainimarama government has adopted a range of policies designed to promote the progressive realization of these rights. For instance, it has expanded water treatment and purification programs, introduced electricity into many rural communities, and expanded access to formal housing for Fijians living in informal housing.[226] In each

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[220] CONSTITUTION OF THE REPUBLIC OF FIJI 2013, ch. 2, arts. 28–30.

[221] *See Polls Close in First Fiji Vote after Coup*, AL JAZEERA ENGLISH (Sept. 17, 2014), http://www.aljazeera.com/news/asia-pacific/2014/09/fijians-vote-first-poll-since-2006-coup-201491621501219576 5.html [https://perma.cc/S4JC-4X6Y] (noting that Bainimarama "pushed steadily for equal rights, culminating in a 2013 Constitution, helping him to consolidate his popularity among Indo-Fijians").

[222] Jenny Hayward-Jones, *Fiji at Home and in the World: Public Opinion and Foreign Policy*, LOWY INST. (Sept. 5, 2011), https://www.lowyinstitute.org/publications/fiji-home-and-world-public-opinion-and-foreign-policy [https://perma.cc/R4QL-77E2].

[223] Mosmi Bhim, *"Stifled Aspirations": The 2014 General Election under Restrictive Laws*, 21 PAC. JOURNALISM REV. 108, 121 (2015).

[224] *See* CONSTITUTION OF THE REPUBLIC OF FIJI art. 58 §§ 1–2 (setting four years as a term of parliament, subject to early election at the option of the Prime Minister).

[225] *Id.* arts. 35, 36, 8. See, for example, the discussion in Coel Kirkby, *Separation of Powers in the 2013 Constitution*, *in* CITIZENS' CONSTITUTIONAL FORUM, FIJI IN TRANSITION: TOWARDS A SUSTAINABLE CONSTITUTIONAL DEMOCRACY 25–39 (2014).

[226] *See New USD 405 Million Fiji Water Resilience Scheme Highlighted to World Climate Community*, COP23 (Oct. 11, 2017), https://cop23.com.fj/largest-ever-eib-support-water-investment-small-island-state-new-usd-405-million-fiji-water-resilience-scheme-highlighted-world-climate-

case, the government has also adopted these policies quite proactively, without waiting for any prompt from the courts or human rights institutions.[227]

Other rights, however, have enjoyed far less substantive protection. The government itself has not made implementation of the rights a priority, and the courts and other independent institutions have had little willingness or ability to enforce them.

Take the right of (equal) access to the franchise. In 2010, Bainimarama banned existing political parties and candidates from contesting the upcoming democratic elections,[228] and re-formed parties (such as the Social Democratic Liberal Party, Fiji Labour Party, and Peoples Democratic Party) suffered a clear disadvantage in contesting these elections without strong name or candidate recognition.[229] Following the election, the government also continued to target the political opposition. In 2014, three opposition members of parliament were expelled from parliament for the remainder of the parliamentary term for using "unparliamentary language."[230] Other opposition MPs were detained after attending a forum to discuss the 2013 Constitution.[231] Under previous public order laws, the opposition is also still required to apply for a permit to meet.[232] There is little scope to challenge these restrictions on political freedom and participation.

Following the dismissal of Australian and New Zealand judges from the Court of Appeal in 2009, the Fiji government has relied exclusively on local Fijian and Sri Lankan judges to staff the court. Many of these judges have been criticized for lacking the same degree of independence of earlier Court

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community/ [https://perma.cc/44S3-6HN9]; Serafina Silaitoga, *Treated Water for Villagers*, FIJI TIMES ONLINE, Feb. 27, 2017; Lal, *supra* note 213; S. MacWilliam, *Bonapartism in the South Africa: The Bainimarama Government in Fiji*, *SSGM Discussion Paper 2015/10* (Canberra, ANU); *Fiji Squatters Receive Titles to Land*, RADIO NZ, Nov. 13, 2015, https://www.radionz.co.nz/international/programmes/datelinepacific/audio/201778513/fiji-squatters-receive-titles-to-land [https://perma.cc/36U7-H6WP]; Manasa Kalouniviti, *'$42.6m for Rural Electrification'*, FIJI TIMES ONLINE, JAN. 8, 2018, http://www.fijitimes.com/story.aspx?id=429987 [https://perma.cc/MB7U-948T].

[227] *See, e.g.*, Kirkby, supra note 225 at 25–39 (noting absence of any litigation of social rights under the 2013 Fiji Constitution).

[228] Ramesh, *supra* note 189, at 500–01.

[229] *See* Sanjay Ramesh, *Fiji Goes to the Polls*, WORLDPRESS.ORG (Aug. 25, 2014), http://www.worldpress.org/Asia/4025.cfm [https://perma.cc/PT25-6N3P] (outlining new parties); Fraenkel, *supra* note 215, at 482 (explaining that "[i]n a single constituency model, such systems benefit parties that have candidates with nationwide appeal"); Bhim, *supra* note 223, at 113 (noting bans on the candidature of prior PMs, including Qarase and Chaudhry).

[230] Bruce Hill et al., *Fiji's Bainimarama Still Dogged by Rights Issues 10 Years on from His Coup,* ABC NEWS (Dec. 4, 2016), http://www.abc.net.au/news/2016-12-05/fijis-bainimarama-still-dogged-by-rights-issues/8087246 [https://perma.cc/7VLK-9ZYN].

[231] *Id.*

[232] Biman Prasad, *Is Our Democracy Really Working?*, THE FIJI TIMES ONLINE (Jan. 30, 2016), http://www.fijitimes.com/story.aspx?id=339680 [https://perma.cc/3XEB-WESA].

of Appeal judges.[233] Experts on the region suggest that other independent institutions are similarly compromised. Since 2014, scholars such as Brij Lal suggest, the political order in Fiji has "depend[ed] on the goodwill or whims of two men, Frank Bainimarama and his second in command Aiyaz Sayed-Khaiyum."[234] This has also extended to all formally independent institutions, including the Human Rights Commission and the Electoral Commission, as well as the courts.[235] There is thus little scope for civil society or any individual actors to rely on formal constitutional guarantees to protect the integrity of the electoral process or the right to equal political representation.

IV. RIGHTS AS BRIBES, SOCIAL MOVEMENTS & GLOBAL ACTORS

Why, one might ask, would social movements ever agree to accept rights as bribes, or as part of an inherently antidemocratic swap?

One answer may lie in the structure of democratic politics or certain social movements: some social-movement actors may be aware of the risks to democracy from certain constitutional trades or bargains, but have internal structural reasons for prioritizing rights-based gains. Groups may be structured or funded in ways that promote a form of "tunnel vision" whereby they concentrate solely on localized gains in the area in which they focus their advocacy, and not on broader system-level effects.[236] They may thus be concerned solely with creating rights-based change and not with the broader impact of their actions on the quality of democracy itself. This may itself also be a response to, or a reflection of, agency problems in the organization of social movements.[237]

Another answer, however, may be that social movements do not fully appreciate the risks to democracy involved in trades of this kind. They may have limited knowledge of or experience in democratic constitutional politics and how various constitutional changes play out over time. Or they may be subject to certain behavioral biases—such as "optimism bias"—that

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[233] *See Fiji 2010 Report*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world/2010/fiji [https://perma.cc/6DNF-25NL] (last visited Jan. 14, 2018) (noting that "new judges aligned with the military regime were appointed, as well as the former chief justice and several judges loyal to Bainimarama").

[234] Lal, *supra* note 213, at 465–68.

[235] *Id*.

[236] *See* Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1588–90 (2010) (discussing the use of constitutional structuring to avoid the shortcomings of these factionalized groups).

[237] Focusing on a single issue may make monitoring easier for members, but equally, may reflect the preference of leaders for short-term, visible gains of the kind associated with formal legal change, rather than longer-term practical gains, and thus place undue weight on achievements of this kind. *See* Ginsburg & Posner, *supra* note 236, at 1588–89, 1589 n.12 (describing James Madison's fear of voters prioritizing short-term gains, which was incorporated into his constitutional model that sought to limit the influence of these factions).

affect their assessment of the likely feedback effect of system-level changes on the realization of specific rights. [238] "Blind spots" or biases of this kind may also be amplified by international governmental and nongovernmental actors, and the support they often give for the expansion of constitutional rights.

Constitutional "outsiders," as Vicki Jackson and I have noted, are playing an increasingly central role in processes of constitutional change in many countries. [239] This also carries with it dangers, as well as opportunities.

In Ecuador, for example, a Philadelphia-based environmental NGO was one of the key actors involved in the drafting of the right to nature in Article 170 of the Constitution. Similarly, in Fiji, foreign governments have repeatedly praised the 2013 Constitution and the calling of democratic elections under the new Constitution.[240] And at no stage did these international actors pause to note the potential limited effectiveness of relevant environmental or political-rights guarantees under conditions of dominant-party rule.

One potential response to the phenomenon of rights-as-bribes, therefore, would simply be for international actors to take a more cautious approach to supporting efforts at constitutional rights expansion—at least in the context of broader efforts at *structural constitutional change*.

Sometimes, rights-based and structural constitutional changes may be mutually reinforcing: structural changes may promote democratic openness and accountability, and thereby the effectiveness of rights-based changes; or rights-based changes may expand freedom of expression, association, access to education, or norms of equality, in ways that promote true democratic self-government.[241]

But in other cases, the link may be far more problematic: rights-based changes may help pave the way for an expansion in the power of powerful legislative or executive actors in ways that undermine commitments both to multiparty democracy and rights themselves. International actors could also usefully do more to *highlight* these dangers – not just the potential gains to

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[238] In Ecuador, for example, as early as 2008, indigenous leaders expressed fears that Correa would not in fact create new forms of governance that empowered them to play a role in their own self-government, or that "Correa's victories would come at their expense." *See* Herbert SIMON, MODELS OF MAN: SOCIAL AND RATIONAL (1957) (discussing the impact of bounded rationality and the cognitive limitations of rational people under this theory). But they nonetheless agreed to support the process of constitutional change in the *hope* that it might do so.

[239] *See* Rosalind Dixon & Vicki Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests* 165–80 (U. of New South Wales Faculty of Law Research Series, Paper No. 53, 2012) (detailing various benefits and drawbacks to using outsider interpretation and engagement).

[240] *See* UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Fiji* (Dec. 17, 2014, A/HRC/28/8) and accompanying text (indicating several countries' positive responses).

[241] For the theoretical connection between democracy and rights of this kind, see, for example, JOHN RAWLS, POLITICAL LIBERALISM (1993).

rights-based changes – when engaging with domestic NGO's and social movements.

International actors alone may have limited capacity directly to affect the actual, as opposed to perceived, legitimacy of processes of constitutional change. But by influencing the *knowledge* or attitudes of domestic actors, they may have a significant indirect impact on the direction of such change—in both a pro- and anti-democratic direction.

V. RIGHTS AS BRIBES & CONSTITUTIONAL DESIGN

Another potential implication of this link between rights-based and antidemocratic constitutional change, relates to the design of formal constitutional amendment procedures. Not all forms of antidemocratic constitutional change involve the expansion of constitutional rights; and not every expansion in constitutional rights is linked to antidemocratic change. But the two are sufficiently connected for constitutional designers to pay some attention to the link in the design of formal processes for constitutional change: To the extent that rights as bribes represent a form of constitutional *trade*, one obvious response is for constitutional designers to promote the *unbundling* of different forms of constitutional change.

The idea of bundling or unbundling various political processes or functions is a now a common part of the public-law toolkit.[242] Processes of constitutional change can also be unbundled in two key ways: first, via *a preference for formal processes of constitutional amendment over replacement*; and second, through formal procedures for change that encourage the *unbundling of constitutional amendments*.

The antidemocratic trades outlined in Part VI all occurred in the context of processes of constitutional replacement, rather than amendment: In Ecuador, via the adoption of the 2008 Constitution as opposed to amendment of the 1998 Constitution;[243] and in Fiji, via the adoption of the 2013 Constitution rather than reinstatement or amendment of the 1997 Constitution.[244] In Ecuador, this was also accompanied by *further* constitutional change via a process of constitutional amendment[245] and again

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[242] *See, e.g.*, Berry & Gersen, *supra* note 8, at 1386 (describing the concept of unbundling constitutional powers vested in the executive branch); Gersen, *supra* note 8, at 303–04 (2010) (describing the phenomenon of bundling constitutional powers within each branch and the concept of unbundling them).

[243] *See Ecuador National Assembly Archive: Elections 2009*, *supra* note 131 (describing elections under the newly adopted 2008 constitution).

[244] *See Polls Close in First Fiji Vote after Coup*, *supra* note 221 (noting that the military coup culminated in a new constitution in 2013).

[245] *See id.* (describing some of the further changes made by the 2015 constitutional amendment in Rwanda); *Ecuador's Constitutional Referendum: A Close Count*, *supra* note 171 (describing the 2011 constitutional amendments in Ecuador).

involved a form of rights-based constitutional trade.[246] The scene or preconditions for this change were set, however, by the earlier process of constitutional replacement.

Processes of constitutional replacement of this kind necessarily involve broad-ranging forms of constitutional bargaining, which encourage parties to rely on constitutional swaps. Without some form of constitutional trade, it will often be difficult for parties to agree on the terms of a new constitution within the necessary time frame: the need to address so many different issues will create the potential for very high "bargaining costs" for parties.[247] Some form of deferral or decision not to decide, therefore, will generally be needed to reach agreement on all the relevant terms of a final constitutional text. Constitutional swaps are one important way in which to do this.

Processes of constitutional amendment, in contrast, generally need not occur within a defined time frame. They can also address a smaller or larger subset of issues depending on the preferences or level of agreement among parties to constitutional negotiations. Structurally, they are thus less likely than processes of constitutional replacement to generate pressure for constitutional swaps. Where swaps do occur as part of a process of constitutional amendment, they will also be relatively transparent to those required to approve or ratify a proposed constitutional amendment: the limited number of issues addressed by a process of constitutional amendment will often mean it is more transparent to voters how various changes have been paired, than under a process of constitutional replacement.

A constitutional system can also encourage a preference for constitutional amendment over replacement through formal and informal means. Constitutional drafters can choose to make formal amendment less onerous than constitutional replacement.[248]

Democratic elites can also promote forms of political discourse that emphasize the value of constitutional endurance and continuity, over radical constitutional change, and thus help foster a *constitutional culture* that prefers constitutional amendment to replacement. In a constitutional amendment context, Tom Ginsburg and James Melton find that cultural factors of this kind are in fact the primary determinant of whether a constitution is likely to be amended.[249]

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[246] *Ecuador's Constitutional Referendum: A Close Count*, *supra* note 171.

[247] *Cf.* Dixon & Ginsburg, *supra* note 3.

[248] Several constitutions in fact do this (e.g., Bolivia, Venezuela).

[249] Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L J. CONST. L. 686, 687 (2015). Their findings suggest little role for formal constitutional amendment procedures in this context, but this may overstate the role of culture relative to formal design. *See, e.g.*, Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237 (Sanford Levinson ed., 1995); John Ferejohn, *The*

Processes of constitutional amendment can also be further unbundled so that various amendments are subject to requirements of separate debate and consideration or to differential procedural requirements. In a legislative context, many state constitutions of the United States adopt mechanisms designed to promote unbundling of just this kind: the most notable example is the use of "single-subject" rules,[250] which require legislatures to unbundle policies into distinct pieces of legislation.[251] Single-subject rules of this kind have a long lineage: Michael Gilbert suggests that they in fact originated in Ancient Rome, in 98 BC, as a response to attempts by legislators to pass unpopular measures by "harnessing [them] up with one more favored."[252] In the United States, the first legislative single-subject rule was adopted in 1818 in the Illinois Constitution and required bills relating to government salaries to have a single subject.[253] And in 2017, forty-one states in the United States had some form of legislative single-subject requirement.[254] Some constitutions also adopt similar forms of single-subject requirement for proposed constitutional *amendments*.[255]

Many constitutions, both in the United States and worldwide, also adopt different procedures for various kinds of amendment: They adopt a "tiered" approach to constitutional design, which places some constitutional provisions on a higher, more entrenched tier, and thus imposes more

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Politics of Imperfection: The Amendment of Constitutions, 22 L. & SOC. INQ. 501, 511 (1997); Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 195 (Tom Ginsburg ed., 2012).

[250] Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single-Subject Adjudication*, 40 J. LEGAL STUD. 333, 334 (2011).

[251] Many U.S. states, as well as some foreign countries, also allow citizens to initiate popular ballot initiatives, which empower voters to impose side-constraints on legislators and thus effectively prevent certain forms of policy-bundling or political logrolling. *See* Brian E. Adams, *Citizens, Interest Groups, and Local Ballot Initiatives*, 40 POL. & POL'Y 43, 44 (2012) (stating that twenty-four states and roughly half of cities allow ballot initiatives); Mark A. Smith, *Ballot Initiatives and the Democratic Citizen*, 64 J. POL. 892, 894 (2002) (describing how some states allow ballot initiatives and how those initiatives can accrue over time to drive policy).

[252] Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 811 (2006).

[253] *Id.* at 812; Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 704 n.77 (2010); Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 104 (2001).

[254] Gilbert, *supra* note 252; Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1982); Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35 (2002).

[255] *See, e.g.*, CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 194, para. 2 (Switz.) (stating that the "principle of cohesion of subject matter" applies to federal popular initiatives and parliamentary legislation subject to a referendum); TRIBUNALE FEDERALE [TF] [Federal Supreme Court] Sept. 12, 2006, 1P_223/2006 ("The principle of the unity of matter requires that a bill may in principle have only one subject area . . . ."); *see also* CONSTITUTION OF IRELAND 1937 art. 46 ("A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal.").

stringent requirements for the amendment of these provisions compared to other provisions.[256] Some forms of tiering are also explicitly sensitive to the need to protect the "democratic minimum core" of a constitution against the threat of democratic backsliding.[257] In South Africa, for instance, the Constitution adopts two tracks for constitutional amendment: ordinary requirements for the amendment of ordinary constitutional provisions; and special requirements for amendments to the amendment rule itself and other provisions setting out the core nature of the Constitution, as one based on

> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms[;] (b) Non-racialism and non-sexism[;] (c) Supremacy of the constitution and the rule of law[; and] (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness,[258]

and the status of South Africa as "one, sovereign, *democratic* state."[259]

If appropriately targeted in this way, tiering can create an important disincentive to antidemocratic forms of constitutional trade: it can mean that certain forms of antidemocratic constitutional change can only be achieved through quite stringent constitutional procedures, whereas the expansion of constitutional rights can be achieved more easily. This can also encourage social movements to attempt to *unbundle* relevant forms of structural and rights-based constitutional change. Bundling, in this context, will require both sides of the trade to be approved by the most stringent procedures, whereas unbundling will make it far easier to expand constitutional rights.

The actual decision to adopt procedures of this kind will, of course, itself depend on politics, and few dominant parties or presidents are likely to agree to procedures of this kind once they have sufficient dominance.[260] To a large extent, the claim that such procedures *could* be adopted is thus simply a logical claim about the range of possible constitutional-design solutions available to address the risk of dominant-party or presidential rule, and not a claim that the adoption of such procedures is politically feasible. There are, however, at least two political dynamics that could favor the adoption of

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[256] *See* Dixon & Landau, *Tiered Constitutional Design*, *supra* note 132 (manuscript at 7–9) (describing the tiered constitutional approaches of Canada, India, and various Latin American countries); *cf.* Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT'L J. CONST. L. 655, 664–66 (2015) (discussing drawbacks associated with the tiered constitutional approaches of Canada and South Africa).

[257] *See* Dixon & Landau, *Tiered Constitutional Design*, *supra* note 132 (manuscript at 36–40) (positing that the constitutional structures in a number of countries function to protect the democratic minimum core to some extent).

[258] THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996.

[259] *Id.* (emphasis added).

[260] *See* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1755 (2013) (explaining that political parties are motivated by the interests of the party, not the overall good of the institution).

procedures of this kind: first, if parties or leaders are sufficiently uncertain about their future electoral prospects that processes of constitution making effectively take place behind a partial "veil of ignorance";[261] and second, if parties are under heightened political pressure, either internally or externally, to engage in especially inclusive processes of constitution making, which give a strong voice to smaller parties or minorities.[262]

Solutions of this kind also have the potential to be both over- *and* underinclusive as a response to the dangers of democratic backsliding. Some forms of constitutional trade, like ordinary forms of logrolling, will clearly be welfare increasing: they will help facilitate socially productive forms of constitutional agreement.[263] Making it more difficult to achieve such swaps, therefore, will imply a loss to social welfare in a range of cases.

Conversely, some forms of antidemocratic constitutional trade will still succeed under the more stringent procedural requirements imposed by single-subject or tiered approaches to constitutional amendment. For example, in Ecuador, while the Constitution formally entrenches a three-track approach to constitutional change, in 2015, the Constitutional Court upheld the attempt by Correa to rely on the least demanding of these tracks to pass a series of further constitutional changes, effectively removing all presidential term limits.[264]

One of the striking features of recent waves of antidemocratic backsliding, in many countries, has been the degree of popular support for such change: voters in a range of countries have voted in national referenda to approve constitutional changes that pose a major risk to the democratic

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[261] RAWLS, *supra* note 241, at 23–24; Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001). This is also a version of Posner and Vermeule's counsel to calibrate normative prescriptions to cases where following them will also be in parties' self-interest. Posner & Vermeule, *supra* note 260, at 1794–96.

[262] On the role of outsiders, see, for example, Zaid Al-Ali, *Constitutional Drafting and External Influence*, *in* COMPARATIVE CONSTITUTIONAL LAW 57 (Tom Ginsburg & Rosalind Dixon eds. 2011). Posner and Vermeule note this argument as a general response to the outsider-insider problem in constitutional politics scholarship, and suggest it has difficulties under a theory of the second best. Posner & Vermeule, *supra* note 260, at 1791. Those difficulties, however, do not necessarily apply where the exception applies in "constitutional" moments, and the norm applies in ordinary politics. *Cf.* BRUCE A. ACKERMAN, WE THE PEOPLE, VOLUME 1: FOUNDATIONS (1991); BRUCE A. ACKERMAN, WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS 4–5 (1998).

[263] *See, e.g.*, Gilbert, *supra* note 252, at 832–34, 836 (describing a theory which posits that legislative bargaining in the form of logrolling results in socially beneficial results that benefit legislators and constituents); M. Albert Figinski, *Maryland's Constitutional One-Subject Rule: Neither a Dead Letter Nor an Undue Restriction*, 27 U. BALT. L. REV. 363, 366 (1998) (suggesting that one reason Maryland has implemented a one-subject rule is to protect the integrity and viability of the governor's veto power).

[264] *See* Gustavo Alvira Gomez, *Democracy Undermined from Within*, GLOBAL AMERICANS (Dec. 18, 2015), http://latinamericagoesglobal.org/2015/12/democracy-undermined-from-within/ [https://perma.cc/8HK7-S6S3] (describing the way in which President Correa and the Ecuadorean Constitutional Court undermined their constitution by allowing for constitutional amendments without referendum).

minimum core in that country.[265] There are also clear limits to what constitutional law can do to address popular—or populist—threats of this kind: constitutions may attempt to impose both procedural and substantive limitations on processes of constitutional replacement, as well as amendment, or popular as well as legislative processes of constitutional change.[266] But there are clear logical limits to how far a constitution can go in constraining forms of constitutional change that enjoy broad national majority support of this kind.[267]

Constitutional design solutions of this kind are thus far from a silver bullet: they are simply one modest way in which the danger of rights-based antidemocratic constitutional change might be mitigated.

CONCLUSION

There is a longstanding debate in the United States over the promise and perils of rights discourse as a tool for social and political transformation: civil- and human-rights scholars have long defended rights as a tool for achieving justice and equality for political minorities and other historically marginalized groups, whereas critical legal-studies scholars have pointed to the re-radicalizing and legitimizing tendencies of rights-based discourses.[268]

The dynamics of constitutional change explored in the Article, however, suggest the possibility of a related phenomenon on a global scale—i.e., the

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[265] *See, e.g.*, Dixon & Landau, *Tiered Constitutional Design*, *supra* note 132 (manuscript at 47–48) (listing Colombia and India as examples of countries where popular support was easily garnered in favor of democracy-threatening changes); Landau & Dixon, *supra* note 48, at 877 (describing how Hugo Chávez re-wrote electoral rules which were approved by unsophisticated voters in a referendum, allowing him to dominate the assembly).

[266] *See* Landau & Dixon, *supra* note 48, at 861, 870–73 (defining substantive and procedural limitations that may be placed on constitutional replacement processes, using Colombia as an example).

[267] *See* Mark Tushnet, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power*, 13 INT'L J. CONST. L. 639, 647, 649 (2015) (pointing out situations in which attempting to constrain constitutional change will likely fail if popular support for change exists).

[268] *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 9–10 (2d ed. 2008) ("Premised on the institutional structure of the American political system and the procedures and belief systems created by American law, [the Constrained Court view] suggests that the conditions required for courts to produce significant social reform will seldom exist."); Duncan Kennedy, *The Critique of Rights in Critical Legal* Studies, 178 LEFT LEGALISM/LEFT CRITIQUE 179, (2002) ("This rights critique . . . operates at the uneasy structure of two distinct, sometimes complementary and sometimes conflicting enterprises, . . . the left and the modernist/postmodernist projects."); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 104 (2002) ("[I]t only makes sense to think pragmatically about human rights in *comparative* terms."); *cf., e.g.*, Kimberlé Crenshaw, *Race, Reform, and Entrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1334–36 (1988) (challenging "both the New Left and New Right critiques of the civil rights movement"); Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 788–91 (1994) (arguing that [Critical Race Theory]'s deconstructive and reconstructive doctrinal analyses differ from those of classical-liberalism in all . . . areas except intersectionality").

potential for rights-based constitutional change to mobilize support for processes of *antidemocratic* constitutional change.

Democratic leaders, in some contexts, may deliberately attempt to link bottom-up calls for constitutional rights protection to top-down efforts at structural constitutional change. Where they succeed in doing so, constitutional rights may thus serve to increase support for the formal consolidation of power in a single political party or leader, or as a basis for a form of *pro-authoritarian logrolling*.

This does not necessarily mean that, as scholars, we should be more or less skeptical about formal constitutional rights guarantees *generally*: sometimes constitutional rights may achieve little or no change but contribute to damaging or undermining broader processes of political change, including the core institutions of competitive democracy. But sometimes constitutional rights may help advance certain social and political goals in ways that a purely political approach to change could not. The relationship between rights-based forms of constitutional change and democracy will almost always depend on the specific legal and political context.

What it does suggest is that as constitutional scholars we should potentially be far more attentive to the *interrelationship* between constitutional rights and structure. Constitutional scholars in both the United States and elsewhere have called for greater attention to constitutional structure in certain areas: Samuel Issacharoff, Pamela Karlan, and Richard Pildes, for instance, famously called for a reorientation of U.S. election law to focus on underlying structures of political competition, rather than individual rights to political participation.[269] Roberto Gargarella has likewise called for a reorientation of constitutional law in Latin America to focus more squarely on constitutional structure—as the "engine" of political change—rather than rights as a mechanism for achieving equality.[270]

The relationship between constitutional rights and structure, however, is potentially far more complex: constitutional rights may have little effect without meaningful structural change, as these scholars suggest. But the adoption of constitutional rights may also depend on certain constitutional structures, and certain forms of structural constitutional change may only occur because they are paired with certain forms of rights-based change.

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[269] SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (2002).

[270] ROBERTO GARGARELLA, LATIN AMERICAN CONSTITUTIONALISM, 1810-2010: THE ENGINE ROOM OF THE CONSTITUTION 159 (2013).

Understanding this relationship—and its potential virtues as well as perils for democracy—is critical to our ability to respond to constitutionalism in an era of increasing globalization *and* illiberalism.[271]

[271] *See, e.g.*, Mark F. Plattner, *Populism, Pluralism, and Liberal Democracy*, 21 J. DEMOCRACY 81, 81–83 (2010) (discussing how "there have even been signs that an erosion of democracy might be getting underway," the idea of "authoritarian resilience," as well as how populism and radical pluralism serve to counteract one another in liberal democracies); Robert Singh, *"I, the People": A Deflationary Interpretation of Populism, Trump and the United States Constitution*, 46 ECON. & SOC'Y 20, 23 (2017) ("[A]mong liberal democracies under populist pressure, a comparatively robust constitutional order counsels a deflationary understanding: that Trumpism is unlikely to survive the reality checks and balances rendering it more political tremor than earthquake."); Rosalind Dixon, *Populist Constitutionalism & the Democratic Minimum Core*, INT'L J. CONST. L. BLOG (Apr. 26, 2016), http://www.iconnectblog.com/2017/04/populist-constitutionalism-the-democratic-minimum-core/ [https://perma.cc/95Q2-TCFL] (discussing democratic "populism" around the world).