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Utopian Constitutionalism

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An extensive literature examines transformative constitutionalism: the growing tendency of constitutions around the world, especially in the Global South, to seek to transform politics and society to reduce poverty, increase inequality, and achieve other goals. Transformative constitutionalists emphasize the creation of newer rights, including economic and social rights, environmental rights, digital rights, and beyond. They also encourage innovation in judicial decision-making as a key route for the implementation of these rights. We introduce utopian constitutionalism as a potential danger for those invested in transformative constitutionalism. Transformative constitutional projects slide into utopian constitutional projects with no prospect of implementation within a realistic timeframe when there are inadequate institutional pathways to develop rights, or when those rights have insufficient popular or civil society support. This Article focuses on a comparison between the 1991 Colombian Constitution and the failed 2022 Chilean constitutional draft to clarify the distinction between transformative and utopian constitutionalism. It describes the risks posed by utopian constitutionalism, including deflection from other forms of legal change and popular disenchantment with liberal democratic constitutionalism. It uses utopianism to suggest improvements to transformative constitutional discourse and design, including greater resistance to rights inflation in constitutional texts, more attention to non-judicial pathways for enforcement, greater interest in the design of transitional norms, and a more careful balance between popular and elite involvement in constitution-making. The very survival of liberal democratic constitutionalism hinges in part on the need to prevent transformative constitutionalism from falling into utopianism.

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Introduction

Human rights, per Samuel Moyn, are the "last utopia" for progressive political movements.[1] In the face of rising economic inequality, they say little about questions of economic redistribution and deliver only limited change. Hence, Moyn argues, they are often closer to an *apology* rather than a transformative legal and political project.

What, however, about constitutions and constitutional rights? Are they also utopian projects, or do their structural dimension mean they hold out greater promise of actual social, political, and economic transformation?

1. Samuel Moyn, The Last Utopia: Human Rights in History 1–10 (2012); *see also* Samuel Moyn, Not Enough: Human Rights in an Unequal World x–xii (2018) (arguing that human rights fail to grapple with economic inequality).

Unlike the U.S. Constitution, many constitutions around the world *do* address problems of economic poverty and inequality and, in fact, place them towards the center of the constitutional project.[2] A large number of constitutions in the Global South (and beyond) have been labeled transformative texts, aiming to change the status quo by achieving sweeping political and social changes such as a reduction in poverty and economic inequality, as well as the achievement of broad mandates for equality.[3] For example, modern constitutions often include increasingly ambitious and lengthy sets of rights provisions, including not just civil and political rights, but also justiciable economic and social rights, as well as expansive and substantive rights to equality and dignity, and newer rights like environmental protections, the rights of Indigenous communities, rights to digital access and privacy, and more.[4]

The question, however, is the conditions under which the promise of transformative constitutionalism is likely to be fulfilled. True constitutional transformation, we argue, requires a set of constitutional aspirations for change, including economic change and redistribution, but also corresponding *democratic support* for that change and *institutional structures* capable of realizing those aspirations.

Without democratic support, constitutional aspirations may prove stillborn: The logic of formal constitutional change in a democracy is that it represents an expression of popular sovereignty and, hence, is dependent on majority (or even super-majority) popular support.[5] Without appropriate institutional structures and pathways to realize these aspirations, constitutions may end up becoming an impractical scheme for social and economic change or a repository of indefinitely remote aspirations for such change.[6] In short, without sufficient popular and institutional support, attempts at *transformative* constitutionalism will drift into what we call *utopian* constitutionalism.

By defining utopianism in this way, we acknowledge that the term has acquired many other meanings not used here. For example, utopianism is sometimes used in the sense of a thought experiment that illuminates important aspects of our social reality, even if it is not meant to be, and could not be,

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2. *See, e.g.*, David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. Rev. 762, 773–74 tbl.1 (2012) (showing the prevalence of different rights).

3. For the foundational work on transformative constitutionalism, see generally Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. Afr. J. on Hum. Rts. 146 (1998). *See also infra* Part I (exploring the concept in more detail).

4. *See, e.g.*, Mila Versteeg, Tom Ginsburg & David Landau, Comparative Constitutional Law and Politics: Analysis, Cases, and Materials 423–26 (2025).

5. *See*, *e.g.,* Yaniv Ronzai, Unconstitutional Constitutional Amendments: The Limits of Amendment Powers 108 (2019).

6. *See, e.g.*, Roberto Gargarella, Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution 185–86 (2013).

realized in practice.[7] This "thought experiment" aspect of utopianism is important in literature and political philosophy, but it makes little sense as applied to a constitution—constitutions are meant to be realized, not simply to serve as a critique of current reality. Another rich strain of work focuses on "practical" kinds of utopias, aiming for projects that contain aspects of utopianism but are nonetheless realizable.[8] However, the qualifier "practical" in these definitions suggests a more standard usage, which we emphasize here: a constitutional project that is unlikely to be realized over any realistic timeframe.

Utopian constitutionalism has very real costs. It can lead to lost alternative opportunities for meaningful legal, political, and economic change, whether of a more radical or incremental variety, and it can contribute to a long-term loss of faith in democratic constitutions as models of self-government. This disenchantment may be especially dangerous in countries at risk of democratic backsliding, thus imperiling basic commitments to democracy. There is also a danger of utopian constitutionalism in the current social and political moment. The factors that seem to increase the risk of utopian constitutionalism are on the rise, including political misinformation, disinformation, and polarization, an emphasis on ordinary citizens as constitutional drafters, and "abusive" forms of constitutional change and borrowing that misappropriate liberal democratic norms for anti-democratic ends.[9]

Even as we celebrate the potential for democratic constitutions to be transformative in nature, it is important to be clear about the boundary between transformative and utopian constitutionalism. While both share a thick set of aspirations for social, political, and economic change, one is matched by democratic support and institutional pathways for change, while the other is little more than "a discourse of hope."[10] However, we fear that tendencies that may lead to utopianism have crept into the mainstream discourse and practice

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7. *See, e.g.*, Alexander Linsbichler & Ivan Ferreira da Cunha, *Otto Neurath's Scientific Utopianism Revisited—A Refined Model for Utopias in Thought Experiments*, 54 J. Gen. Phil. Sci. 233, 234 (2023).

8. *See, e.g.*, Gregory Claeys, Utopianism for a Dying Planet: Life After Consumerism 99 (exploring different ways in which a "realized utopianism" can be constructed that have a "realistic dimension").

9. *See* Rosalind Dixon & David Landau, Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy 15–19 (2021) (examining ways in which tools of liberal democratic constitutionalism can be repurposed for anti-democratic ends). *See generally* David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013) (discussing ways in which tools of constitutional change can be used to undermine democracy).

10. Sanele Sibanda, *When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism*, 24 Law Democr. Dev. 384, 399 (2020).

of transformative constitutionalism. These include an over-emphasis on popular involvement in constitution-making, a preference for ever-new and more ambitious rights content, an over-reliance on courts as enforcers of constitutional provisions at the expense of other pathways, and, at a general level, more attention to rights than to structure. In Part V of this Article, we suggest ways in which the practice of transformative constitutionalism can be reoriented in light of its dangerous potential to slide towards utopianism.

In making these arguments, we draw on examples from around the world. We emphasize the 1991 Colombian text as a canonical example of a transformative constitution, albeit one that we think has not been entirely understood in the literature. Illuminating lesser-known aspects of the 1991 project, including its emphasis on non-judicial pathways for transformation, highlights similar aspects of other canonical cases, like South Africa and India. The Colombian experience involves fairly successful processes of constitutional transition and at least partial constitutional transformation, alongside growing disenchantment with the limits of that transformation.

In contrast, we view the recent failed Chilean constitutional draft of 2022 as an example of utopian constitutionalism, both because of the lack of adequate popular and elite support for some of its provisions and because the draft often failed to match its extraordinarily ambitious rights content with institutional pathways for achieving change. The 2022 draft was probably the most ambitious effort at transformative constitutionalism yet attempted in Latin America, and perhaps the world. Thus, its failure has been viewed by commentators as a major blow against the very practice of transformative constitutionalism. Our view is that the case should not be taken as a warning against transformative constitutionalism as such; instead, it should be viewed as a cautionary tale of pitfalls to avoid when realizing a transformative constitutional project.

The remainder of the Article is divided into six parts. Part I surveys the basic distinction between transformative and utopian constitutionalism and outlines what we call the structural (lack of adequate institutional pathways) and sociological (lack of adequate democratic support) variants of utopianism. Part II considers the factors that made the 1991 Colombian Constitution a relatively successful example of transformative constitutionalism, while Part III explains the factors that led the 2022 Chilean draft to fall into both forms of utopianism. Part IV draws on Chile and other examples to explore the dangers posed by utopianism, including deflection from other avenues of change and popular disenchantment with liberal democratic constitutionalism. Part V examines lessons that the problem of utopian constitutionalism may offer for scholars and practitioners of transformative constitutionalism, both of process and constitutional design. The Article ends with a brief conclusion.

I. Transformative Versus Utopian Constitutionalism

Democratic constitutions serve several important functions. They set the basic "rules of the game" for democratic politics, thereby enabling the operation of electoral politics and protecting the "minimum core" of democracy from attack.[11] They impose constraints on the exercise of public power, which protect individuals from arbitrary interference with their rights and freedoms. But many modern constitutions, both inside and outside the Global South, are also viewed as fundamentally transformative in character—that is, they seek to change the status quo and reach a new political and social reality, often by advancing socioeconomic and other forms of equality.

A. *Transformative Constitutionalism*

We start with the question of how transformative constitutionalism should be defined. The original use belongs to Karl Klare, who, in a landmark article, described South Africa's post-apartheid constitutional project in transformative terms. Klare viewed the then-new South African Constitution as a "transformative" text, which he defined as "a long-term project of constitutional enactment, interpretation, and enforcement committed . . . to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[12] Klare's focus was primarily on changing legal and judicial culture. Klare has been the first of a long line of scholars to focus on transformative constitutionalism largely as a judicial project focused on finding new methods of constitutional interpretation in order to achieve social change.[13] While Klare's particular method of interpretation, anchored in Critical Legal Studies, has faced criticism, several scholars have nonetheless pursued the broader interpretive project.[14]

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11. Dixon & Landau, *supra* note 9, at 28–31. *See generally* Rosalind Dixon & David Landau, *Competitive Democracy and the Constitutional Minimum Core*, *in* Assessing Constitutional Performance 268 (Tom Ginsburg & Aziz Huq eds., 2016).

12. Klare, *supra* note 3, at 150.

13. *Id.*; *see also* Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 Am. J. Comp. L. 527, 528, 532–41 (2017); Gautam Bhatia, The Transformative Constitution: A Radical Biography in Nine Acts xvii–lxiv (2019); Diego Werneck Arguelhes, *Transformative Constitutionalism: A View from Brazil*, *in* The Global South and Comparative Constitutional Law 165, 167 (Philipp Dann, Michael Riegner & Maxim Bönnemann eds., 2020); Surabhi Chopra, *The Constitution of the Philippines and Transformative Constitutionalism*, 10 Global Const. 307, 310–13, 329–30 (2021).

14. *See generally* Klare, *supra* note 3; Hailbronner, *supra* note 13; Bhatia, *supra* note 13; Werneck Arguelhes, *supra* note 13; Chopra, *supra* note 13.

As Klug has pointed out, transformative constitutionalism has, over time, taken on many different, interrelated meanings.[15] In some work, the concept seems to denote a constitutional design or jurisprudence of a particular set of jurisdictions, often summarized as the "Global South" (itself, of course, an imprecise concept). The courts and constitutional texts of newer, poorer democracies are said to be especially focused on transforming society by recognizing new forms of rights, like social and economic rights, and by adopting a thicker, more substantive conception of equality.[16] In some well-studied systems like India and Colombia, courts have at times taken on a more "activist" judicial role to compensate for pervasive failures in the political process caused by dysfunctional party systems, high levels of corruption, and other factors.[17]

A transformative set of new rights and a reimagined judicial role may be characteristic of the "Global South." There is significant value in recognizing the important jurisprudential achievements of courts that are often overlooked or seen as derivative of the Global North. But as Michaela Hailbronner has shown persuasively, transformative constitutionalism cannot just be seen as a product of the Global South—many of the same rights, concerns, and methods of interpretation have also appeared in traditional "Global North" jurisdictions, like Germany. For instance, Hailbronner shows that core aspects of German constitutional text and jurisprudence have likewise been oriented towards transformative goals such as constructing a "social state of law" and overcoming the legacies of the Nazi regime.[18] In fact, most modern constitutions contain social and economic rights, and recent events like the global financial crisis have made those rights more salient in many countries of the "Global North."[19] The distinction between the "Global South" and "Global North" may be meaningful, but it is blurry.

A more encompassing definition of transformative constitutionalism refers to it as a property of a constitution or part of a constitution, rather than a form of interpretation. Sunstein has usefully distinguished between a preservative

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15. Heinz Klug, *Transformative Constitutionalism as a Model for Africa?*, *in* The Global South and Comparative Constitutional Law, *supra* note 13, at 141, 148.

16. *See generally, e.g.*, Daniel Bonilla Maldonado, *Introduction: 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) [hereinafter Constitutionalism of the Global South].

17. On the concept of judicial activism and its potential meanings and variants, see generally, for example, Sujit Choudhry & Claire E. Hunter, *Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v. NAPE*, 48 McGill L.J. 525 (2003).

18. *See* Hailbronner, *supra* note 13, at 528, 543.

19. For the example of Portugal, see generally, for example, Teresa Violante & Patrícia André, *The Constitutional Performance of Austerity in Portugal*, *in* Constitutions in Time of Financial Crisis 229 (Tom Ginsburg et al. eds., 2019) (considering a series of decisions by the Constitutional Court after the global financial crisis).

and transformative constitution, where the former is intended to maintain a status quo and to prevent its degradation, while the latter seeks to change the social order and to push beyond a discredited past.[20] Like Klare, Sunstein's paradigm of a transformative constitution is the post-apartheid South African text; his paradigm of a preservative constitution is the U.S. Constitution, although he acknowledges that even the U.S. text has radically transformative elements, such as the Reconstruction amendments.[21] Sunstein's reformulation is thinner in some ways than Klare's—it does not define with as much specificity what the constitution is seeking to transform, but it is also broader in the sense that it moves beyond judicial interpretation to other designs and mechanisms through which transformation might proceed. Additionally, embedding political aspirations in a constitution can provide a *focal point* for social movements to mobilize around realizing those aspirations.[22] Sunstein, however, does not fill out these alternative mechanisms in any detail and, in practice, hews fairly close to Klare's earlier focus on courts and rights. For example, he is interested in the creative ways in which the South African judiciary has interpreted social rights to try to give them teeth without exceeding the boundaries of judicial legitimacy and capacity.[23]

Perhaps more provocatively, we have argued in other work that labels like "transformative" constitutionalism can be understood as *framings* of projects of constitutional change, rather than as intrinsic characteristics of those underlying projects themselves.[24] In many cases, the same project could be framed by proponents as overcoming a discredited past (transformative), preventing the erosion of a desirable status quo (preservative), or even returning to a real or imagined past (what we have called "restorative constitutionalism").[25] Put that way, what really makes a constitutional or constitutional reform project "transformative" may be the way it is discussed and understood by political elites and ordinary citizens rather than a set list of provisions or characteristics, such as inclusion of economic and social rights.

Klug ultimately finds all existing definitions unsatisfactory and proposes his own—the concept of transformation as a normative yardstick or method of evaluation. In other words, transformative constitutionalism becomes a tool to judge and critique the performance and implementation of a constitutional

20. *See* Cass R. Sunstein, The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever 216–17 (2004).

21. *See* Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 Forum Constitutionnel 123, 125 (2000).

22. *See, e.g.*, Michael W. McCann, *Legal Mobilization & Social Reform Movements: Notes on Theory and Application*, 11 Studs. L. Pol. & Soc'y 225, 226 (1991).

23. *See* Sunstein, *supra* note 21, at 130–31.

24. *See* Rosalind Dixon & David Landau, *Restorative Constitutionalism*, 81 Wash. & Lee L. Rev. 455, 468 (2024).

25. *See id.* at 469.

project over time by determining whether it "is facilitating processes of social change."[26] He draws a generally positive, albeit mixed, verdict on South Africa's transformative project when looked at in that manner.[27]

This Article does not attempt to identify a single "correct" definition among these competing options. Rather, each definition likely captures different aspects of the phenomenon, and the most appropriate usage will depend on specific context and research goals. What we can more usefully say is that, in practice, discussions of transformative constitutionalism (going all the way back to Klare's original contribution) have two primary pillars: the expansion of constitutional rights and the role of the courts in their enforcement.

First, the literature on transformative constitutionalism emphasizes *constitutional rights* as the locus of change. It emphasizes the many new forms of rights that have arisen in constitutional practice in recent generations—increasingly ambitious, positive conceptions of equality, as well as socioeconomic rights, group rights for Indigenous groups and other communities, environmental rights, and rights to information, internet access, etc.[28] Just as Moyn observed that international human rights have acted as a "last utopia" at the international level, replacing disenchantment with Marxism and other more ambitious projects, so too it seems that a similar dynamic has occurred in transformative constitutionalism.

Second, the literature on transformative constitutionalism focuses on *constitutional courts* as the engine of change. Some work has noted that courts are not the only audience for constitutional rights; rights may also serve to mobilize the public or prod action from legislatures and executives.[29] For example, a classic (but now less favored) model of constitutional guarantees of socioeconomic justice viewed them as directive principles aimed mainly at the political branches of the state rather than making them justiciable.[30] Nevertheless, the prevailing examples of transformative constitutionalism in the literature are court-led. In focusing on the role of courts, however, current scholarship overlooks or

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26. Klug, *supra* note 15, at 148.
27. *See id*. at 154–61.
28. James Fowkes, *Transformative Constitutionalism and the Global South: The View from South Africa*, *in* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE 97, 106–10 (Armin von Bogdandy et al. eds., 2017). *See generally* Heinz Klug, *Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa*, 67 BUFF. L. REV. 701 (2019); Francois Venter, *The Limits of Transformation in South Africa's Constitutional Democracy*, 34 S. AFR. J. HUM. RTS. 143 (2018); Hailbronner, *supra* note 13.
29. *See, e.g.*, Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2740, 2759–60 (2014); McCann, *supra* note 22, at 226.
30. *See* Tarunabh Khaitan, *Directive Principles and the Expressive Accommodation of Ideological Dissenters*, 16 INT'L J. CONST. L. 389, 390 (2018).

subsumes some of the non-judicial elements of these projects—elements with potentially even greater promise in realizing relevant goals.

These are, of course, general tendencies; they do not describe the entire literature. Recently, for example, Klug has explored the ways in which the independent, non-judicial bodies found in Chapter 9 of the South African Constitution (what the Constitution calls "institutions protecting democracy") have played a transformational role.[31] He emphasizes, for example, the role of the Public Protector in exposing the corruption of the Zuma administration, eventually causing President Jacob Zuma's resignation under pressure.[32] Klug's analysis suggests an expansion of transformative constitutionalism in two distinct ways—moving beyond courts to encompass other institutions and moving beyond rights to look at the ways in which constitutions can be leveraged to improve politics. As we will see, the kind of broadening indicated by Klug is essential to make transformative constitutionalism a more effective project.

B. *The Discontents of Transformative Constitutionalism*

In recent years, the literature on the practice of transformative constitutionalism has become more critical in nature. Interestingly, some older lines of attack have largely fallen away. For example, the traditional debate on whether judicially enforceable economic and social rights should be included in constitutions *at all* seems largely settled; the proponents of inclusion have won, as the vast majority of new constitutions include these rights.[33] It would still, of course, be possible to construct arguments against giving constitutions transformative goals, but most recent work does not take this approach.

Instead, most recent scholarship makes essentially an emerging realist or empirical critique of transformative constitutionalism. Within South Africa, a wave of scholarship reflects disillusionment with transformation, especially among a range of Black constitutional scholars. Some of this work argues that the judiciary—and the Constitutional Court in particular—has been too timid in enforcing the new rights and egalitarian commitments found in the post-apartheid Constitution.[34] Others place blame on the Constitution itself, asserting that the text reflected compromises made with the former regime (such

31. *See* Klug, *supra* note 28, at 703–04.

32. *See id.* at 733–34.

33. *See* Law & Versteeg, *supra* note 2, at 772–81.

34. *See, e.g.*, David Bilchitz, Poverty and Fundamental Rights 150 (2007) (critiquing the Constitutional Court's failure to develop the minimum core and take other aggressive measures to enforce economic and social rights). *See generally, e.g.*, Christopher Mbazira, *Confronting the Problem of Polycentricity in Enforcing the Socio-Economic Rights in the South African Constitution*, 23 S.A. Publiekreg / S.A. Pub. L. 30 (2012); Catherine Albertyn, *(In)equality and the South African Constitution*, 36 Dev. S. Afr. 751 (2019).

as a robust right to property) that inhibited transformation.[35] In a recent retrospective, Klare and his co-author (former judge) Dennis Davis argue that transformation continues to be the right way to understand the South African text but that the long-dominant African National Congress ("ANC") party and its offshoots have not taken its goal seriously.[36]

Outside of South Africa, a robust critical literature has also emerged. In Latin America, for instance, Diego Arguelhes observes that while Brazilian courts have adopted the language of transformative constitutionalism, their opinions have done little to reduce poverty or alleviate inequality in practice.[37] He argues that the Brazilian courts, because of political constraints and formal conceptions of judicial role, have devoted relatively little effort to actually enforcing their judgments on economic and social rights.[38] Here a contrast might be drawn with the Colombian Constitutional Court, which actually has put considerable (albeit highly variable) effort into monitoring and following up on its judgments.[39] More broadly, Gargarella argues that the common practice of grafting new rights onto constitutions without restructuring the "engine room" of state power has ultimately frustrated the potential for systematic transformation.[40]

This growing critical literature echoes and expands on some themes found in older works about the relationship between law and social change, such as Gerald Rosenberg's classic *The Hollow Hope*.[41] First, rights are obviously not necessarily self-executing; some legal or political actors must give them life and deploy them to undertake change. In a sweeping empirical analysis, Chilton and Versteeg find, provocatively, that only certain kinds of rights—those which tend to create organizations that will then defend the rights—are systemically associated with better outcomes, while others make little to no difference.[42] Courts emerge as one pathway through which rights might matter and, indeed, are by far the route most studied in the literature on transformative constitutionalism, but their efficacy seems fragile at best. Courts often lack the will to

35. *See* Joel M. Modiri, *Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence*, 34 S. Afr. J. on Hum. Rts. 300, 312–19 (2018).

36. *See* Dennis Davis & Karl Klare, *Two Cheers for Transformative Constitutionalism*, 35 L. & Critique 487, 494 (2024).

37. Werneck Arguelhes, *supra* note 13, at 167.

38. *Id.* at 184–87.

39. *See* David Landau, *The Reality of Social Rights Enforcement*, 53 Harv L. Rev. 189, 207–30 (2012).

40. *See* Gargarella, *supra* note 6, at 16.

41. *See* Gerald N. Rosenberg, The Hollow Hope 3–4 (1991) (arguing that courts generally cannot bring about social change); *see also* Rosalind Dixon, *Dynamic, Regressive, or Obstructionist Courts? What Kinds of Hopes for Judicial Review*, 49 L. & Soc. Inquiry 2565, 2566 (2024) (discussing and critiquing Rosenberg's thesis and finding some reason for "qualified hope").

42. *See* Adam Chilton & Mila Versteeg, How Constitutional Rights Matter 25–58 (2021).

issue transformative decisions, whether through perceived constraints on the judicial role or because of their relatively weak place within the political system.

Even where courts are willing to issue bold decisions, there are stark limitations on the impact of those decisions, particularly where they are not supported by other political and social actors.[43] Courts often rely on civil society groups and other organizations to bring them the steady stream of cases needed to shape an agenda, rather than allowing only isolated legal victories. Furthermore, translating these courtroom wins into substantive policy shifts requires the active cooperation of allied politicians and bureaucrats within the administrative state and political branches.

Thus, the two main building blocks of the transformative constitutionalism literature—rights and courts—both emerge as troubled agents in a quest for political and social change. The critiques, we think, open two key questions.

The first suggests nuance, rather than despair: What are the conditions under which constitutional rights and strong courts *might* lead to transformative outcomes? Chilton and Versteeg, as noted above, focus on the type of right as the key variable and contrast rights that tend to form protective organizations (like freedom of religion and the right to unionize) from those that do not.[44] Of course, this is only one of a number of factors that may make an impact. As two relatively successful (and central) cases of transformative constitutionalism—Colombia and South Africa—suggest, judicial power, the institutional role conception of judges on a court, the relationship of judges to the broader political system, and popular support for reform efforts are all key variables.

The second question is perhaps even more ambitious: Can one broaden conceptions of transformation beyond rights and courts to include other aspects of constitutional design? One goal of the case studies below is to show the ways in which these other aspects of transformative constitutionalism are central to both the goals of constitutional designers and results, but have been overlooked by leading accounts. A richer account of transformative constitutionalism would need to foreground attempts to re-channel politics and create new, non-judicial institutions to work policy changes.

Constitutional designers do not have full control over these dimensions. The evolution of a political system and the trajectory of both its judicial and non-judicial institutions depend on many factors, only some of which are reasonably foreseeable to constitutional designers over even a relatively brief time horizon. But designers do have *some* say. They can, through the inclusion of rights

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43. *See, e.g.*, Dixon, *supra* note 41, at 2571; David E. Landau, *Substitute and Complement Theories of Judicial Review*, 92 Ind. L.J. 1283, 1293–94 (2017). *See generally* Charles Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspectives (1998).

44. *See* Chilton & Versteeg, *supra* note 42, at 332–33.

and other provisions, articulate the goals the new constitutional order should prioritize, and those goals might be more or less in line with the values of the broader population. They can also construct institutional pathways—both judicial and non-judicial—through which rights might actually be realized in practice, and the choices they make about the nature of these pathways can prove highly consequential.

C. Utopian Constitutionalism and Its Variants

A transformative constitutional project drifts into utopian constitutionalism when it adopts language that promises radical change without any actual capacity to deliver on that promise. In this sense, utopianism is a specter that haunts transformative constitutionalism. It is a reminder that putting new rights (or even new institutions) in a constitutional text is no guarantee that on-the-ground change will actually occur. Constitutional norms are not self-executing: They depend for their realization on mobilization by civil society and institutional pathways for judicial, legislative, and executive change.

Utopian constitutionalism can take at least two, often intertwined, forms.[45] First, it can involve a disconnect between the substantive ambition or aspirations of a constitution and the structures to support its realization. Specifically, this includes the adoption of ambitious substantive constitutional norms without any accompanying attention to the need for institutions with the power and willingness to implement those norms. We call this "structural" constitutional utopianism. Second, it may involve a sweeping ambition for change that lacks sufficient support from the public and key civil society groups. We call this "sociological" constitutional utopianism.

1. Structural Utopianism

Modern constitutions are often extremely ambitious in the rights content they include. As noted above, there is a general tendency towards rights inflation through which constitutions include new forms of rights (economic and social, environmental, digital, etc.).[46] In many cases, the inclusion of new rights may be important to building a coalition that will support the ultimate text. But constitutional projects are often less clear on the pathways through which these new rights will be realized in practice.

In some cases, constitutions may include new forms of rights while maintaining existing institutions that have already proven too weak or conservative

45. *See* David Landau & Rosalind Dixon, *Utopian Constitutionalism in Chile*, 13 GLOB. CONST. 228, 230–31 (2024).

46. *See, e.g.*, David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163, 1196 (2011) (showing an increase between 1946 and 2006 in the number of rights contained in constitutions across all three major generations of rights).

to achieve previous efforts at sweeping constitutional change. At a broad level, this is Gargarella's account of Latin American constitutionalism during the twentieth and early twenty-first centuries: Successive constitutional designers, he argued, "grafted" social and economic rights onto "hostile" constitutions whose basic institutional architecture was essentially unchanged.[47] Those traditional institutions, in turn, lacked the will or capacity to utilize those new rights to carry out much change. In other cases, indicated by the example of the 2022 Chilean draft below, constitutional designers may adopt vast new aspirations as well as seek changes to the institutional architecture, but may fail to connect the two. This may lead to a situation where it is unclear how new rights aspirations will be realized in practice, or which institution will have the capacity for doing so.

The structural variant of constitutional utopianism can come about for different reasons. One possibility is that constitutional designers may be naïve about the importance of constitutional structures or institutions in delivering concrete forms of change. We do not think such naïveté is unlikely, especially where constitutional designers are inexperienced and disconnected from institutionalized political parties, as occurred in the 2022 Chilean example. Drafters in such situations may put too much importance on the symbolic victory of including ambitious new rights in constitutions, without caring or understanding much about how the new right will translate into concrete change. Alternatively, politicians may understand these pathways well but face pressure from lower-information constituents or supporters to focus on the more overtly rights-based, aspirational dimensions of proposed constitutional change. In both cases, "good faith" forms of structural utopianism are the product of limited knowledge or understanding on the part of relevant constitutional actors.

In other cases, structural utopianism may result from the drafters' strategy. A constitutional drafter might include ambitious new rights content while retaining existing structures and institutions as a bid to shore up support for a new text. The relative absence of structures to develop new rights might be used to assuage fears of political opponents, easing the way towards constitutional adoption. The 2022 Chilean drafting process suggests this kind of a strategy: As explained below, drafters wrote highly conservative transitional norms, leaving implementation in the hands of traditional political actors in large part to shore up flagging political support for the draft. The 2022 experience suggests that this strategy is probably a bad bet—political elites who opposed the draft framed new constitutional provisions around their worst potential impacts (ignoring the likelihood of implementation). Meanwhile, voters understandably

47. *See* Gargarella, *supra* note 6, at 134.

focused on the symbolic aspects of the draft rather than the details of its implementation, leading to a decisive defeat in a September 2022 referendum.

In yet other cases, structural utopianism may be a result of bad faith, again playing on voters' perhaps limited understanding. In such scenarios, constitutional rights may act as a "bribe," with constitutional drafters offering ambitious and bold new rights content coupled with other structural changes that will frustrate the realization of that content and may significantly erode democracy as well.[48] In Türkiye, for example, then-Prime Minister Erdogan proposed and succeeded in a constitutional referendum that expanded constitutional equality guarantees at the same time as it allowed the regime to pack the court that would be charged with enforcing those guarantees.[49] In Ecuador, former President Correa proposed a new constitution with some of the most celebrated rights content ever seen, including ambitious new social and environmental rights content, such as recognition of the rights of nature.[50] Yet his draft also centralized executive power and undermined judicial independence, leading to a situation in which these new guarantees predictably lay dormant—for at least a considerable period of time.[51] In these and other ways, the lure of utopian constitutionalism may serve as a gateway to democratic backsliding.

2. *Sociological Utopianism*

If structural utopianism occurs where there is a lack of sufficient attention to the institutional pathways through which new aspirations will be carried out, sociological utopianism arises where there is a lack of sufficient popular and political support for a transformative project. In other words, the aspirations inserted into a text may outpace popular and political opinion, creating a mismatch that may frustrate the realization of constitutional aspirations. At the extreme, this gap can lead to outright political defeat, as seen in the 2022 Chilean constitutional draft, which was rejected by a large margin in a popular referendum.[52] Even when such drafts go into effect, they risk becoming dead letters if they lack the supportive constituencies necessary to sustain them in practice.

This kind of mismatch may be relatively low risk with day-to-day, ordinary politics. For one thing, ordinary politics tend to focus on the mundane, rather

48. *See* Rosalind Dixon, *Constitutional Rights as Bribes*, 50 Conn. L. Rev. 767, 784–85 (2018).

49. *See* Ozan O. Varol et al., *An Empirical Analysis of Judicial Transformation in Turkey*, 65 Am. J. Comp. L. 187, 189–90 (2017).

50. *See* Dixon, *supra* note 48, at 791–801; Dixon & Landau, *supra* note 9, at 122–25.

51. For later developments after Correa's departure, see, for example, Mihnea Tănăsescu et al., *Rights of Nature and Rivers in Ecuador's Constitutional Cour*t, Int'l J. Hum. Rts. 1 (2024).

52. Roland Benedikter & Miguel Zlosilo, *The Chilean Pendulum: Perspectives After Chile's Constitutional Referendum*, Lat. Am. Focus Group (Sep. 13, 2022), https://blogs.eui.eu/latin-american-working-group/the-chilean-pendulum-perspectives-after-chiles-constitutional-referendum/ [https://perma.cc/52UP-WVXU].

than the injection of lofty new aspirations into political discourse. For another, ordinary politicians usually have a reasonable grasp on the preferences of key constituencies. They can and do miscalculate, but there are usually limits to how badly they do so.

Constitutional politics, according to a now venerable line of scholarship, is supposed to be different. Theoretically, constitution-making is said to represent an exceptional moment when the "people" intervene directly to determine the future of the polity through the invocation of constituent power. The widely invoked notion of a "constitutional moment" captures the idea of an exceptional time in politics, one where ordinary political factors are at least mixed with deeper, longer-term deliberation about the future of the polity.[53]

At the level of process design, this is often (although not inevitably) instantiated by a procedure through which a specialized constituent assembly writes the new constitution, often preceded or followed by a popular referendum. The involvement of a specialized body, drawn from outside of normal political institutions, is meant to capture the dynamics of a "constitutional moment" where ordinary political pressures are at least dampened.[54] However, it may also raise risks of gaps between the preferences of members of the assembly and those of key constituencies (including the public), as well as risks that members of the assembly will misperceive those public preferences.

Judging a constitutional project as utopian in nature using either of the two metrics developed here is a complex task. This is particularly true when judging ex-ante—in other words, from the perspective of the drafters. In part, this is because relationships change over time. A drafter might make a reasonable choice to put a new right into a constitution without developing strong implementation pathways, or after knowing that there is a dearth of public support for the change. Over time, pathways and support may be created. Institutions may change in ways not envisaged by constitutional drafters through shifts in the broader legal and political culture. Likewise, a proposal for constitutional change may start off with little public support but gradually gain support as the public is made aware of what it involves and why it is being adopted.

Of course, these changes can go in both directions. Promising institutional pathways to implement new rights may wither over time, and the public may either turn against some ideas that initially have very high support or simply lose attention. One pattern sometimes seen with transformative constitutionalism is an initial burst of energy, followed by increasing inertia. Courts sometimes seem to lose energy over time, while political institutions lose interest as

53. *See* Bruce A. Ackerman, We the People: Foundations 51 (1991).

54. *See* Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 Duke L.J. 364, 394 (1995).

public focus wanes. Pieterse suggests that such a pattern describes the arc of transformation in South Africa.[55]

II. Transformative Constitutionalism in Practice: Reconsidering the Canonical Case of Colombia

The Colombian Constitution of 1991 is considered perhaps the most transformative constitutional project in Latin America.[56] Indeed, the country's active and creative Constitutional Court has established a celebrated jurisprudence based on the constitution's robust set of rights. While Colombia shows how pathways of transformative constitutionalism can succeed, it also shows their limits. The efforts of drafters to facilitate the rise of a powerful court to implement rights guarantees succeeded, but ambitious efforts to remake the rest of the political system largely failed, both because drafters made some bad choices and because of subsequent events that may have been difficult to foresee.

A Constituent Assembly wrote the text, where deliberations were dominated by a multiparty agreement including both traditional political actors and political newcomers. The text contained the basic elements of transformative constitutionalism: a rich set of new rights and a new constitutional court committed to enforcing those rights. The new rights included ambitious social rights guarantees, a substantive conception of equality, and new rights for the country's Indigenous communities. These new rights were explicitly framed by then-President Cesar Gaviria and members of the Constituent Assembly as part of a transformative project. Gaviria and others who shaped the constitutional project emphasized the need to make rights real, ensuring they did not remain mere parchment guarantees.[57]

For this purpose, the President and constitution-makers strengthened the judicial mechanisms responsible for enforcing the aforementioned rights. First, drafters created a new court. Many scholars critiqued the old Supreme Court for its outdated, formal jurisprudential style and track record of damaging decisions. The new specialized Constitutional Court was intended to be a break

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55. *See* Marius Pieterse, *Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 Hum. Rts. Q. 796, 816 (2007).

56. *See* Manuel José Cepeda Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 Wash. U. Glob. Stud. L. Rev. 529, 690–91 (2004).

57. *See* President Cesar Gaviria Trujillo, *Instalación de la Asemblea Nacional Constituyente* [*Installation of the National Constituent Assembly*], *in* Introducción a la Constitución de 1991: Hacia un Nuevo Constitucionalismo [Introduction to the Constitution of 1991: Towards a New Constitutionalism] 313, 315 (Manuel José Cepeda Espinosa ed., 1992) (emphasizing in his opening address to the Assembly the demand of citizens for "effective guarantees for their rights").

from this legacy, including overhauled tenures and selection mechanisms.[58] Whereas the members of the old Supreme Court served for life and selected their own successors (a process called co-optation),[59] members of the new Constitutional Court served only eight-year terms and were picked by the Senate from lists prepared by three different institutions: the president, the Council of State, and the Supreme Court.[60] The selection mechanism was designed to reduce the closed, somewhat cliquish nature of the old Supreme Court while also fragmenting selection power in a way that made it hard for any one institution (particularly the executive) to dominate the Constitutional Court.

The drafters also imbued the new Constitutional Court with very strong powers from a comparative perspective. Since the early twentieth century, Colombia has had one of the most powerful instruments of abstract judicial review in the world: the public action.[61] The public action allowed any citizen to challenge any law, on any ground, at any time. The 1991 Constitution gave citizens the power to take public actions directly to the Constitutional Court, in addition to creating a powerful new individual complaint mechanism, the *tutela*.[62] The *tutela* allows anyone aggrieved by governmental, or in some circumstances non-governmental, action to file a formal or informal petition. The reviewing court then has ten days to reach a decision.[63] The Constitutional Court did not have original jurisdiction over these claims (which were filed in ordinary courts), but it did have complete discretion as to which of the claims it would hear on appeal.[64] President Gaviria and members of the Constituent Assembly framed the *tutela* as a key part of the project to make rights more effective in practice and to reduce the culture of rights violations by state and non-state actors alike that plagued Colombia in the 1980s.[65]

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58. *See, e.g.*, Humberto de la Calle, Contra Todas Las Apuestas: Historia Íntima de la Constituyente de 1991 [Against All Odds: The Intimate History of the Constituent Assembly of 1991] 208 (2004) (observing that "the majority of constituents felt the need to defenestrate the Supreme Court before it could throw the new constitution to the ground").

59. *See* David Landau, *Beyond Judicial Independence: The Construction of Judicial Power in Colombia* (Oct. 2014) (Ph.D. dissertation, Harvard Graduate School of Arts and Sciences), at 55.

60. Constitución Política de Colombia [C.P.] art. 239.

61. On the history and creation of the public action, see generally Jorge González Jácome, Entre la Ley y la Constitución: Una Introducción Histórica a la Función Institucional de la Corte Suprema de Justicia, 1886–1915 [Between Law and Constitution: A Historical Introduction to the Institutional Function of the Supreme Court of Justice, 1886–1915], at 82–95 (2007).

62. Constitución Política de Colombia [C.P.] art. 241(4).

63. *Id.* art. 86; Decreto 2591 de 1991, Nov. 19, 1991, art. 33 (Colom.).

64. Constitución Política de Colombia [C.P.] art. 86; Decreto 2591 de 1991, Nov. 19, 1991, art. 33 (Colomb.).

65. *See* Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 Case W. Res. J. Int'l L. 139, 156 (1992).

A. Transformation in Colombia

Drafters ensured that these new guarantees would take effect quickly and in ways that would support a transformative outcome. The 1991 Constitution's transitional provisions gave President Gaviria extensive temporary powers to write (via decree) legislation that regulated the *tutela*, the Constitutional Court, and a number of other key building blocks of the new constitutional order.[66] The president used these powers in an expansive way. Those provisions also gave Gaviria considerable power to appoint the first justices to sit on the new Constitutional Court, and he and his allies intentionally selected justices who had an expansive, transformative vision of constitutional law.[67]

The strategy worked, perhaps better than Gaviria intended. The transitional court sat for only a year but very quickly constructed the key building blocks of the new constitutional order.[68] This included a doctrine allowing social rights to be enforced via *tutela*, despite an ambiguous constitutional text that left the judicial enforceability of social rights at best uncertain.[69] The transitional court also synthesized from the text an overarching social right to a "vital minimum," or a minimum needed to live a dignified life.[70] Likewise, the court developed core doctrines allowing it to rein in abuses of states of exception, including, based on an ambiguous constitutional text,[71] caselaw that allowed it to invalidate an entire state of emergency where the factual prerequisites were not met (rather than just decrees issued during that emergency).[72] Finally, the court constructed a "constitutional block" doctrine that gave international and regional human rights law a major role in the domestic constitutional order.[73]

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66. Constitución Política de Colombia [C.P.] trans. prov. art. 5.

67. *Id.* trans. prov. art. 22 (defining the composition of the seven-person transitional Court, and allowing the President to select two of five initial members, with those five members then selecting the remaining two).

68. For an overview, see Landau, *supra* note 59, at 128–56.

69. *See, e.g.*, Constitución Política de Colombia [C.P.] art. 85 (stating that some rights were of "immediate effect," but not explaining how this connected to enforceability via *tutela*); Landau, *supra* note 59, at 144–47.

70. *See* Corte Constitucional [C.C.] [Constitutional Court], octubre 26, 1992, Sentencia T-571/92, Gaceta de la Corte Constitucional [G.C.C.] (vol. 6., p. 880), pt. III(2) (Colom.); Corte Constitucional [C.C.] [Constitutional Court], junio 24, 1992, Sentencia T-426/92, Gaceta de la Corte Constitucional [G.C.C.] (vol. 2., p. 452), ¶¶ 5–8 (Colom.).

71. *See* Constitución Política de Colombia [C.P.] art. 241 (explicitly stating that decrees issued during emergencies were reviewable but remaining silent on declaration of emergency itself).

72. *See* Corte Constitucional [C.C.] [Constitutional Court], mayo 7, 1992, Sentencia C-004/92, pt. VII, https://www.corteconstitucional.gov.co/relatoria/1992/c-004-92.htm [https://perma.cc/23P6-BSNK] (Colom.).

73. *See* Corte Constitucional [C.C.] [Constitutional Court], octubre 28, 1992, Sentencia C-574/92, pt. V(F), https://www.corteconstitucional.gov.co/relatoria/1992/c-574-92.htm [https://perma.cc/6ABF-TE5C] (Colom.). For an overview, see generally Rodrigo Uprimny, *The*

The subsequent successes of the Constitutional Court are well-known and include an ambitious program of social rights enforcement, major structural decisions affecting internally displaced persons and the healthcare system,[74] the creation of a discourse on the rights of victims that played a major role in the politics of the peace process with the Revolutionary Armed Forces of Colombia–People's Army (*Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo*, in Spanish, or "FARC–EP") and other groups,[75] as well as a creative program of environmental rights, including giving standing to environmental subjects such as rivers.[76]

One striking component of the Colombian project is the extent to which the *tutela*, and to a lesser extent the court, managed to build up support with the general public. Starting during a deep recession in the late 1990s, the *tutela* became a routine tool to access basic services like healthcare and pensions.[77] Several political attempts to curb the power of the court or to rein in the *tutela* failed, seemingly in part because of this popularity.[78] The court's support has, at the same time, proven fragile. For example, it took a big hit during a corruption scandal involving one of the justices.[79] Nonetheless, the court's ability to act as an engine of transformation has relied on the relatively high popularity of its social rights jurisprudence in particular, especially in the context of pervasive perceptions of state failure.[80]

Constitutional Court and Control of Presidential Extraordinary Powers in Colombia, 10 Democratization 46 (2010).

74. *See* Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04, Gaceta de la Corte Constitucional [G.C.C.] (vol. 1., p. 353), pt. IV (Colom.); Corte Constitucional [C.C.] [Constitutional Court], julio 31, 2008, Sentencia T-760/08, pt. II(8.1), https://www.corteconstitucional.gov.co/relatoria/2008/t-760-08.htm [https://perma.cc/9654-A3PZ] (Colom.).

75. *See* Sentencia T-025/04, pt. IV; Corte Constitucional [C.C.] [Constitutional Court], diciembre 5, 2019, Sentencia C-588/19, pt. VI(D), https://www.corteconstitucional.gov.co/relatoria/2019/c-588-19.htm [https://perma.cc/F24H-4DCV] (Colom.).; David Landau, *Causes and Consequences of a Judicialized Peace Process in Colombia*, 18 Int'l J. Const. L. 1301, 1320–21 (2021); David Landau, *Vulnerable Insiders: Constitutional Design, International Law and the Victims of Armed Conflict in Colombia*, 57 Va. J. Int'l L. 679, 688–98 (2017).

76. Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 2016, Sentencia T-622/16, pt. II, ¶ 6.2, https://www.corteconstitucional.gov.co/relatoria/2016/T-622-16.htm [https://perma.cc/56BW-F5BT] (Colom.) (protecting the rights of the Atrato River). For discussion of this landmark decision, see Alexandra Huneeus, *The Canon of Nature Rights*, *in* Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights 515, 524–27 (Sujit Choudhry et al. eds., 2024).

77. *See generally* Pablo Rueda, *Legal Language and Social Change During Colombia's Economic Crisis*, *in* Cultures of Legality: Judicialization and Political Activism in Latin America 25 (Javier Couso et al. eds., 2010).

78. *See* Landau, *supra* note 59, at 292–315.

79. *See* Sandra Botero, *Confianza, apoyo a la democracia y corrupción: una mirada a la Corte Constitucional en la opinión pública colombiana* [*Trust, Support for Democracy, and Corruption: A Look at the Constitutional Court in Colombian Public Opinion*], 4 Lat. Am. L. Rev. 25, 33 (2020).

80. *See* Landau, *supra* note 59, at 292–315.

B. Beyond Rights and Courts in the Colombian Case

Significantly, the 1991 constitutional project sought to reach well beyond the judiciary. The other structural moves made in the 1991 Constitution are largely forgotten, simply because they proved to be much less successful. Even more than the courts, the 1991 Constituent Assembly focused attention on the Congress, which was viewed as a sclerotic, parochial, and corrupt institution with little ability to resolve major national problems.[81] The Assembly sought to rejuvenate Congress through deep reforms to the electoral system and other changes in the procedure and structure of the institution. Most strikingly, the Senate, which had been elected via several small (and often badly malapportioned) districts, would now be elected via proportional representation in one large national district.[82] In a pathbreaking move, the 1991 Constitution also added special seats for Indigenous representation—two in the Senate, and one in the House.[83] Certain kinds of legislative funds often used for pork-barrel expenditures or corruption were prohibited, and the practice of having replacement legislators (*suplentes*) who were often associated with opaque, corrupt practices also ended.[84] Drafters curtailed the ability of the president to legislate around the Congress, either via declaring a state of exception or by receiving delegations of power from Congress.[85]

Finally, and most dramatically, in the transitional norms for the new constitutional text, the drafters immediately revoked the mandate of the existing Congress.[86] They ceded some of their powers, for a time, to President Gaviria, who was given sweeping authority to pass key pieces of legislation called for in the new text (as noted above), and to a Commission selected by the Assembly itself, which had powers to veto legislative decrees issued by Gaviria.[87] Revoking the mandate of Congress well before terms had expired would also allow rapid new legislative elections, which many at the Constituent Assembly hoped would end the duopoly of the traditional parties and allow the new political

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81. *See* Ronald B. Archer & Matthew Soberg Shugart, *The Unrealized Potential of Presidential Dominance in Colombia*, *in* PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA 110, 116–17 (Scott Mainwaring & Matthew Soberg Shugart eds., 2012); Renata Segura & Ana Maria Bejarano, *Ni una Asamblea Más sin Nosotros!* [*Not One More Assembly Without Us!*] *Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes*, 11 CONSTELLATIONS 217, 220 (2004).

82. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 171.

83. *Id.* arts. 171, 176. There were also two reserved seats in the Chamber of Deputies for Afro-Colombians. *See id.* art. 176.

84. *See id.* art. 136, cl. 4; Eduardo Pizarro Leongómez, *Giants with Feet of Clay: Political Parties in Colombia*, *in* THE CRISIS OF DEMOCRATIC REPRESENTATION IN THE ANDES 78, 85 (Scott Mainwaring et al. eds., 2006).

85. *See* Uprimny, *supra* note 73, at 57 tbl.1.

86. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] trans. prov. art. 3.

87. *See id.* arts. 5, 6.

actors elected to the Assembly to enter the system.[88] The decision to dissolve the existing Congress was perhaps the most difficult and divisive issue dealt with by the 1991 Constituent Assembly: It was fiercely opposed by elements of the old guard, and several members of the Assembly (including a Conservative delegate who was an ex-president) resigned their seats in protest.[89] The ruling Liberal party was split between its different factions; the incumbent President Gaviria signed onto the deal, but only after ensuring existing members of the Constituent Assembly would be ineligible to run in the next congressional election.[90]

While the changes to judicial rights implementation proved impactful, the ambitious attempt to remake Congress to be a more open and effective body was less successful. Indeed, one recent Colombian commentator has called it simply "the political change that never was."[91] In the subsequent legislative elections, many members of the traditional political class returned to power, while the new political forces that helped to shape the Constituent Assembly fizzled.[92] Many members of the Assembly had become stars during the constitution-making process, so the rule prohibiting them from running for the next set of congressional elections played an important role in this outcome.[93] As well, the various goals of the constitution-makers conflicted: The changes to the Senate that were designed to create a more open body by switching to a form of pure proportional representation also made it more fragmented and dysfunctional, populated in large part by what one political scientist called "electoral microenterprises."[94]

The main standard bearer of the "spirit of '91" became the Constitutional Court, but not because the Constituent Assembly ignored other institutions. On the contrary, as we have seen, it viewed changes to the Congress in particular as central to the transformative project. Instead, the Court stepped into ceded political space because changes to other institutions proved less successful. Even when constitutional values have permeated the bureaucracy and the legislature, they have often done so at the prodding of the Court.

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88. For discussion, see de la Calle, *supra* note 58, at 194–95.

89. *Id.* at 210–12.

90. *See id.*; *see also* Constitución Política de Colombia [C.P.] trans. prov. art. 2 (excluding members of the Assembly from the upcoming congressional elections).

91. Juan Sebastian Lombo, *Revocatoria del Congreso: el cambio político que nunca fue* [*Revocation of Congress: The Political Change that Never Was*], El Espectador (June 11, 2021), https://www.elespectador.com/politica/revocatoria-del-congreso-el-cambio-politico-que-nunca-fue/ [https://perma.cc/7DCD-FCJ9].

92. *See, e.g.*, Lawrence Boudon, *Colombia's M-19 Democratic Alliance: A Case Study in New-Party Self-Destruction*, 28 Lat. Am. Persps. 73, 73 (2001).

93. *See id.* at 83–85.

94. Leongómez, *supra* note 84, at 79.

Consider internally displaced persons and the rights of victims: The state began paying more systemic attention to the large displaced population after the Court issued its landmark decision creating a structural remedy for the community in 2004, which was followed by ongoing, innovative judicial oversight.[95] Eventually, Congress passed major legislation addressing the issue—the Victims' Law—which echoed much of the court's jurisprudence.[96] Something similar happened in healthcare, where the court's structural intervention in 2008 on behalf of the rights of aggrieved *tutela* petitioners resulted only in slow progress in reforming the system,[97] but it sparked a public and political conversation about its systemic failings, especially in the "subsidized" system for those without formal employment.[98] Again, ideas proposed by the court worked their way into the political system, with Congress in 2015 passing a statutory law defining health as a "fundamental right," a substantial shift from the more traditional framing as a public service.[99]

C. *Colombia's Transformative Constitutionalism in Comparative Perspective*

There are some interesting parallels between the experience in Colombia and that in other "canonical" transformative jurisdictions, such as India and South Africa. In these other cases, too, courts emerged as central engines of transformation, but they did so in part because more ambitious attempts to spark changes to legislatures and other political institutions have not lived up to expectations. In part by default, rather than design, high courts in Colombia, India, and South Africa have borne much of the weight of expectations of constitutional transformation. Of course, all three of these courts, despite their creativity, have run up against the limits of judicially led change.

In India, the initial vision, as noted by Khosla, was extraordinarily ambitious; indeed, the overarching goal was a remaking of the citizenry along liberal democratic lines.[100] Yet attention has focused on the Supreme Court, which in the 1970s began a project of "Public Interest Litigation" oriented around

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95. *See* César Rodríguez Garavito & Diana Rodríguez Franco, Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South 38–49 (2015).

96. *See* Ley 1448 de 2011, Jun. 10, 2011, Diario Oficial [D.O.] 48.096 (Colom.).

97. *See* Corte Constitucional [C.C.] [Constitutional Court], julio 31, 2008, Sentencia T-760/08, https://www.corteconstitucional.gov.co/relatoria/2008/t-760-08.htm [https://perma.cc/9654-A3PZ] (Colom.).

98. *See* Aquiles Ignacio Arrieta-Gómez, *Realizing the Fundamental Right to Health Through Litigation: The Colombian Case*, 20 Health Hum. Rts. 133, 140–41 (2018).

99. Ley 1751 de 2015, Feb. 16, 2015, Diario Oficial [D.O.] No. 49.427, art. 2 (Colom.) ("The fundamental right to health is autonomous and irrenunciable in the individual and collective sense.").

100. *See* Madhav Khosla, India's Founding Moment: The Constitution of a Most Surprising Democracy 22 (2020).

rights.[101] The court reached the apex of its power during a period in which the legislature was discredited by incoherence and corruption, and similarly fragmented to that of Colombia.[102] Indeed, as in Colombia, the court has justified its activist role by referring to systemic problems in the political system.[103] More explicitly than in Colombia, the public interest litigation revolution in India was an attempt to improve the popularity of the court after a period in which it had been discredited in part because of its relatively passive response during Indira Gandhi's emergency.[104]

Like in Colombia, the Indian Supreme Court has issued some stunning decisions that mobilized and strengthened civil society and political actors seeking change. Take its famous structural remedy in a sprawling case involving the right to food.[105] There was an incipient "right to food" movement before the decision of the Supreme Court, but the movement grew dramatically in strength and influence following the court's decision to recognize the right of all Indian school children to a nutritious midday meal and to engage the Right to Food Campaign in the implementation and monitoring of its decision. In part, this was because the Campaign gained standing, legitimacy, and relevance from the court's orders, but it also reflected the fact that the orders of the court provided a constitutional focal point for ongoing legal and political action on the part of the campaign.[106]

In South Africa, attention has likewise focused on the Constitutional Court and its role in carrying transformative constitutionalism forward. Klare's original contribution, as noted above, was fixated on the legal system and the role of the Constitutional Court in transforming the formalist, apartheid-era legal system.[107] The court has issued several celebrated decisions, even as it has also

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101. *See, e.g.*, Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India*, *in* Consequential Courts: Judicial Roles in Global Perspective 262, 263 (Diana Kapiszewski et al. eds., 2013).

102. *See* Nick Robinson, *India and the Rise of the Good Governance Court*, 8 Wash. U. Glob. Stud. L. Rev. 1, 14–15 (2009).

103. *See id.* at 22.

104. *See* Mate, *supra* note 101, at 270–71 (arguing that public interest litigation arose in part out of the crisis caused by the judiciary's failure to contend with Indira Gandhi's abuses of power).

105. Order dated November 28, 2001, Peoples Union for Civil Liberties v. Union of India & Others, Writ Petition (Civil) No. 196 of 2001, https://web.archive.org/web/20150722002812/http://www.righttofoodindia.org/orders/nov28.html (India).

106. Rosalind Dixon & Rishad Chowdhury, *A Case for Qualified Hope? The Supreme Court of India and the Midday Meal Decision*, *in* A Qualified Hope: The Indian Supreme Court And Progressive Social Change 243, 244 (Gerald N. Rosenberg et al., eds., 2019) [hereinafter A Qualified Hope]; Alyssa Brierly, *PUCL v. Union of India: Political Mobilization and the Right to Food*, *in* A Qualified Hope, *supra* note 106, at 212, 214–15; Nick Robinson, *Closing the Implementation Gap: Grievance Redress and India's Social Welfare Programs*, 53 Colum. J. Transnat'l L. 321, 342–43 (2015).

107. *See* Klare, *supra* note 3.

attracted a long list of international and domestic critics. Unlike the Colombian and Indian judiciaries, the South African Court has coexisted with a dominant party—the African National Congress—since the end of apartheid. This has constrained and shaped what the court has been able to do, as many scholars have noted.[108]

At times, the court has been effective in working within these constraints. In the early *Treatment Action Campaign* decision, the court considered a challenge to prior ANC-government policy that limited access to retroviral medications for those living with HIV and AIDS.[109] Specifically, it considered the constitutionality of limits on access to anti-retroviral medications aimed at preventing mother-to-child transmission of HIV that the global community had provided for free to the South African government.[110] The court held that limiting access to the drug, particularly given the absence of cost constraints, was unreasonable in light of the right of access to healthcare in section 27(2) of the Constitution.[111] The court ordered immediate access to the drugs in sites with the capacity to test for HIV and offer breast-milk substitutes, as well as a timely rollout in other sites. As Roux explained, the court could issue a relatively muscular ruling in the case not only because of the absence of cost constraints, but also because it was able to exploit factions within the ruling ANC.[112]

In another landmark early case, *Grootboom*, the court was asked to review a failure by national, state, and local government actors to provide short-term access to emergency housing for homeless South Africans.[113] The court held that the failure to do so was unreasonable in light of the state's obligation under section 26(2) and that all three levels of government were required to work together to formulate a new plan that addressed the short, medium, and long-term housing needs of vulnerable South Africans.[114] It issued a paradigmatic "weak-form" remedy, holding that the existing plans were unconstitutional but refusing to issue precise guidance on what needed to be done or maintain jurisdiction over the case.[115] The holding has been both celebrated for its creativity and heavily critiqued for its lack of teeth, but recent work suggests that it

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108. *See, e.g.*, Theunis Roux, The Politics Of Principle: The First South African Constitutional Court, 1995–2005, at 143–44 (2013).

109. *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*, 2002 (5) SA 721 (CC) (S. Afr.).

110. *See id.*

111. *See id.* ¶ 125.

112. *See* Roux, *supra* note 108, at 298–99.

113. *See Government of the Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC) (S. Afr.).

114. *Id.*

115. *Id.*; *see also* Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 Int'l J. Const. L. 391, 393 (2007).

sparked gradual but sweeping changes to housing policy.[116] As well, the court remained involved in the housing issue over time, moving towards a requirement that the state conduct "meaningful engagement" with affected parties before undertaking evictions and other actions.[117] Brian Ray shows that this judicial strategy, within limits, has led to an approach to housing development that is markedly more consultative and protective of those in informal housing.[118]

A substantial line of critical literature suggests that the South African Court has too often failed to move the transformative project forward. For example, much critical work focuses on the *Mazibuko* decision, where the court failed to define a "minimum core" entitlement to water after two lower court decisions did so.[119] All of this work focuses too heavily on the court itself. Klare, returning with his co-author Dennis Davis to the project after many years, recently argued that the main responsibility for the limitations on constitutional transformation in South Africa lies not with the constitutional text or even the court but, rather, with the political system, including corruption within the ruling ANC.[120] More hopefully, Klug shines light on the important role that South Africa's famous Chapter 9 institutions, or non-judicial independent accountability institutions, have played in transforming South Africa's constitutional system.[121] For example, the Public Protector (with help from the court itself) played a significant role in uncovering corruption by former President Jacob Zuma and set in motion a chain of events that eventually forced Zuma out of office. Both works, in somewhat different ways, shine light on the limitations of a purely court-centric notion of transformative constitutionalism and highlight the other pathways that might be missed by such an approach.

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116. *See* Marcia Klein, *Development: SA Govt Builds on Housing Promise*, Bus. Times (July 6, 1997), at 3; Sven Lunsche, *ANC Good Deeds Come to Grief at Local Level*, Bus. Times (May 30, 1999), at 10; Malcolm Langford, *The Impact of Public Interest Litigation: The Case of Socio-Economic Rights*, 27 Aust. J. Hum. Rts. 505, 519–22 (2021).

117. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*, 2008 (3) SA 208 (CC), para. 18 (S. Afr.); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*, 2009 (9) BCLR 847 (CC), para. 166 (S. Afr.).

118. *See* Brian Ray, Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave 332 (2016).

119. *See, e.g.*, Tracy Humby & Maryse Grandbois, *The Human Right to Water in South Africa and the* Mazibuko *Decisions*, 51 Les Cahiers de Droit 521, 539 (2010).

120. *See* Davis & Klare, *supra* note 36, at 494.

121. *See* Klug, *supra* note 28, at 703–04.

III. Utopian Constitutionalism in Practice: The Failed Chilean Constitutional Draft of 2022

If Colombia shows how drafters can achieve at least limited transformation through careful attention to institutional pathways, the failed Chilean draft of 2022 suggests the wrong turn that drafters might make towards utopianism. In September 2022, voters in Chile overwhelmingly rejected a draft constitution by a decisive margin, with sixty-two percent voting against and thirty-eight percent voting to approve.[122] This failed draft had been the product of a year of sustained work by an elected Constitutional Convention following massive popular protests in 2019 and an entry referendum where voters supported replacing the 1980 Constitution by an even more resounding margin of eighty percent in favor and twenty percent opposed.[123]

This Part first maps the historical trajectory on the left, which moved from skepticism of Latin American transformative constitutionalism to a full embrace in a short amount of time. It then describes the main content of the 2022 draft and its extraordinary ambition, particularly in its density of rights guarantees. Finally, this Part explains why the 2022 Chilean draft should be viewed as utopian both structurally, as lacking adequate institutional pathways to develop its ambitious rights content, and sociologically, since wide swaths of the public and party elites perceived its content as out of touch with what they wanted the new text to do.

A. *Historical Suspicion of Transformative Constitutionalism in Chile*

The failed referendum in 2019 marked the culmination of an extraordinary process through which left-leaning movements and parties in Chile had sought to replace the 1980 constitutional text, written during the military dictatorship. The 1980 text created a blueprint for a restricted democratic political system in which the military and its allies would retain considerable influence.[124] Under the original 1980 text, for example, the military was able to appoint certain "iron" senators who would remain in their positions for life, as well as a powerful National Security Council dominated by the military and possessing broad and ambiguous powers over civilian authorities.[125] Moreover, the

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122. *See* Catherine Osborn, *How Chile's Constitution Revolution Missed the Mark*, Foreign Pol'y (Sept. 9, 2022), https://foreignpolicy.com/2022/09/09/chile-constitution-referendum-results-reject-boric/ [https://perma.cc/Z3Y4-AF5N].

123. *See* Plebiscito 2020, Servicio Electoral de Chile (Oct. 26, 2020), https://web.archive.org/web/20221021052801/https://historico.servel.cl/servel/app/index.php?r=EleccionesGenerico&id=10.

124. For an overview, see Robert Barros, Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution 171–72 (2002).

125. *See id.* at 229.

1980 text envisioned the new Constitutional Court as playing a major role in curbing popular will. The seven-member court, two of whom were selected by the National Security Council and three by the regime-allied Supreme Court, was able to exercise abstract review of new laws at the behest of the president or minorities in either chamber.[126] The regime also crafted an electoral system that was designed to favor the military's right-wing allies, though some of its core assumptions about how those electoral rules would function backfired.[127]

Throughout the 1990s and 2000s, a center-left coalition slowly worked to amend the 1980 Constitution's most democratically noxious provisions through several reforms, the most sweeping of which occurred in 2005 during the presidency of Ricardo Lagos.[128] Although the 1980 Constitution contained a bill of rights engrafted with a mix of neoliberal, Catholic, and conservative influences, very little attention was spent amending these provisions. Instead, the focus was on altering the structural provisions that tilted politics in favor of the old authoritarian regime and the right. Among many other changes, the iron senators and National Security Council were eliminated, the composition of the Constitutional Court was reworked and its powers shifted more towards concrete forms of review, and the electoral rules were (to some extent) changed.[129] This style of left-leaning constitutional politics, which sought to unfetter majoritarianism from the restraints placed on it by the 1980 Constitution, was both quite successful by many metrics and unusual from a Latin American perspective. It placed Chile well outside of the main lines of the regional "new constitutionalism." As already noted, the reformers put little emphasis on the 1980 Constitution's rights provisions, and they also demonstrated ambivalence or skepticism of courts, especially the Constitutional Court, given its historical role as protector of right-wing and authoritarian interests.[130]

Over time, the outcry on the left for replacement of the 1980 Constitution, rather than its continued piecemeal reform, grew louder. One reason was practical—despite all the reforms, the 1980 Constitution continued to stymie policymaking efforts by the generally ascendant center-left majority. The 1980 Constitution created supermajority requirements for changes or replacements of laws on many major matters. Many laws required a "qualified quorum" or

126. *See* Javier Couso, *Trying Democracy in the Shadow of an Authoritarian Legality: Chile's Transition to Democracy and Pinochet's Constitution of 1980*, 29 Wis. Int'l L.J. 393, 398–99 (2012).

127. *See, e.g.*, Peter Siavelis, *Continuity and Change in the Chilean Party System: On the Transformational Effects of Electoral Reform*, 30 Comp. Pol. Stud. 651, 656–58 (1997).

128. *See* Javier Couso, *Chile's 'Procedurally Regulated' Constitution-Making Process*, 13 Hague J. on R.L. 235, 237–38 (2021); Claudio Fuentes, *Shifting the Status Quo: Constitutional Reforms in Chile*, 57 Lat. Am. Pol. & Soc'y 99, 100 (2021).

129. *See* Fuentes, *supra* note 128, at 100.

130. On the historical conservative bias in the Chilean judiciary, see Lisa Hilbink, Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile 71 (2007) (arguing that the tendency reproduced itself in the judiciary over a long period).

absolute majority of all members of the chamber (rather than a simple majority of those present and voting). Other key matters were regulated as organic laws in the Constitution and, thus, could only be altered by a four-sevenths supermajority of all members of the chamber.[131] In a famous argument, the academic Fernando Atria (who would later be part of the 2022 Convention) argued that these supermajority requirements and the overall rigidity of the Constitution effectively made the 1980 text a "cheating [*tramposa*]" constitution, which left authoritarian and right-wing legacies in place, regardless of election results.[132] Mingled with this was a more foundational complaint about the origins of the 1980 text—critics argued that the document, written without any democratic input by the junta or allied lawyers and academics, could not be a solid basis for building an authentically democratic Chile, no matter how deeply it had been reformed.[133]

The second administration of the socialist President Michelle Bachelet took this project forward in a direct way. Bachelet convened a process aimed at overhauling (though not technically replacing) the 1980 text. The procedure created by the administration relied on a series of participatory citizens' assemblies—*cabildos* and *encuentros*—that convened over 200,000 citizens between 2015 and 2017 at the local, provincial, and national levels (a significant number in a country of ten million).[134] Experts synthesized the input of these institutions, and in 2017 and 2018, the government wrote (in a closed-door process) a draft overhaul, which was presented to Congress as a proposal for constitutional change. For several reasons—including a loss of participatory momentum due to a complex process and the election of the right-leaning President Sebastian Piñera—the proposal was dead on arrival. It was never taken up by Congress and produced no results.[135]

Nonetheless, the content of the 2018 Bachelet draft is interesting, especially as a contrast to the 2022 Convention draft.[136] Although Bachelet's draft left

131. Constitución Política de la República de Chile [C.P.] art. 66.

132. *See generally* Fernando Atria, La Constitución Tramposa [The Rigged Constitution] (2013).

133. *See* Couso, *supra* note 128, at 242.

134. *See* José Francisco Garcia, *A Failed but Useful Constitution-Making Process: How Bachelet's Process Contributed to Constitution-Making in Chile*, 13 Glob. Const. 239, 242–44 (2024); Sergio Verdugo & Jorge Contesse, *The Rise and Fall of a Constitutional Moment: Lessons from the Chilean Experiment and the Failure of Bachelet's Project*, Int'l J. Const. L. Blog (Mar. 13, 2018), https://www.iconnectblog.com/the-rise-and-fall-of-a-constitutional-moment-lessons-from-the-chilean-experiment-and-the-failure-of-bachelets-project/ [https://perma.cc/T7C4-XTKR].

135. *See* Miriam Henríquez Viñas & José Francisco García, *El Proceso Constituyente de Bachelet en Chile (2015–2018): Razones de un Fracaso (Previsible)* [*Bachelet's Constituent Process in Chile (2015–2018): Reasons for a (Foreseeable) Failure*], 21 Int'l J. Pub. L. 1496, 1506 (2023).

136. *See* Proyecto de reforma constitucional, iniciado en mensaje de S.E. la Presidenta de la República, para modificar la Constitución Política de la República [Bill for Constitutional Reform, Initiated by a Message from Her Excellency the President of the Republic, to Amend

many of the constitution's existing rights in place, it did reflect some currents of regional neo-constitutionalism. For example, it recognized Indigenous identity and collective Indigenous rights, which were absent from the 1980 text but reflected regional and global trends.[137] The equality clause was broadened to include private actors, made more specific, and now required the state to take (unspecified) positive measures to achieve equality based on sex.[138] It also added some important content to the economic and social rights already found in the 1980 Constitution, which were notable for their neoliberal bent and generally required private provision to exist alongside state provision. The draft beefed up and reframed some of the existing rights in a way that prioritized public provision while maintaining private involvement. It also added an entirely new right to housing.[139] At an overarching level, the Bachelet draft linked Chile to a tradition in Europe and Latin America by renaming Chile as a "democratic and social state of law," a change that Bachelet's justification referred to as "a new matrix of interpretation of the constitution."[140]

The draft reflected a more ambivalent approach towards judicialization, in line with the historical approach of the Chilean left. The scope of the constitution's individual complaint mechanism would have been broadened to include, for the first time, the economic and social rights found in the constitutional text, thus inviting a more comprehensive judicialization of rights.[141] At the same time, the Constitutional Court's abstract review powers would have been enormously restricted, with a four-fifths supermajority now needed to render laws unconstitutional.[142] Juxtaposed, these two changes reflect different objectives of the 2018 Bachelet draft—a desire to cautiously incorporate some aspects of Latin American transformative constitutionalism on the one hand, and the traditional impulse of the Chilean constitutional reformers to eliminate the 1980 Constitution's counter-majoritarian checks on political power on the other hand.

This second objective is reflected in the dramatic changes to the abstract review powers of the Constitutional Court, which were designed to ensure that laws would only be struck down when "there was a clear and strong majority

the Political Constitution of the Republic], Mensaje N. 407–365, Boletín No. 11.617-07 (2018), https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76296/1/Mensaje%20Pdta.Bachelet.pdf [https://perma.cc/ZY36-PUKH] (Chile).

137. *Id.* arts. 4, 5.

138. *Id.* art. 19, cl. 4.

139. *See id.* art. 19, cl. 12.

140. *Id.* at 23.

141. The new rights instrument, the *tutela*, also would have had a changed structure, with cases going first to the ordinary judiciary, but being appealable for the first time to the Constitutional Court. *See id.* art. 20.

142. *See id.* art. 94, cl. 1.

agreement" regarding their unconstitutionality.[143] It is also reflected in significant proposed changes to the political process that would have reduced the number of laws subject to a special quorum and eliminated any requirement for a supermajority, leaving organic laws subject only to a requirement of an absolute majority.[144] The proposal also would have made the Chilean Constitution significantly easier to amend.[145] It defined rights and other provisions in relatively spare terms, explicitly leaving regulation of key issues to law. Overall, then, the dominant approach of the Bachelet draft was in line with the historical Chilean tendency, but outside the Latin American mainstream: The goal was to allow some space for increased judicialization of rights while focusing on making the political process itself more flexible and more capable of achieving constitutional goals. This is a very different kind of transformative constitutionalism, one focused less on rights and certainly less on courts.

B. The 2019 Protests and the Turn Towards Transformative Constitutionalism

The shift in emphasis between the 2018 Bachelet draft and the 2022 Convention draft is remarkable, particularly since leftist political actors wrote both. The first focused largely (albeit not exclusively) on opening space for democratic politics to work; the second acted as an extraordinary synthesis of trends in regional transformative constitutionalism, particularly when it came to adding new rights. The intervening events were dramatic and helped to explain this shift. Beginning in October 2019, massive social protests—initially sparked by a hike in Santiago subway fares—spread throughout the country and focused on economic inequality as well as broader issues of social inequality and dignity.[146] Faced with plummeting approval ratings, the already unpopular administration of the conservative President Sebastian Piñera agreed to negotiate with other political forces to replace the 1980 Constitution, essentially as an exit from the crisis.[147]

In a relatively consensual style familiar to Chile since the transition from the dictatorship, most major political forces agreed on a set of amendments to the 1980 Constitution that would pave the way for its replacement. In contrast to the unilateral invocations of constituent power that had paved the way for some

143. *Id.* art. 25.
144. *Id.* art. 67.
145. *Id.* arts. 130–133.
146. Loreto Cox et al., *The 2019 Chilean Social Upheaval: A Descriptive Approach*, 16 J. Pol. Lat. Am. 68, 71 (2024).
147. *See* Couso, *supra* note 128, at 243.

other regional constitutional replacements, the Chilean process was guided by rules now found in the existing Constitution itself.[148]

These rules were designed to give major political forces a say in the final product, especially a rule requiring a two-thirds vote to approve the Convention's internal working procedures.[149] However, in a shift from past practice, the rules also opened up seats widely to independent candidates.[150]

The election for members of the Convention was held in May 2021, while President Piñera remained in power with very low approval ratings near the single digits. The election produced two key results.[151] The first was the very poor showing of not only the right, but also the center. The tipping point convention member needed to approve the new constitutional provisions with the required two-thirds majority was thus well to the left of the median legislator in the Congress. Critically, the right could not block constitutional change.[152] The second was that even leftist parties did not fare that well in an anti-institutional, anti-party environment. Independent leftists, many of them activists on issues like the environment or sexual equality, took a large number of the seats.[153] Thus, the 2019 protests themselves, which changed the political environment, and the results of the election, which put the constitutional drafting power largely in the hands of a different kind of left, help to explain the new approach taken in the 2022 Convention.

The draft itself is particularly noteworthy for its extraordinary list of rights, reflecting many different currents of global constitutionalism. These influences included traditional liberal democratic constitutionalism, social democracy, and the Bolivarian constitutions, but the rights included in the draft

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148. *See id.* at 243–44. On uses and abuses of constituent power, see generally, for example, Joshua Braver, We the Mediated People (2023); David Landau, *Constituent Power and Constitution Making in Latin America*, *in* Comparative Constitution Making 567 (David Landau & Hanna Lerner eds., 2019); Andrew Arato, Adventures of the Constituent Power (2017).

149. Constitución Política de la República de Chile [C.P.] art. 133 ("The Convention shall approve the rules and its voting regulations by a quorum of two-third of its members in office.").

150. *Id.* art. 131; *see also* Samuel Issacharoff & Sergio Verdugo, *The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond*, 78 U. Mia. L. Rev. 1, 48–49 (2023) (exploring the significance of this change in electoral law).

151. *See, e.g.*, Odette Magnet, *Chile's Unpopular President Delivers Solitary Farewell*, Al-Jazeera (June 2, 2021), https://www.aljazeera.com/news/2021/6/2/chile-unpopular-outgoing-president-delivers-solitary-farewell [https://perma.cc/27ZC-WDXQ].

152. *See* Issacharoff & Verdugo, *supra* note 150, at 50.

153. *See id.*; Maria Isabel Aninat Sahli, *New Forms of Representation and the Failure of the Chilean Constitutional Convention*, Int'l J. Const. L. Blog (Oct. 8, 2022), https://www.iconnectblog.com/i-connect-symposium-on-the-chilean-constitutional-referendum-new-forms-of-representation-and-the-failure-of-the-chilean-constitutional-convention/ [https://perma.cc/3US3-U9PS].

transcended any of these three influences and, without question, would have put Chile at the global vanguard.[154] The draft devoted an astonishing number of articles—roughly 100—to its section on rights.[155] It introduced a remarkable set of entitlements, including (1) comprehensive socioeconomic rights; (2) environmental rights; (3) Indigenous rights; and (4) creative new rights that are difficult to categorize.

First, the draft included a very comprehensive set of economic and social rights going well beyond the relatively spartan set of rights found in the 1980 Constitution and even the 2018 Bachelet proposal. Notable examples of newly minted rights include the right to a vital minimum of energy, the rights to food and nutrition, the right to water, the right to housing, and a "collective right" to city and territory.[156] The prevailing approach was also quite different: Whereas the 1980 Constitution instantiated a neoliberal model, the 2022 draft moved away from it. It did not require the legislature to eliminate private providers in areas like health and education, instead calling on government funding and other models to prioritize public provision.[157]

Second, the draft included a plethora of new environmental rights. It identified three distinct sets of rights holders in the constitution: individuals, Indigenous peoples, and nature.[158] Nature thus becomes a key rights holder, and environmental rights are interwoven throughout the text in a way that intermixes the human right to the environment, the rights of nature itself, and duties on the state. For example, the draft guarantees a new right to environmental education "that strengthens the preservation, conservation and care required with respect to the environment and nature" and will promote "ecological awareness."[159]

Third, the text included an extensive set of rights for Chile's Indigenous communities and more broadly redefined the relationship between these communities and the state. The text defines Chile as a "plurinational" state made up of the Chilean state and the different Indigenous nations.[160] It instantiates several different rights for Indigenous communities, including the right to prior

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154. On Bolivarian constitutionalism, see generally Phoebe King, *Neo-Bolivarian Constitutional Design: Comparing the 1999 Venezuelan, 2008 Ecuadorian, and 2009 Bolivian Constitutions*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 366 (Dennis Galligan & Mila Versteeg eds., 2013) (exploring texts of Venezuela, Ecuador, and Bolivia).

155. *See* Propuesta de Constitución Política de la República de Chile, July 4, 2022, *translated at* https://www.constituteproject.org/constitution/Chile_2022D (Rodrigo Delaveau Swett, trans.) [hereinafter Chile 2022 Draft], arts. 17–126 (not including additional provisions on environmental guarantees).

156. *Id.* arts. 51, 52, 54, 57, 59.

157. *See id.* arts. 35, 54.

158. *See id.* art. 103.

159. *Id.* art. 39.

160. *Id.* art. 1 (defining Chile as a "plurinational, intercultural, and ecological" state).

consultation for economic and other projects (or in one provision, "consent"[161]), the right to traditional territories, the right to restitution of land on a preferential basis, and rights to language, culture, and self-government.[162] It envisions separate Indigenous justice systems.[163]

Fourth, and in addition to those areas already canvassed, the draft also included new rights of other types. Many of these dealt with internet-related issues, such as the rights to digital connectivity, computer security, and to "a digital space free of violence."[164] Others fell into several different categories—for example, the right of victims to truth, justice, and reparations; the rights of those with disabilities; the rights of the neurodivergent; the right to sport; the right to care; and the right of campesinos and Indigenous groups to use of their traditional agricultural seeds.[165] The draft also included a transformative conception of equality, protecting a large number of protected grounds and including an obligation for the state to "correct and overcome" disadvantages held by both groups and individuals.[166]

These many rights proposals reflected the most ambitious conception of transformative constitutionalism ever attempted. Most of them had antecedents from elsewhere in the region and around the world—thus, in many ways, the Chilean Convention was drawing together different strands of transformative constitutionalism. Giving rights to nature, for example, reflected the text in Ecuador and later caselaw in Colombia.[167] The "plurinational" conception of the state and broad Indigenous rights reflected in the Bolivian Constitution as well as developments in many other regional texts.[168] Even the various new provisions on digital rights drew on tendencies found elsewhere around the world.[169]

C. *Structural Utopianism in the 2022 Draft*

The sheer ambition of the 2022 draft's numerous rights provisions begs an obvious question: How would they have been implemented? The classic conception of the model of transformative constitutionalism, as we have seen, has

161. *Id.* art. 191.
162. *See id.* arts. 34, 66, 79.
163. *See id.* art. 309.
164. *Id.* arts. 86, 88–89.
165. *See id.* arts. 24, 29, 55, 60.
166. *Id.* art. 25(5).
167. Constitución de la República del Ecuador art. 10; Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 2016, Sentencia T-622/16, https://www.corteconstitucional.gov.co/relatoria/2016/T-622-16.htm [https://perma.cc/56BW-F5BT] (Colom.) (giving rights to the Atrato River).
168. Constitución Política del Estado art. 1 (Bol.).
169. *See, e.g.*, Juliana Müller, Rights in the Digital Age 47–72 (2025) (giving comparative examples).

been to focus on courts. In Colombia, after 1991, the new Constitutional Court played a protagonist's role, staffed with judges wielding a new conception of judicial role and armed with expansive new powers.[170] In Chile, there was relatively little thinking about the relationship between the ambitious new rights proposals and the institutions needed to implement them.

In comparison to Colombia, the drafters in Chile placed little weight on the judiciary. This reflected the ambivalence that the left has traditionally had regarding the institution, which historically had a conservative reputation, although in recent years parts of the judiciary (particularly the Supreme Court) have developed a more progressive approach.[171] The draft constitution seemed particularly uncertain on the role of the Constitutional Tribunal, which would be renamed a Constitutional Court.[172] The distrust towards the Tribunal, which, as noted above, was traditionally part of Pinochet's plan to hem in democratic politics, ran very deep because of its conservative track record.[173] The appointments mechanism for the Constitutional Court would have been overhauled, and the institution itself would have been turned over immediately, with little transition period.[174] Thus, there was a clear effort to shift the ideological tendency of the institution. However, it was also weakened, even more than in the 2018 Bachelet draft. While the 2018 draft would have required a four-fifths supermajority to strike down a law on ex-ante review, the 2022 draft would have eliminated ex-ante review entirely.[175] The court's other source of cases—referrals from ordinary courts—would have been subject to new restrictions.[176] Unlike in Bachelet's 2018 draft, the constitutional complaint mechanism would not have been heard on appeal by the Constitutional Court but instead remained in the hands of the Supreme Court, as under the 1980 Constitution.[177] The Constitutional Court would therefore continue to exist but with substantially diminished powers. Unlike in Colombia, where the designers of the court brought together

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170. *See, e.g.*, Cepeda Espinosa, *supra* note 56, at 558.

171. *See* José Francisco García G. & Sergio Verdugo R., Activismo Judicial en Chile: ¿Hacia el Gobierno de los Jueces? [Judicial Activism in Chile: Towards the Rule of Judges?] 244 (2013). For a close read of changing jurisprudence dealing with social rights on the Constitutional Tribunal, see generally Jaime Bassa Mercado & Bruno Aste Leiva, *Mutación en los criterios jurisprudenciales de protección de los derechos a la salud y al trabajo en Chile* [*Shift in Jurisprudential Criteria for the Protection of the Rights to Health and Work in Chile*], 42 Revista Chilena de Derecho 215 (2015).

172. Chile 2022 Draft, *supra* note 155, art. 377.

173. *See, e.g.*, Javier Couso, *Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970–2010*, 89 Tex. L. Rev. 1517, 1533 (2011).

174. *See* Chile 2022 Draft, *supra* note 155, trans. prov. 45 (requiring the confirmation of the new Constitutional Court within six months and prohibiting the existing Constitutional Tribunal from hearing new cases).

175. *Id.* art. 381.

176. *See id.* arts. 378 (composition), 381.

177. *Id.* art. 119(6).

in its hands a powerful individual complaint mechanism with a sweeping form of abstract review, the Chilean Constitutional Court would have been given little power to lead the transition. If anything, the changes seemed designed to ensure that the Constitutional Court could not *hinder* the transition; in other words, that it would largely stay out of the way.

The situation with the ordinary judiciary was a little different, perhaps reflecting more optimism about the role of the Supreme Court and lower ordinary courts. The individual complaint mechanism mentioned above was expanded to include a broader set of rights, including social rights, environmental rights, and indigenous rights, mostly excluded from enforcement under the 1980 Constitution.[178] However, while the draft also made sweeping changes in appointment and administration mechanisms (most importantly by creating a new Judicial Council),[179] the changes to the composition of the ordinary judiciary would have been very gradual. The transitional provisions left existing personnel in place, while the newly lowered retirement age would not have applied to existing senior judges, and the fourteen-year term limit on Supreme Court judges would have applied only prospectively, starting from the date of the new constitution.[180]

All in all, the Chilean draft relied on the judiciary as a route of implementation in only a limited way. The legislature, of course, stands out as an alternative route. Yet here too, the relationship of the drafters to the institution was notably ambivalent. The new text included not only many new rights but also added a considerable amount of detail within those rights. As Versteeg and Zackin recognize, adding detail to constitutional provisions is a strategy for constraining legislative discretion, although whether it is effective in doing so is a more complicated question.[181] At the same time, the text is full of so-called "by law" clauses explicitly requiring that new laws be passed to regulate and expand on the constitutional provisions.[182] The drafters recognized the enormous volume of new legislation that would need to be passed for implementation purposes.

The transitional provisions, however, reflected little urgency or plan about the passage of these new laws. The provisions called upon Congress to pass a number of the new laws needed to implement the draft constitution and, in some cases, imposed timelines for legislative action.[183] However, in almost all cases, the transitional provisions did not impose any consequence on failure to

178. *See id.* art. 119.

179. *See id.* art. 342.

180. *See id.* trans. prov. art. 40.

181. *See* Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 Am. Pol. Sci. Rev. 657, 660 (2016).

182. On "by law" clauses, see Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 Int'l J. Const. L. 636, 637 (2012).

183. *See, e.g.*, Chile 2022 Draft, *supra* note 155, trans. art. 23 (among many other examples).

meet the timeline, nor did they create defaults or workarounds that would have allowed for alternative routes of implementation (such as unilateral presidential action).[184] In contrast, as we have seen in Colombia, the 1991 Constitution's transitional provisions gave then-President Cesar Gaviria extensive executive powers to enact new laws by decree. He used these powers to promulgate many of the building blocks of the new constitution.[185]

Most importantly, contrary to the traditional approach of the Chilean left, which was fixated on gradually changing the nature of legislative elections and processes, the 2022 Convention demonstrated a murkier vision of legislative change. It executed some traditional goals shared by the 2018 draft, including making the amendment rule more flexible and scrapping supermajority requirements for passing or reforming certain kinds of laws.[186] It would also have added a proportional number of reserved seats for Chile's Indigenous communities and placed a gender parity requirement on the Congress and other state institutions. Both of these shifts may have altered the contours of legislative politics over time, albeit in fairly unpredictable ways.[187] Other changes carried out by the Convention were more cosmetic or vague in nature, such as replacing the Senate with a new body called the Chamber of Regions.[188]

As with the judiciary, most of the changes to the design of the legislature would have been phased in very slowly. According to the transitional provisions, the existing Congress would have been left in place for a long time. For example, the replacement of the existing Senate with the new Chamber of the Regions would have occurred only after four years.[189] As a result, much of the implementation process would have been left in the hands of a Congress that was far more conservative than the Convention and which likely would have proven hostile to many of its goals. Perhaps distrusting both classical routes of implementation—judicial and legislative—the political independents who played a large role in the Convention pushed towards a third, more novel route of implementation: the creation of non-judicial independent accountability institutions. The draft maintained long-standing, high-capacity bodies, particularly the Chilean General Comptroller of the Republic (*Contraloría General de la República*),[190] a specialized ombudsperson for children's rights, and a

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184. *See, e.g.*, *id.* trans. art. 27 (stating that the President should present Congress bills dealing with health in eighteen months, and education within twenty-four months, and that Congress should pass these laws within twenty-four months of presentation but providing no explicit consequences for failure of either institution to act).

185. *See* Constitución Política de Colombia de 1991 [C.P.] trans. prov. arts. 5–6.

186. *See* Chile 2022 Draft, *supra* note 155, arts. 271, 383(2).

187. *See id.* arts. 161, 252(3).

188. *See id.* art. 254.

189. *See id.* trans. prov. art. 13(2).

190. *See id.* art. 351.

specialized ombudsperson for the rights of nature. It also added other bodies[191], like a national agency for the protection of data and a national water agency.[192] These new institutions were not given a role in implementing the constitution in the transitional provisions (which again emphasized the legislature), and indeed, they themselves would need to have been created by Congress before coming into existence. The sheer number of these institutions and the paucity of detail concerning them in the draft would suggest an obvious problem. Some of these institutions may never have been created;[193] others would have struggled to build institutional capacity.[194]

In sum, the 2022 draft reflects a substantial mismatch between the ambitions freighted on the text and its ability to implement those ambitions.

D. Sociological Utopianism in the 2022 Draft

Thus far, we have explained the aspects of "structural" utopianism in the 2022 Chilean text; now, this Section will turn to the "sociological" dimension, which relates to the interaction between a constitutional text and external constituencies, such as political parties, civil society, and the public. As noted above, the Convention was elected at a unique moment influenced by the 2019 protests. Therefore, the political environment was strongly both anti-right and anti-party. The resulting electoral rules, although agreed via consensus of most of the major political parties, were friendly to independent candidates and lists.[195] The result was a Convention that was both far to the ideological left of the Congress and included a clear majority of independent delegates, despite Chile's tradition of well-institutionalized parties.[196] Analysts pointed to the unusual electoral rules as playing a key role in spurring the problems produced by the draft, in part because they allowed a Convention composed of many delegates with very little or no prior political experience.[197]

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191. *See id.* arts. 123–125 (general human rights ombudsperson); *id.* arts. 148–150 (ombudsperson for nature); *id.* art. 126 (ombudsperson for children).

192. *Id.* art. 376.

193. *Id.* art. 144.

194. This happened to the administrative courts created on paper by the 1925 Constitution, but with design left for Congress via a by law clause, and which never existed in practice. *See* Luis Eugenio García-Huidobro & Sebastián Guidi, *Bertoldo's Court: Constitutional Delegation in the Design of Judicial Institutions*, 9 Lat. Am. Leg. Stud. 127, 184–87 (2021); *see also* Chile 2022 Draft, *supra* note 155, art. 161.

195. *See* Issacharoff & Verdugo, *supra* note 150, at 50; Aninat Sahli, *supra* note 153.

196. *See* Issacharoff & Verdugo, *supra* note 150; Tom Ginsburg & Isabel Álvarez, *It's the Procedures Stupid: The Success and Failures of Chile's Constitutional Convention*, 13 Glob. Const. 182, 189–91 (2024).

197. *See, e.g.*, Javier Couso, *Tras el fracaso constitucional, Chile quiere justicia social con gradualidad* [*Following the Constitutional Failure, Chile Seeks Social Justice Through Gradualism*], OpenDemocracy (Oct. 11, 2022), https://www.opendemocracy.net/es/fracaso-constitucional-chile-quiere-justicia-social-gradualidad/ [https://perma.cc/8SJX-JK93].

Many of the ideas in the 2022 draft came from grassroots civil society organizations that sprang up after the protests. These organizations acted as conduits on particular issues, such as the environment, which was an area of activism from which many delegates were drawn. At least some of this organization proved ephemeral as the energy behind the protests waned. The traditional parties reasserted themselves, and substantial elements of the Chilean right, center, and even left showed hostility (or indifference) to the new draft ahead of the September 2022 referendum, contributing to its defeat. Even if the draft had survived the referendum, the persistence or reemergence of hostile parties would have made implementation very challenging.

The referendum also provided possible evidence of mismatches between the draft and the views of the general public. Several provisions became flashpoints of controversy during the referendum campaign, including the definition of Chile as a plurinational state; some rights of Indigenous groups, such as restitution of land and prior consultation; and the right to abortion.[198] The tendency of delegates to defer major issues to the legislature and thus leave them open-ended, which almost certainly would have moved implementation to actors substantially to the right of the majority of voters, became a weakness during the referendum. For example, the right to abortion, as well as economic and social rights like the rights to healthcare, pensions, and education, were characterized by opponents as the most extreme possible versions of themselves. The former was portrayed as potentially an unlimited right (even though the text left open the possibility of limits via legislative definition) and the latter as a threat to existing systems of private provision and thus middle-class entitlements.[199]

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198. *See* Mauricio Morales, *Religious Voting in a Secularised Country: Evidence from Chile's 2022 Constitutional Referendum*, 13 SECULARISM & NONRELIGION 2, 11 (2024).

199. *See, e.g.*, Paula Molina, *Triunfo del "rechazo" | La (aparente) paradoja de Chile: 3 razones para entender el no a la nueva Constitución cuando casi el 80% estaba a favor de cambiarla* [*The "Reject" Victory | Chile's (Apparent) Paradox: 3 Reasons to Understand the "No" Vote on the New Constitution—When Nearly 80% Were in Favor of Changing It*], BBC NEWS MUNDO (Sept. 5, 2022), https://www.bbc.com/mundo/noticias-america-latina-62790749 [https://perma.cc/G5CQ-ERZN]; Javier Couso, *Making Sense of Chile's Failed Constituent Process*, INT'L J. CONST. L. BLOG (Oct. 4, 2022), https://www.iconnectblog.com/i-connect-symposium-on-the-chilean-constitutional-referendum-making-sense-of-chiles-failed-constituent-process/ [https://perma.cc/H4C9-SV9G]; Guillermo Pérez, *The Illusion of Indigenous Representation*, INT'L J. CONST. L. BLOG (Sept. 29, 2022), https://www.iconnectblog.com/i-connect-symposium-on-the-chilean-constitutional-referendum-the-illusion-of-indigenous-representation/ [https://perma.cc/HEH2-U2MF]; Sergio Verdugo, *The Paradox of Constitution-Making in Democratic Settings. A Tradeoff Between Party Renewal and Political Representation?*, INT'L J. CONST. L. BLOG (Sept. 24, 2022), https://www.iconnectblog.com/i-connect-symposium-on-the-chilean-constitutional-referendum-the-paradox-of-constitution-making-in-democratic-settings-a-tradeoff-between-party-renewal-and-political-representation/ [https://perma.cc/PFF8-N3XL].

More broadly, Chile may furnish some evidence that political polarization deepens the likelihood of a utopian outcome. There, electoral outcomes swung wildly between extremes during the country's two constitution-making episodes. A group of quite left-wing actors dominated the elections to write the 2022 draft; a group of extreme right-wingers dominated the second go-around in 2023.[200] Each group seems to have misjudged public opinion, believing that a constitution laden with their own side's policy goals and ideological content would prove popular with the public precisely because of their respective electoral mandates and misreading the ephemeral nature of their respective wins. Both sides were wrong, and both drafts lost easily in popular referendums.[201] Polarization heightens risks that electoral outcomes will diverge further from the median voter. It also makes negotiation across ideological lines less likely, and neither the 2022 nor 2023 Conventions saw a serious effort to make deals with the losing side or with the (largely missing) center.

IV. The Dangers of Utopian Constitutionalism

As the examples in the previous Part help illustrate, utopian constitutionalism carries serious risks for a project of democratic constitutional change and consolidation. We highlight two risks here: First, the danger that a utopian constitutional project will distract from other forms of legal and non-legal change (an elaboration and adaptation of a longstanding radical critique of reliance on law); and second, the long-term risks of constitutional disenchantment arising from unkept constitutional promises. Popular disenchantment with the transformative promise of a constitution may lead to a flow-on loss of faith in the constitution as a source of protection for the minimum requisites of electoral democracy, feeding problems of democratic "rot" or "erosion."

In prior work, we have argued that democracy can be understood in "thinner" and "thicker" ways, as well as encompassing a variety of different constitutional commitments.[202] A common theme of almost all democratic theory, however, concerns the importance of regular, free and fair multi-party elections in which

200. *See* Benedikter & Zlosilo, *supra* note 52.

201. For sources explaining the failure, see Issacharoff & Verdugo, *supra* note 150, at 58–61. *See generally* Sergio Verdugo & Luis Eugenio García-Huidobro, *How Do Constitution-Making Processes Fail? The Case of Chile's Constitutional Convention (2021–22)*, 13 Glob. Const. 154 (2024); Rosalind Dixon & Marcela Prieto Rudolphy, *Parity Constitutionalism*, 13 Glob. Const. 210 (2024); Oran Doyle, *After the Referendum: Analysis of Failure*, 3(2) Compar. Const. Studies 181 (2025); David Landau & Rosalind Dixon, *Sobre fracaso constitucional, constitucionalismo transformador y utopismo* [*On Constitutional Failure, Transformative Constitutionalism, and Utopianism*], 21 Int'l J. Const. L. 1549 (2023); Couso, *supra* note 199.

202. *See* Dixon & Landau, *supra* note 9, at 276–78; *see also* Richard A. Posner, Law, Pragmatism, and Democracy 130 (2003) (calling the thicker and thinner versions type 1 and type 2 democracy).

all citizens have access to certain political rights and freedoms (such as the rights to vote, speech, assembly, and association) and a system of institutional "checks and balances" capable of protecting these other requisites for true self-government.[203] These same understandings of the "democratic minimum core" are reflected in the actual practices of constitutional democracies worldwide.[204] For this reason, we argue, it is this core that should guide judgments about the minimum—if not maximum—requirements for constitutional democracy. Disenchantment with transformative constitutionalism may spill over and threaten this thin foundational set of democratic constitutional commitments.

A. *The Risk of Deflection*

The alternative to formal constitutional change is rarely *no change*; rather, it is the adoption of change through different pathways and on a different timescale. Broadly speaking, there are two alternatives to transformative constitutionalism: "revolutionary" models of change, which involve large-scale, bottom-up, and often more rapid forms of social, political, and economic rupture; and pragmatic, sub-constitutional models of change, which involve slower, more incremental forms of change through a change of judicial, legislative, and policy pathways.[205]

There are long-running debates among left-leaning U.S. scholars about the merits of liberal legalism as a vehicle for social, political, and economic change. Civil rights lawyers have argued for the benefits of rights and legal reform movements as vehicles for change—including the capacity of law to help catalyze rights consciousness and social mobilization.[206] However, Marxist scholars and, subsequently, Critical Legal Studies ("CLS") scholars have emphasized the conservatizing force of law—arguing that it co-opts those seeking change into "reforming" rather than overthrowing unjust legal, political, and economic structures and adds a veneer of legitimacy to those structures without making any real inroads in changing their fundamentally oppressive character.[207]

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203. *See* Dixon & Landau, *supra* note 9, at 277.

204. *See id.*; Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 Int'l J. Const. L. 606, 629–30 (2015).

205. For a discussion of the choice between a reformed liberal democratic constitutionalism and more revolutionary constitutionalism, see Theunis Roux, *Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa*, 57 Verfassung In Recht And Übersee 5, 7 (2024).

206. *See generally, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, *in* Feminist Legal Theories 23 (Karen Maschke ed., 2013); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561 (1984).

207. *See generally, e.g.*, Duncan Kennedy, A Critique of Adjudication: Fin de Siecle (1997).

As we noted above, this critique has taken on new life and form in the Global South as a critique of transformative constitutionalism as a democratic constitutional project.[208] In South Africa, J.M. Modiri famously drew on post-colonial, CLS, and post-structural critiques of law and liberal legalism to argue that:

> [T]he Constitution's promise of dignity, equality and freedom for all as well as any legal progress made in the area of equality, socio-economic rights and access to justice are negated and rendered facile and irrelevant in the race of an unaccountable economic system that has generated huge inequalities while also deepening and leaving those of the past intact.[209]

Rather than re-invest in transformative constitutionalism, Modiri argued that Black South Africans would do better to "'defatalize the present' and work towards the creation of radical alternatives."[210] Sanele Sibanda similarly argues that faith in constitutionalism is a misplaced distraction: "transformative constitutionalism's ostensible weddedness to liberal democratic constitutionalism . . . makes it ill-suited for achieving the social, economic and political vision it proclaims."[211]

For some CLS and post-colonial scholars, the trade-off is between attempts to achieve progressive, egalitarian change through a process of formal constitutional amendment or replacement versus more revolutionary political movements and means. Hence, the cost of transformative constitutionalism is the lost chance to pursue more "radical innovation or experimentation" both politically and economically.[212]

We are more skeptical of the potential of radical, revolutionary forms of political change—and more concerned about the risks posed by them. However, we emphasize that the perceived failure of transformative constitutional discourse, as instantiated by the risk of utopianism, may raise the risk that political and social actors will resort to more radical alternatives.

The more salient trade-off, in our view, is between different forms of legal change—that is, a focus on formal constitutional replacement or amendment versus reliance on other avenues, such as the courts, legislation, and regulation. These alternative avenues are often more incremental, but over time they too may effectuate changes that are effectively constitutional in scope. In many cases, they may demand less concentration and expenditure of political energy.

One alternative to formal constitutional amendment in liberal democratic constitutional systems is a process of constitutional (re)interpretation

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208. *See* Roux, *supra* note 205, at 41–42.
209. Joel Modiri, *Law's Poverty*, 18 Potchefstroom Electron. L. J. 224, 261 (2015).
210. *Id.* at 262.
211. Sibanda, *supra* note 10, at 8.
212. *Id.* at 499.

by courts.[213] Judicial interpretation does not usually have the same expressive value as formal constitutional change, and it often occurs more incrementally.[214] However, as the concept of utopian constitutionalism implies, judicial decisions are important to implementing formal constitutional change. Courts can often interpret existing norms in ways that achieve similar forms of informal change to proposed formal constitutional changes.[215]

Another channel for constitutional reform involves legislative change, especially the passage of quasi-constitutional statutes or "super statutes."[216] Ordinary statutes usually have a lower level of formal entrenchment than constitutional provisions. From a practical perspective, however, they can achieve a similar level of entrenchment politically, and they can have a similarly sweeping impact on the constitutional order. Some statutes gain popular and elite acceptance in ways that make them extremely politically costly to amend or repeal: for example, the Social Security law in the United States. Likewise, some statutes become what Eskridge and Ferejohn call "super-statutes" that work deep, enduring changes to political and social practices akin to major constitutional changes.[217]

In this sense, both the courts and the legislature can be impactful alternatives to formal constitutional change. In a less visible sense, so too can efforts to build regulatory capacity or to shift bureaucratic behavior on programs that set social policy. Bureaucracies, particularly in the Global South, are often plagued by problems of state incapacity and corruption; in this sense, ground-level interventions on the details of social policy can prove quite important, if also time-consuming and difficult.[218]

Our broad point is that a decision to pursue formal constitutional change, including amendment but especially constitution-making, will plausibly make it more difficult to pursue other routes at least simultaneously. Social movements and both public and elite attention will fixate on the most visible route. Meanwhile, the constellation of popular attention, social movement activism,

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213. *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457, 1462 (2001); Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, *in* Comparative Constitutional Law 96, 99–100 (Tom Ginsburg & Rosalind Dixon eds., 2011).

214. *See generally, e.g.*, Rosalind Dixon, *Updating Constitutional Rules*, 2009 Sup. Ct. Rev. 319 (2009); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996); Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 Colum. L. Rev. 1482 (2007).

215. *See* Strauss, *supra* note 213, at 884 (arguing that in U.S. constitutionalism, formal amendments have been a "sidelight" to judicial reinterpretation and other paths).

216. *See generally* William N. Eskridge Jr. & John A. Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215 (2001).

217. *See id.* at 1242 (referring to the "constitution-bending effects" of some U.S. statutes).

218. *See* David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C.L. Rev. 1501, 1512 (2014).

and elite support necessary to achieve either ambitious constitutional or ambitious legal change may not recur for a long time.

The problem of utopian constitutionalism sharpens these trade-offs. A successful effort at drafting a transformative constitution should lead to a cascade of judicial, legislative, and regulatory changes, as discussed in detail above. However, a text that is seen as too far out of step with popular and elite sentiment or which fails to develop structural avenues for change to occur will be less likely to do so.

Consider Chile in this light. One of the puzzles of the 2019 social protests is that political elites and social movements landed on constitution-making as an exit to the crisis, now freighted with much broader expectations and goals than the traditional leftist goal of ending the counter-majoritarian features of the 1980 text. It is not at all obvious that the inchoate demands for mitigating inequality and expanding dignity in those protests were best served by constitutional replacement, as opposed to more prosaic channels of legislative, judicial, and bureaucratic change. At the moment, however, the high visibility of constitution-making, coupled with the long-standing nature of the demand among left-leaning political actors, coincided and led to a constitutional moment. Indeed, an overwhelming percentage of voters (nearly eighty percent) voted to enter a new constitution-making process.[219]

One plausible answer to this challenge would be that the 1980 Constitution itself, even in a highly modified form, was too rigid and tilted in favor of right-wing interests to allow the kinds of changes that were necessary via other routes. This was essentially the argument in Colombia in 1991, where a broad coalition of actors saw the old Constitution (and the institutions it created, such as the Congress and Supreme Court) as blocking needed change.[220] Peculiarly, the movements supporting constitutional replacement in Chile moved away from this traditional leftist argument in favor of more overtly transformational constitution-making just at the time of the protests.

Obviously, the failure of the 2022 (or 2023) drafts to get enacted puts a pretty clear face on the trade-off. The enormous public attention and elite support for sweeping change could have opened vast space for extensive legislative reforms. The broad support, which extended temporarily even to center-right political parties, would likely have also enabled those legislative changes requiring heightened majorities under the 1980 Constitution. Likewise, political actors could have opted for an ambitious program of constitutional amendment in lieu

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219. *See* Pascale Bonnefoy, *'An End to the Chapter of Dictatorship': Chileans Vote to Draft a New Constitution*, N.Y. Times (Oct. 25, 2020), https://www.nytimes.com/2020/10/25/world/americas/chile-constitution-plebiscite.html [https://perma.cc/9DVE-443E].

220. *See, e.g.*, Julieta Lemaitre, *The Peace at Hand: War and Peace in Colombia's 1991 Constituent Assembly*, Yale Law School, SELA, May 2012, https://law.yale.edu/sites/default/files/documents/pdf/sela/SELA12_Lemaitre_CV_Eng_20120511.pdf [https://perma.cc/J6ZS-4A7Q].

of wholesale constitution-making, as suggested by Bachelet's earlier project. The failure of the 2022 draft to get enacted largely wasted that energy, and it seems unlikely to recur anytime soon. In this sense, the perception among most elites and the public that the 2022 draft had gone too far proved very costly indeed—an issue that would repeat when the 2023 draft was rejected by similar margins and on similar grounds because of a perceived over-alignment with the right.[221]

Maybe the subtler question is—even assuming the 2022 draft had gone into effect—would it have been the best use of energy by political elites, social movements, and the public? Given the relative paucity of structural pathways created by the draft to achieve its goals, an issue analyzed in great detail in the prior part, we are uncertain that the answer is yes. It is unclear, at best, whether the draft would have catalyzed the series of judicial, legislative, and bureaucratic changes that would have achieved transformation. In that sense, both the sociological and structural utopianism found in the 2022 Chilean draft made it a less wise alternative to more mundane, but potentially more effective, forms of change.

B. The Risk of Disenchantment

A second danger is what one might call constitutional disenchantment, or a loss of faith in a (and perhaps even any) democratic constitutional order as capable of meeting the needs and aspirations of citizens. This is a general risk inherent to any democratic constitutional project: Constitutions that fail to deliver on their promise risk contributing to a general loss of faith in democracy among citizens. This risk, however, increases along with the ambition of the change promised by a specific constitutional instrument or its claim to be transformative in character.

When constitutional changes that promise great change are adopted but deliver little or no change in practice, citizens may reasonably start to question the value of democratic constitutional norms. While the focus of this skepticism may initially be on ostensibly transformative or aspirational provisions, there is a very real risk of it spreading to the entire constitutional system, including the "democratic minimum core" or the basic system of democratic contestation.[222]

Most citizens know only a limited amount about their country's constitutional arrangements. If those arrangements are shown to be failing in some material way, it will therefore be rational for them to attribute that failure to the constitution *generally*. However, the danger of this kind of skepticism is that

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221. *See* Issacharoff & Verdugo, *supra* note 150; Verdugo & García-Huidobro, *supra* note 201; Cusco, *supra* note 197.

222. *See generally* Dixon & Landau, *supra* note 9.

it can undermine broader democratic support not just for a specific constitution or set of constitutional arrangements, but also for democratic constitutionalism more generally—including constitutional protections of electoral democracy, civil and political rights, and the role of courts in the enforcement of the constitution.

Consider, as an example, the South African experience regarding the inclusion of socio-economic rights in the 1996 Constitution and constitutional aspirations for social and *economic* transformation. There was vigorous debate among key constitutional thinkers in South Africa in the mid-1990s about the merits of including economic and social rights and similar provisions. Figures such as (later Justice) Albie Sachs and Etienne Mureinik argued that it was essential for the 1996 Constitution to contain aspirations for economic change if it was to speak to the concerns of Black South Africans in the transition to democracy.[223] Dennis Davis, in contrast, cautioned against the potential disillusionment associated with the inclusion of social rights.[224] He condensed his argument as follows:

> Once social and economic rights are included in a bill of rights, the constitution trumpets to the society at large that each is entitled to demand enforcement of such rights whether they be rights to housing, to employment, to medical care or to nutrition. To include these rights as being of equivalent status to first-generation rights is to raise expectations within a society that these rights can indeed be enjoyed by all. For members of society to then find that all that is entailed thereby is a process of negative constitutional review is to create a situation where expectations are raised only to be dashed on the rock of a technical legal review.[225]

Almost thirty years after the enactment of the 1996 Constitution, one can still argue about who has had the better of the argument. The Constitutional Court has been restrained in its approach to the enforcement of economic and social rights, rejecting the notion of a "minimum core" to various rights and an individualized—as opposed to structural or systemic—approach to enforcement.[226] This restrained approach has been criticized by a number of domestic scholars.[227] However, the court has also issued several landmark decisions, and

223. *See, e.g.*, Justice Albie Sachs, *Social and Economic Rights: Can They Be Made Justiciable*, 53 SMU L. Rev. 1381, 1385 (2000). *See generally* Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S.A. J. Hum. Rts. 451 (1992).

224. *See generally* Dennis M. Davis, *Socioeconomic Rights: Do They Deliver the Goods?*, 6 Int'l. J. Const. L. 687 (2008).

225. Dennis Davis, *The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, S. Afr. J. Hum. Rts. 475, 484–85 (1992).

226. *See, e.g.*, *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC) (rejecting the minimum core argument) (S. Afr.); *Soobramoney v. Minister of Health (Kwazulu-Natal)*, 1998 (1) SA 765 (CC) (S. Afr.) (declining to order dialysis for an individual petitioner).

227. *See* Bilchitz, *supra* note 34, at 150.

careful work has shown that enforcement of social and economic rights under the 1996 Constitution has led to real improvements in access to critical forms of healthcare, emergency housing, protection against arbitrary eviction, and, for communities living in informal housing, a seat at the table to negotiate the terms of any transition from informal to formal housing.[228]

While there has clearly been meaningful economic change in South Africa, in part aided by the enforcement of constitutional social and economic rights, poverty levels remain extremely high. The Constitutional Court's approach to social and economic rights enforcement has also been modest and incremental and, arguably, has made only small inroads in addressing ongoing problems, such as high levels of unemployment (which sits at roughly thirty percent nationally) and lack of access to formal housing.[229] In addition, social rights guarantees have done almost nothing to address problems of economic inequality. For the most part, the Constitutional Court's decisions on social rights have focused on the protection of the "most vulnerable" South Africans and have hence done little to shift resources toward, or increase access to, government services for a larger group of low-income citizens.[230]

Of course, as we have discussed, legislation is also a plausible (and oftentimes much more important) route to the implementation of social rights, but the record here seems similar. The adoption of the 1993 and 1996 interim and final Constitution in South Africa was accompanied by the passage of both large-scale affirmative action programs in employment and company ownership [the 1994 Black Economic Empowerment ("BEE") and 1998 Employment Equity Acts] that aimed to reduce intersectional forms of racial and economic inequality.[231] However, many critics point out how the BEE in particular perpetuated the concentration of economic power among a white and newly minted black

228. *See generally, e.g.*, Rosalind Dixon & Theunis Roux, *Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa*, *in* From Parchment to Practice: Implementing New Constitutions 53 (Tom Ginsburg & Aziz Z. Huq eds., 2020); Malcolm Langford, *Housing Rights Litigation:* Grootboom *and Beyond*, *in* Socio-Economic Rights in South Africa: Symbols or Substance? 187 (Malcolm Langford et al. eds. 2013). For earlier statements of the importance of a purposive, substantive approach to adjudication, see Sibanda, *supra* note 10, at 492.

229. *See, e.g.*, Jacques Morisset, *To Reduce South Africa's Unemployment, Make Work More Attractive*, World Bank Blogs (Oct. 23, 2023), https://blogs.worldbank.org/en/africacan/reduce-south-africas-unemployment-make-work-more-attractive [https://perma.cc/5MT7-5ML3]; Koketso Moeti, *South Africa's Deadly Housing Crisis*, Project Syndicate (Oct. 12, 2023), https://www.project-syndicate.org/commentary/johannesburg-tragic-fire-underscores-housing-crisis-by-koketso-moeti-2023-10 [https://perma.cc/6ZDD-ESYW].

230. On the "most vulnerable" language, see *Government of the Republic of South Africa v. Grootboom* 2001(1) SA 46 (CC) (S. Afr.).

231. For a useful discussion, see generally, for example, Raymond Portocarero, *The Effect of the Black Economic Empowerment Act of South Africa: Amended Codes of Good Practice 2013* (Master's Thesis, Erasmus University Rotterdam, 2021) (on file with authors).

economic elite.[232] Indeed, this is one reason that the ANC government has sought to update and expand the scope of BEE to focus on government procurement processes as a vehicle for driving more widespread changes in economic ownership and employment.[233] On most leading measures, economic inequality has not, in fact, improved meaningfully since the transition from apartheid.[234]

This economic landscape has also coincided with—and arguably contributed to—growing discontent with the 1996 Constitution and the democratic order it creates.[235] As Sandy Liebenberg notes, while many claims that the Constitution represents "an impediment to fundamental transformative and redistribution of resources" are "either populist rhetoric or a strategy to divert attention from government failures and corruption," they have "struck a chord," especially among young South Africans, against this backdrop of entrenched poverty and inequality.[236] Jackie Dugard suggests that the discontent extends to the court, noting that the "remoteness" of its jurisprudence "from the lives of the majority of South Africa's residents" renders it "weaker in the face of increasing hostility from the polity."[237]

This has led to rising criticism of the constitutional order within South Africa in the last decade or so. In 2011, N. Ramatlodi, a senior ANC official, expressed doubts about the constitutional order.[238] In 2017, the "progressive professionals forum" publicly called for the replacement of the Constitution with a more majoritarian, political constitutional model, suggesting that it was a "ploy" by the National Party and its supporters "to ensure that the government's intervention was somewhat limited in addressing the country's structural challenges."[239] In 2022, ANC Minister of Transport Lindiwe Sisulu criticized the Constitution as a "neo-liberal" document akin to a form of pain relief that did not address the underlying "social and economic legacies" of apartheid and

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232. *See generally* Roger Tangri & Roger Southall, *The Politics of Black Economic Empowerment in South Africa*, 34 J. S. Afr. Stud. 699 (2008); Roger Southall, *The ANC & Black Capitalism in South Africa*, 31 Rev. Afr. Pol. Econ. 313 (2004).

233. *See, e.g.*, Preferential Procurement Policy Framework Act 5 of 2000 (S. Afr.); Broad-Based Black Economic Empowerment Act 53 of 2003 (S. Afr.).

234. *See* Antony Sguazzin, *South Africa Wealth Gap Unchanged Since Apartheid, Says World Inequality Lab*, *TIME* (Aug. 5, 2021), https://time.com/6087699/south-africa-wealth-gap-unchanged-since-apartheid/ [https://perma.cc/HP7C-NPUN].

235. *See* Sibanda, *supra* note 10, at 406.

236. Sandra Liebenberg, Book Review, 16 Int. J. Const. L. 289, 296 (2018) (reviewing Ray, *supra* note 118).

237. Jackie Dugard, *Courts and Structural Poverty in South Africa: To What Extent Has the Constitutional Court Expanded Access and Remedies to the Poor?*, *in* Constitutionalism of the Global South, *supra* note 16, at 293, 323.

238. Ngoako Ramatlhodi, *ANC's Fatal Concessions*, TimesLIVE (Sep. 1, 2011), https://www.ilrigsa.org.za/wp-content/uploads/2020/06/Ramathlodi-2011.pdf [https://perma.cc/2W38-77DT].

239. Roux, *supra* note 205, at 62–63.

colonialism.[240] Perhaps most importantly, this economic landscape has fueled the rise of the Economic Freedom Fighters' ("EFF") party, a self-proclaimed "radical, Left, anti-capitalist" movement and party seeking sweeping changes to South Africa's economic and political system.[241] The EFF calls for the "capture [of] political and state power through whatever revolutionary means possible to transform the economy to benefit all, Africans in particular."[242]

We have discussed South Africa in some depth here because it illustrates quite well the tensions within transformative constitutionalism and the fuzzy lines between transformation and utopianism, but one could construct similar narratives about other jurisdictions that are well-regarded as examples of transformative constitutionalism. Colombia, despite a more aggressive Constitutional Court, has faced somewhat similar outcomes. Some particular social programs have been greatly improved, but an overall impact on outcomes like inequality is less discernible, and popular discontent with the outputs of the country's constitutional democracy seems to be growing.[243]

Our point is not that transformative constitutionalism is pointless, but rather that it is a demanding, long-term project under the best circumstances. The old argument against the inclusion of economic and social rights in the new post-Cold War "third wave" constitutions was that they would weaken commitments to democratic constitutionalism by making promises that cannot be kept.[244] This argument was clearly overstated but nonetheless contained an important kernel of truth, even where transformation is viewed as relatively successful. It drew attention to the need for a constitution to contain the strongest possible institutional pathways for the realization of new rights. And perhaps to be a bit less ambitious, and more realistic, about what can be achieved.

V. Lessons for Transformative Constitutionalists

Chile's 2022 drafting process resonated very loudly in Latin America and around the world. We fear that the widespread branding of the experience as a "failure" with immense political and social cost may stain broader efforts at

240. *See id.*

241. Economic Freedom Fighters, Eff Constitution: Adopted in 2nd National People's Assembly 4 (Dec. 2019), https://effonline.org/wp-content/uploads/2024/01/FINAL-EFF-CONSTITUTION-02.03.2020.pdf [https://perma.cc/EZA2-92HC].

242. *Id.* at 9.

243. *See* Manuel Jose Cepeda Espinosa & David Landau, Colombian Constitutional Law: Leading Cases 147–49 (2017). *See generally* Dixon & Landau, *supra* note 204; César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 Tex. L. Rev. 1669 (2011).

244. *See, e.g.*, Cass R. Sunstein, *Against Positive Rights*, 2 E. Eur. Const. Rev. 35, 36–37 (1993) (arguing that inclusion of social rights could have dangerous effects in post-communist countries).

transformative constitutionalism regionally and globally.[245] At the same time, the Chilean experience offers important clues as to the ways that transformative constitutionalism may slouch towards utopianism. In that vein, this Part offers suggestions on ways in which the lens of utopianism might be used to cast a critical eye on ways in which transformative constitutionalism is put into practice. We do not, of course, aim to be comprehensive, and while Chile is our jumping-off point, we also range beyond it.

Additionally, we emphasize one key point that makes generalizing from the Chilean experience tricky—its problems were a mix of bad luck and highly particularistic failures, which are unlikely to be repeated, as well as broader issues more characteristic of the practice of transformative constitutionalism regionally and globally. Indeed, in many respects, the 2022 Chilean draft reflected a culmination of transformative currents of thought within Latin America. Our main concern is with this broader set of factors and what we can learn from them.

A. *Processes of Constitutional Change: Risks of (Excessive) Popular Participation*

Unlike thirty years ago, when Jon Elster fretted about the absence of literature on constitution-making processes, there is now a vast scholarly and policy treatment on the subject.[246] However, firm conclusions remain elusive in both quantitative and qualitative work.[247] One of the most consistent recommendations from constitution-making practitioners, such as those affiliated with international governmental and non-governmental organizations that assist drafters, has been a recommendation towards expansive popular participation.[248] Some work has gone so far as to suggest that there may be an emerging international human right to such participation.[249]

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245. *See* Eduardo Aleman & Patricio Navia, *Chile's Failed Constitution: Democracy Wins*, 34 J. Dem. 90, 96–99 (2023).

246. Elster, *supra* note, at 364. For recent overviews, see generally Comparative Constitution Making (David Landau & Hanna Lerner eds., 2019); Constitution Making (Sujit Choudhry & Tom Ginsburg eds., 2016); Constitution Makers On Constitution Making (Tom Ginsburg & Sumit Bisarya eds., 2022).

247. For one significant attempt to learn from quantitative data, see generally Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 Ann. Rev. L. & Soc. Sci. 201 (2011).

248. *See* Jeremy Ellis, Constitutional Mandates: Foundations for Successful Democratic Constitutional Replacement 3 (draft on file with the authors); Mark Tushnet, *Constitution-Making: An Introduction*, 91 Tex. L. Rev. 1983, 1994 (2013); Ginsburg et al., *supra* note 247, at 214–19; Vivien Hart, *Democratic Constitution Making* 11–12 (United States Institute of Peace, Special Report No. 107, July 2003); Erin C. Houlihan and Sumit Bisarya, *Practical Considerations for Public Participation in Constitution-Building: What, When, How and Why?* (International IDEA Policy Paper No. 24, 2021).

249. *See generally* Thomas M. Franck & Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, *in* Framing the State in Times of Transition:

The scholarly treatment of popular involvement is more critical. Some work questions the extent to which popular involvement actually shapes constitutional texts.[250] Scholars have instead tended to emphasize *elite* inclusion of all major political forces, and potentially consensus between those forces, as the key to good outcomes like a deepened, rather than threatened, democracy.[251] According to this line of scholarship, the key to an optimal constitution-making process is to have most major political groupings (such as parties) at the table rather than getting the public directly involved at various stages.

Utopian constitutionalism bears on this debate by suggesting risks of an overemphasis on popular participation at the expense of old-guard political elites and seasoned political Parties. Popular participation in constitution-making offers some obvious benefits. It increases the degree to which constitutions can claim to have true democratic, political legitimacy, and it can increase popular support for, or allegiance to, a new democratic constitutional order. Additionally, social movements and advocacy organizations can at least sometimes provide expertise and energy in a process of popular-driven constitutional change.[252]

There is nonetheless a key role for constitutional experts or "elites" in a process of constitutional drafting as legal or technical experts or political leaders capable of judging what degree of change is realistic or achievable within any given political context or moment. Political elites can also play an important informational role in supporting successful processes of transformative constitutional change. Those with long experience in electoral politics have greater exposure to the views of their fellow citizens. They also have stronger personal and career incentives to understand those views accurately. In short, heavy involvement of experienced political elites plausibly reduces risks of both structural and sociological utopianism: the former because those elites are good at understanding how to achieve practical political change, and the latter because they are usually also good at understanding and adjusting to popular

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Case Studies in Constitution-Making 3 (Laurel E. Miller, ed., 2010) [hereinafter Framing the State]; Vivien Hart, *Constitution Making and the Right to Take Part in a Public Affair*, *in* Framing the State, *supra* note 249, at 20.

250. *See* Alexander Hudson, The Veil of Participation: Citizens and Political Parties in Constitution-Making Processes 3 (2021). *See generally* Abrak Saati, *Participatory Constitution-Making as a Transnational Legal Norm: Why Does It 'Stick' in Some Contexts and Not in Others?*, 2 U.C. Irvine J. Int'l Transnat'l Comp L. 113 (2017).

251. *See, e.g.*, Donald L. Horowitz, Constitutional Processes and Democratic Commitment 92–123 (2021) (arguing that the key to successful process is relative consensus). *See generally* Gabriel L. Negretto & Mariano Sánchez-Talanquer, *Constitutional Origins and Liberal Democracy: A Global Analysis, 1900–2015*, 115 Am. Pol. Sci. Rev. 522 (2021) (finding empirically that constitutions written by multiple political forces result in better democratic outcomes than those written unilaterally).

252. *See generally, e.g.*, Hélène Landemore, *When Public Participation Matters: The 2010–2013 Icelandic Constitutional Process*, 18 Int'l J. Const. L. 179 (2020).

sentiment.[253] Advocacy organizations and citizens with less political experience, in contrast, may be more likely to make both kinds of mistakes.[254]

The Colombian process of 1991 had some degree of public participation in stages—the entry referendum and receipt of proposals by various civil society actors and citizens, but it was dominated by political elites who comprised an interesting mix of old guard political parties (the Liberals and Conservatives) and newcomers, including both dissident members of the old parties and a demobilized guerrilla organization.[255] The mix included one ex-president and an enormous amount of overall political experience, aided by an allied and experienced Liberal President Gaviria and his team.[256] The result was a text that seemed to balance aspiration and achievement of structural change fairly well.

In contrast, the Chilean process had much less involvement by the established political parties. The irony is that the design of the process was hashed out in a multi-party pact involving most of those parties, and it was designed fundamentally to give all the major political forces a seat at the table.[257] In particular, a requirement of two-thirds for the Convention to approve its rules and voting procedures basically guaranteed that the new draft itself would require approval by a two-thirds vote.[258] However, the rules were also hashed out at a very anti-party moment and thus deviated from past practice, making it very easy for independent movements to run candidates on equal terms.[259] The combination of rules and context, as explained above, resulted in a Convention dominated by political newcomers and independents, with most established parties having only a weak presence and relatively little political experience on display.

The result was a difficult process involving costly negotiations to reach the two-thirds threshold.[260] The high-capacity policy think tanks associated with the established parties across the spectrum had little influence over the text. Therefore, ideas may have been less tied to the kinds of structural pathways that had historically achieved change in Chilean politics. While the parties (even those on the left) were quite marginalized at the time the Convention

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253. Gabriel Negretto, *Constitution-Making and Liberal Democracy: The Role of Citizens and Representative Elites*, 18 Int'l J. Const. L. 206, 213 (2020) (arguing that citizens and groups focus more on rights provisions than on structural change).

254. Tushnet, *supra* note 248, at 1987–88; Ginsburg et al., *supra* note 247, at 214–19; Hart, *supra* note 249, at 11–12.

255. *See, e.g.*, Cepeda Espinosa, *supra* note 56, at 549–50.

256. For an account written by Gaviria's chief negotiator with the Assembly, see generally de la Calle, *supra* note 58; *see also* Cepeda Espinosa, *supra* note 56, at 249–51 (emphasizing the role played by Gaviria's team in constructing the new Constitutional Court).

257. *See* Couso, *supra* note 128, at 244.

258. Constitución Política de la República de Chile [C.P.] art. 133.

259. *See* Issacharoff & Verdugo, *supra* note 150, at 48.

260. *See* Ginsburg & Álvarez, *supra* note 196, at 187–88.

was called, they seemed to regain strength over the course of the process. The result is that they were in some position to mobilize opposition before the exit referendum, a role which rightist, centrist, and even some center-left party leaders played.[261]

Gargarella has argued that it was an error to have an exit referendum that could kill the process after the draft was completed.[262] However, it strikes us as a potentially worse outcome to permit a text that was so heavily opposed by a decisive majority of ordinary citizens and political elites (sociologically utopian, in our terminology) to go into effect. An unpopular text, especially one opposed by political elites, would have been especially difficult to implement. Continuing opposition to the text would also have fed further instability by feeding calls for further constitutional change or replacement.

Chile is not the only constitution-making process where the marginalization of traditional political parties proved problematic. Iceland offers another example with some striking similarities. Like the Chilean constitution-making process, the Icelandic process was initiated during a period of deep distrust in political parties and traditional political actors, in that case spurred by the 2008 financial crisis. The result was a drafting body composed largely of political outsiders who relied on an innovative set of (largely digital) tools to encourage popular participation through a kind of crowd-sourcing.[263] Alexander Hudson has shown that the public not only participated at relatively high rates, but also had a relatively strong influence on the constitutional text.[264] However, by the time the draft was complete, the traditional political parties and elites had recuperated much of their power. The design of the process left the ordinary legislature with full power to determine what to do with the completed draft prepared by the Assembly, and thus, political elites were able to kill the effort simply by declining to move forward.[265]

The implications of these arguments for the design of processes of constitutional change seem important, if not always obvious. One is to reinforce the importance of processes that are in large part led by old-school parties and political movements rather than primarily or exclusively by ordinary citizens or political outsiders. To some degree, though, such a recommendation feels like it

261. René Tapia, *When Ideology Trumps Deliberation: Evidence from Chile's 2022 Constitutional Proposal*, 2025 PS 1, 2–4 (showing how opposition from the right and parts of the center-left doomed the draft).

262. *See generally* Roberto Gargarella, *Why Are "Exit Referendums" Undesirable?: The Case of Chile (2020–2022)*, 1 Eur. Hum. Rts. L. Rev. 32 (2023).

263. Landemore, *supra* note 252, at 188 (describing the Assembly as one of "amateurs"). *See generally* Thorvaldur Gylfason, *The Anatomy of Constitution Making: From Denmark in 1849 to Iceland in 2017*, *in* Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives 217 (Gabriel L. Negretto ed., 2020).

264. *See* Hudson, *supra* note 250, at 113–37.

265. *See* Gylfason, *supra* note 263, at 229–30.

is swimming upstream both in practice and scholarship.[266] Indeed, a prominent critique of transformative constitutionalism identifies it as *too elite* in nature or insufficiently driven by popular political movements.[267] Yet both the Chilean and Icelandic examples may suggest that the death of parties may have been called prematurely. Parties have surely lost legitimacy and popularity, but there is still no clear alternative when it comes to linking the populace and government to changes in law and policy.[268]

The question of how to achieve genuine popular input into constitution-making without falling into utopianism or another pitfall is a difficult one. Ideally, one would leverage the broader set of ideas stemming from civil society and activist groups with the pragmatism and experience of political elites. Practically, there seems to be a sharp trade-off—Hudson shows that popular participation leaves a lesser mark on the constitutional text when organized parties are strong participants in the process, as opposed to when they are weak.[269] Strong parties tend to get ideas from their own networks, not from outsiders. The practical result of a more elite-driven process is likely to be a less expansive constitutional imagination that was present in Chile in 2022, but with stronger pathways for implementation. As we have suggested throughout this Article, that is often a worthwhile trade-off.

B. Towards More Effective Constitutional Rights

The literature and practice of transformative constitutionalism put great stress on constitutional rights. Constitutional texts and scholarship are full of innovation in this area, both as to new rights and court decisions interpreting them domestically or internationally. Indeed, recent years have seen an explosion of innovation on the topic. The traditional "generations" of human or social rights have become more complex and, perhaps, are breaking down entirely.[270]

Nearly all new constitutions now include a robust set of economic and social rights, the so-called second generation after traditional civil and political

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266. For two recent examples calling for more innovative, popularly-driven processes, see Hélène Landemore, Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many 233–34 (2012); Mark Tushnet & Bojan Bugarič, Power to the People: Constitutionalism in the Age of Populism 259–70 (2022).

267. *See, e.g.*, Sibanda, *supra* note 10, at 403; Modiri, *supra* note 35, at 258. For discussion of the constitution as linked to perceptions of "elite" constitutional governance, see Liebenberg, *supra* note 236, at 296.

268. *See generally* Kim Lane Scheppele, *The Party's Over*, *in* Constitutional Democracy In Crisis 495 (Mark A. Graber et al. eds., 2018).

269. *See* Hudson, *supra note* 250, at 175.

270. *See* Steven L.B. Jensen, *Putting to Rest the Three Generations Theory of Human Rights*, Univ. Rts. Grp. (Feb. 21, 2018), https://www.universal-rights.org/putting-rest-three-generations-theory-human-rights/ [https://perma.cc/A448-5TTE].

rights.[271] The list of standard rights in this area has grown beyond traditional candidates like rights to education, healthcare, and labor, now including newer entrants like rights to water and to a generalized "vital minimum."[272] The even more heterogeneous third-generation has seen innovation in the scope of Indigenous rights, especially in Latin America, including the concept of a plurinational state, the idea of legal pluralism, and an autonomous judicial system for Indigenous communities, and rights to prior consultation before major economic projects are undertaken.[273] These are coupled with other, rather different, third-generation rights dealing with the environment which often pair with the even newer idea of a right of nature itself or its constituent parts, like rivers and mountains.[274] A number of new constitutions are now also dealing with a so-called fourth generation of digital rights—recall that the 2022 Chilean draft included several examples along these lines, including connectivity, computer security, and violence-free online spaces.[275] Many new rights, again as demonstrated by the Chilean draft, are hard to put into any obvious category: Take the rights of victims (which is now an important discourse globally) and the rights of neurodivergent persons as interesting examples from that draft.[276]

From a statistical perspective, the trend is clear and obvious: Constitutions written today on average contain far more rights than those written in the past, not only because they have added new generations, but also because they contain more rights *within* each generation.[277] The drivers of this trend are, of course, complex. The biggest seems to be demand, whether from the general public (as often seems true with economic and social rights) or interest or advocacy groups. In modern constitution-making, this demand from domestic groups is often supplemented by support from international interest groups and organizations who have been particularly influential on issues like

271. *See* Chilton & Versteeg, *supra* note 42, at 172–73 (showing that rights to education and healthcare are now found in eighty-two and seventy-one percent of constitutions, respectively); Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 Am. J. Comp. L. 1043, 1054 tbl.2 (2014) (giving the frequency of different economic and social rights).

272. *See* Jung et al., *supra* note 271, at 1054 tbl.2.

273. Nancy Postero & Leon Zamosc, *Indigenous Movements and the Indian Question in Latin America*, *in* Struggle For Indigenous Rights in Latin America 1, 1–31 (2012). *See generally* Dan Ruge, *Indigenous Rights in Latin America: The Gap Between Doctrine and Reality*, 9 Hum. Rts. & Hum. Welfare 72 (2009).

274. *See* Huneeus, *supra* note 76, at 515 (noting the extension as a "radical departure" from traditional rights theory and exploring its development). *See generally* Sam Bookman, *The Puzzling Persistence of Nature's Rights*, 2025 Utah L. Rev. 165 (2025) (discussing use of the concept in the U.S. as a mobilization tool for activists).

275. *See supra* Part III.B.

276. *See* Chile 2022 Draft, *supra* note 155, arts. 24 (victims); *id.* art. 29 (neurodivergent).

277. *See, e.g.*, Law & Versteeg, *supra* note 46, 1197–98.

environmental rights.[278] A second driver may be the dynamics of constitution-making bodies themselves. It may often be easier to reach agreement on inclusion of a new right than it would be to bargain on structural issues like the electoral rules. This may be particularly true if, as is often the case in modern constitutions, the right is left relatively undefined and subject to legislative definition via a "by law" clause.[279]

An obvious question raised by the proliferation of rights is one of efficacy: Do these new rights change outcomes? As noted above, Chilton and Versteeg's macro-level statistical analysis suggests that, for many rights, they do not.[280] They also find that only those rights that tend to construct or empower rights-protecting organizations, like those protecting the rights to freedom or religion or labor, tend to have a systemic effect on outcomes across countries.[281] Unfortunately, many of the new rights—like rights to healthcare, housing, the environment, and digital connectivity—may not have such obvious organization-generating effects and, indeed, may face collective action problems that make enforcement difficult. Chilton and Versteeg's findings offer one potential tool—albeit a rough one—that may help constitutional drafters prioritize some rights over others, or which might impact the framing of rights. For example, their analysis might suggest that economic and social rights, further empowering already organized groups (like labor unions), might be more effective than those aimed at the general public.[282]

However, Chilton and Versteeg's methodology does not say much about the *institutional* pathways through which rights may succeed. As noted above, courts are framed as the natural enforcers and protectors of rights, including for newer forms of rights found in the second, third, and fourth generations and beyond. However, a now extensive literature on economic and social rights and a more nascent literature on environmental rights suggest that the challenges of reliance on courts are deepened when newer and more complex rights are at issue.[283]

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278. *See, e.g.*, Tom Ginsburg, *Constitutional Advice and Transnational Legal Order*, 2 U.C. Irvine J. Int'l Transnat'l Comp. L. 5, 25–27 (2017) (defending the role of international actors during constitution-making); Negretto, *supra* note 253, at 213 (discussing the role that citizens may play in pushing for expansions of rights).

279. On by law clauses as a response to bargaining difficulties, see Dixon & Ginsburg, *supra* note 182, at 641–43.

280. *See* Chilton & Versteeg, *supra* note 42, at 332.

281. *Id.*

282. *See id.* at 34.

283. *See, e.g.*, Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law 189–94 (2008) (discussing the challenges of legitimacy and capacity that differ in degree for economic and social rights); Dixon, *supra* note 115, at 406–08 (arguing that both the political branches and courts are prone to forms of error in enforcing social rights); Sam Bookman, *Demystifying Environmental*

These newer rights often raise questions of judicial capacity and legitimacy that are different in degree, if not in kind, from traditional civil and political rights. Judicial culture can be quite conservative and sticky, and in some contexts, this may make courts reluctant to enforce newer rights.[284] Furthermore, not all forms of rights enforcement are likely to prove transformative. A long line of work on social rights suggests that the most prevalent and accessible forms of enforcement may tend to benefit the relatively affluent. Sometimes, this is because benefits may accrue only to those who sue (and thus know their rights and can afford a lawyer), while in other common cases, social rights are enforced in a fundamentally defensive way, protecting the status quo rather than requiring the construction or expansion of social programs.[285] In contrast, achieving more transformative impacts that reach the marginalized may necessitate more creative judicial work, such as the use of structural remedies and the deployment of monitoring mechanisms and other tools that will pressure and shape the bureaucracy over a long time period. Some courts (those disproportionately studied in the literature, such as the Colombian Constitutional Court and Indian Supreme Court) are willing and capable of providing such remedies, but many others are not.[286] This is not a reason to give up on the judiciary as a pathway; there certainly are success stories. However, it does suggest that the conditions under which they may prove to be an effective pathway are demanding.

An obvious implication is that the design of judiciaries may be closely connected to the effectiveness of rights. One of the problems with the Chilean 2022 draft, from that perspective, is that the drafters did not necessarily make the changes to the courts that would have led to success in enforcing the battery of new, complex rights. While the individual complaint mechanism was broadened to include new forms of rights, the ordinary judiciary was left pretty much intact.[287] The Constitutional Tribunal would have had its personnel rapidly turned over, but it also had its powers greatly weakened; there would have

Constitutionalism, 54 Enviro. L. 1, 60 (2024) (discussing the weaknesses of court-centric enforcement of environmental norms).

284. *See generally, e.g.*, David Landau, *Judicial Role and the Limits of Constitutional Convergence in Latin America*, *in* Comparative Constitutional Law in Latin America 227 (Rosalind Dixon & Tom Ginsburg eds., 2017).

285. *See* Landau, *supra* note 39, at 201 tbl.1 (2012) (arguing that many common forms of social rights enforcement benefit middle-class groups, rather than the poor); Rosalind Dixon & David Landau, *Defensive Social Rights*, *in* The Oxford Handbook of Economic and Social Rights (Malcolm Langford & Katharine G. Young eds., forthcoming 2026) (discussing uses of social rights enforcement to preserve the status quo).

286. *See generally, e.g.*, Dixon & Chowdhury, *supra* note 106 (discussing the right to food litigation in India); Rodríguez Garavito & Rodríguez-Franco, *supra* note 95 (examining the impact of structural litigation on internally-displaced persons in Colombia).

287. *See supra* Part III.C.

been no clear judicial guardian of the new constitutional text.[288] In contrast, constitutional functions in Colombia were immediately given to a new Constitutional Court with vast powers and an overhauled selection process.[289] The result was a rapid shift in constitutional jurisprudence and a court that was well positioned to play a protagonist's role.

The issues of selection and judicial power are both worth attention. A long line of scholarship shows that there is no perfect selection mechanism, and it can be hard to predict the consequences of a design decision.[290] Nonetheless, the Colombian example suggests that one key to changing jurisprudence is changing the coalition of actors who can dominate judicial selection.[291] Colombia changed from a system exclusively dominated by existing judges towards one that had more balance and in which a wider range of political and non-political actors were able to participate. Other judiciaries in the region have experimented (not always successfully) with more creative appointment procedures that include a role for non-governmental actors, like civil society commissions.[292] Moreover, rapid changes in at least some key apex courts may be important to shifting patterns of appointment, as Colombia shows.

With respect to judicial power, there is some evidence that very strong and specialized constitutional courts with robust review powers are better positioned to construct a transformative jurisprudence.[293] Beyond this, however, in leading Global South jurisdictions like India and Colombia, high courts have spent considerable energy constructing new procedural mechanisms to extend the reach of their jurisprudence. In India, for example, the court famously developed "public interest litigation" as a way to ease filings of claims; it also developed tools allowing it to create and monitor structural remedies.[294] In Colombia, likewise, the court developed the doctrine of a "state of unconstitutional affairs" to allow it to join together a large number of individual complaints

288. *See* Chile 2022 Draft, *supra* note 155.

289. *See supra* Part II.B.

290. *See* Donald L. Horowitz, *Constitutional Courts: A Primer for Decision Makers*, 17 J. Democ. 125, 128 (2006) (noting that "[t]here is no single, incontrovertibly best way to structure a constitutional court").

291. *See* Daniel M. Brinks & Abby Blass, *Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice*, 15 Int'l J. Const. L. 296, 307–08 (2017).

292. *See* Constitución de la República Bolivariana de Venezuela art. 270 (1999) (creating a Judicial Nominations Commission supposedly composed of civil society actors); Constitución Política del Estado (Bolivia) art. 197 (2009) (creating a process for popular election of the high court). On some of the problems with Bolivia's judicial elections, see generally Amanda Driscoll & Michael J. Nelson, *Judicial Selection and the Democratization of Justice: Lessons from the Bolivian Judicial Elections*, 3 J. L. & Cts. 115 (2015).

293. *See* Brinks & Blass, *supra* note 291, at 319 (noting the conditions under which a court may be a "major policy player").

294. *See generally, e.g.*, Mate, *supra* note 101; Zachary Holladay, *Public Interest Litigation in India as a Paradigm for Developing Nations*, 19 Ind. J. Glob. Legal Stud. 555 (2012).

(called *tutelas*) and issue sweeping structural remedies.[295] In both cases, these innovations have helped give courts tools to enforce rights, especially newer forms of rights. Constitutional texts could give more attention to these seemingly mundane, but important, details. Some texts, but not many, cover details of access to constitutional justice—for example, the Colombian text requires that the *tutela* be highly informal and rapid, disavowing the byzantine formalism that plagues some other individual complaints in the region.[296] Even fewer seem to cover the details of remedies.[297] An explicit power (or even obligation) to declare a state of unconstitutional conditions and issue structural injunctions, or similar language, may be helpful as courts deal with newer forms of rights like socioeconomic and environmental rights.

Regardless, courts face widespread challenges in enforcing newer and more complex rights, suggesting the need for additional thinking on alternative enforcement pathways. The most important institutions in many contexts will be ordinary political institutions like legislatures and bureaucracies; also, comparative constitutional design increasingly includes an expanding battery of non-judicial independent accountability institutions, such as human rights commissions and ombudspersons, which experience suggests can play a key role, especially when backed by courts or other support structures.[298] The next Section will say more about these points.

A final point is our most tentative—there is a reasonable argument that new constitutions should contain fewer rights. The 2022 Chilean draft reflects the latest iteration of a trend towards rights inflation, where constitutional texts include more and more rights, and different kinds of rights, over time.[299] Some scholars argue that newer or more complex rights, like economic and social rights or environmental rights, do not belong in constitutional texts.[300] These

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295. *See generally, e.g.*, Manuel José Cepeda Espinosa & Guillermo Otalora Lozano, *The Unconstitutional State of Affairs Doctrine*, *in* Constitutionalism and the Right to Effective Governance 107 (Vicki C. Jackson & Yasmin Dawood eds., 2022).

296. *See* Constitución Política de Colombia [C.P.] art. 86 (allowing claims to be filed informally and requiring that they be decided within 10 days at each level). On those byzantine details across Latin American countries, see generally Allan R. Brewer-Carías, The "Amparo" Suit: Judicial Protection of Human Rights in Latin America (2006).

297. *See* Aziz Z. Huq, The Collapse of Constitutional Remedies 4 (2021); Kent Roach, Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law 44 (2021).

298. *See, e.g.*, Neil Modi, *The Fourth Branch, Separation of Powers, and Transformative Constitutionalism*, 25 Or. Rev. Int'l L. 49, 72–101 (2024) (examining developments in India and South Africa); Klug, *supra* note 28, at 703 (discussing how judicial doctrine strengthened the power of non-judicial accountability institutions in South Africa).

299. *See* Law & Versteeg, *supra* note 2, at 1996.

300. *See, e.g.*, Frank Cross, *The Error of Positive Rights*, 88 UCLA L. Rev. 857, 863 (2001) (arguing that "positive rights offer a poor bargain for the disadvantaged"); Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 Tex. L. Rev.

claims have become less prevalent in recent years, in part because they seem far too categorical—there are examples of courts and other actors successfully using newer rights to push political and social changes that are significant. Consider how South African jurisprudence on housing stemming from the canonical *Grootboom* decision and its progeny, although oft criticized, effectively altered housing and eviction policy in the country.[301] Consider also the way in which the Colombian Court's decisions on internally displaced persons sparked a dialogue about the rights of victims that radically changed bureaucratic and legislative behavior.[302]

Our point is very different. It is not that any particular type of right should be privileged in constitutional texts. There is a strong case for inclusion of second, third, and fourth generation rights in new constitutional texts, both as a response to popular demands and because they respond to essential human needs. We fear, however, that at times, constitution-makers may include new rights in constitutions without thinking through how they will be realized. The hope may be that the new right acquires symbolic importance that will spark political change or that new pathways will emerge *after* the constitution goes into effect. These developments, of course, do happen via political and social change, but it can be difficult to predict exactly how.[303]

The decision to include a new right in a constitution should spark more of a conversation about the pathways through which the right will be realized. Moreover, there is a likely limit to the number of feasible pathways that can be constructed. Almost all the new, complex rights found in constitutions require significant legislative development; many will ultimately require new bureaucracies. As we noted above, inclusion of new constitutional rights that are unlikely to be realized has costs in terms of popular disillusionment and in potentially frustrating the achievement of more essential constitutional and political priorities.

There is no simple or general answer for how to determine which rights should be prioritized in constitutional texts. To a high degree, the answer will turn on where historical problems exist and what popular demands have focused on. In Chile in 2022, for example, the protests focused on many issues

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1643, 1646 (2011) (asserting that "social and economic rights might be better protected when courts refrain from trying to enforce those rights assertively").

301. *See, e.g.*, Ray, *supra* note 118, at 333; Langford, *supra* note 224, at 220–21.

302. *See* Rodríguez-Garavito & Rodríguez-Franco, *supra* note 95; Rodriguez-Garavito, *supra* note 243, at 1683 tbl.2 (finding and categorizing various kinds of impact from the internally-displaced persons decision and its follow-ups).

303. Consider Ecuador, where the fall of the Correa regime opened space for more aggressive enforcement of environmental rights. *See, e.g.*, Tănăsescu, *supra* note 51, at 2 (discussing recent caselaw).

but often had economic inequality at their heart.[304] Thus, a perception that the new draft focused on identity issues and environmental activism over socioeconomic problems may have harmed the fortunes of the draft. Additionally, following an extension of Chilton and Versteeg's logic, constitution-makers should consider the existing orientation of support for new rights, whether from civil society groups or state institutions, in making these decisions.[305] All in all, these points may suggest the wisdom of a judicious extension of new rights like that found in the 2018 Bachelet draft rather than the massive expansion of new forms found in the 2022 draft.

C. The Primacy of Structure

Our argument suggests the importance of linking changes in rights provisions to changes in structure. As Gargarella shows in his sweeping survey of Latin American constitutional history, additions of ambitious new socioeconomic rights too often achieved little without corresponding changes to the constitutional "engine room."[306] However, Gargarella provides little detail about what kinds of ambitious changes to the engine room would do the trick.

The possibility of a radical rethinking of structural design has proven elusive. A line of scholarship calls for more participatory models of governance, whether through voting in recalls, initiatives, and referendums or more ambitious proposals, like citizens' assemblies or direct civil society involvement in decision-making.[307] In Latin America, the track record of these experiments to date has generally been poor. In large part, they have been co-opted by powerful actors with often authoritarian aims, a dynamic that is far from inevitable but does exercise a strong pull. Take judicial appointments: Experiments to elect judges in Bolivia and Mexico have been dominated by the ruling party.[308] Likewise, civil society involvement in judicial selection in Venezuela

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304. *See* Lea Sasse, *Chile Despertó—The Reasons for the Mass Protests in Chile 2019/2020*, at 6–8 (Institute for International Political Economy Berlin, Working Paper No. 166, 2021), https://www.ipe-berlin.org/fileadmin/institut-ipe/Dokumente/Working_Papers/ipe_working_paper_166.pdf [https://perma.cc/Z6JK-TS8R].

305. *See* Chilton & Versteeg, *supra* note 2 (arguing that rights make an impact only when they gain support from organizations with political power); *cf.* Epp, *supra* note 43 (arguing that litigation produces social change only when supported by organized civil society).

306. Roberto Gargarella, *Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution*, 4 Notre Dame J. Int'l & Comp. L. 9, 16 (2014); Gargarella, *supra* note 6, at 172.

307. Tushnet & Bugarič, *supra* note 266, at 244; Antoni Abat i Ninet, Constitutional Crowdsourcing: Democratising Original and Derived Constituent Power in the Network Society 127–64 (2021). *See generally* Hélène Landemore, Politics Without Politicians: The Case for Citizen Rule (forthcoming 2026).

308. *See* Driscoll & Nelson, *supra* note 292; Gustavo López Nachón, *Losing Sight of Judicial Independence: The Case of Mexico's Judicial Reform*, Yale J. Int'l L. Online (Jul. 9, 2025), https://

was effectively controlled by allies of Chávez and his regime.[309] Experience from elsewhere around the world additionally suggests that citizens' initiatives and similarly participatory processes often run into problems when they clash with the interests of political elites.[310]

More prosaically, we would suggest that the keys to implementation in a typical case are likely to be the existing political branches. Thus, transformative constitutionalism should center on change in the legislature. The Colombian Constitution of 1991 attempted to do this by radically altering electoral rules to get new political forces to enter, as well as by changing rules around legislative deliberation. Despite the ambitious nature of the effort, the perception is that it did not work: The newcomers fared poorly in subsequent elections, and representatives of the traditional two parties (and their factions) returned.[311]

In Chile in 2022, the vision for legislative change was more elusive. The text worked some important structural changes in design, for example, by reserving ten percent of legislative seats for Indigenous peoples (a move far more ambitious than a similar effort in Colombia) and by adding a sweeping mandate for gender parity.[312] In contrast, the traditional model of the Chilean center-left, where the text was made more flexible and majoritarian over time such that political parties could carry policy ideas into practice, was deemphasized in 2022 without another clear model of politics taking its place. Some changes, such as the creation of a battery of new independent institutions, the replacement of the Senate with a Chamber of Regions elected on a different basis of representation (but with substantial powers), and the inclusion of several highly detailed rights provisions and other content, actually went in the other direction, making the text more counter-majoritarian and increasing the number of veto players.[313] The changes sought (and wrought) by the Chilean left parties up to and including the Bachelet draft told a simpler story about how constitutional provisions would be primarily implemented: by political parties enacting their policy agendas in an increasingly flexible political system.

The most interesting recent trend in structural design is the addition of new non-judicial independent accountability institutions like human rights commissions, ombudspersons, electoral commissions, anti-corruption bodies,

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yjil.yale.edu/posts/2025-07-09-losing-sight-of-judicial-independence-the-case-of-mexicos-judicial-reform [https://perma.cc/N9YF-2X6V].

309. *See* ALLAN R. BREWER-CARIAS, DISMANTLING DEMOCRACY IN VENEZUELA: THE CHÁVEZ AUTHORITARIAN EXPERIMENT 227–29 (2012).

310. *See, e.g.*, Thorvaldur Gylfason & Anne Meuwese, *Digital Tools and the Derailment of Iceland's New Constitution*, at 24 (CESifo Working Paper Series, Working Paper No. 5997, 2016).

311. *See* Lombo, *supra* note 91; Boudon, *supra* note 92, at 83–85 (covering the implosion of the M-19).

312. *See* Chile 2022 Draft, *supra* note 155, arts. 6(4), 252, 254.

313. *See supra* Part III.C.

etc.[314] The Chilean text contained an impressive battery of new institutions along these lines, including the general ombudsperson and specialized ombudspersons for children and for nature, a new water agency, and a new agency for the protection of data.[315] However, the transitional provisions (examined in more detail below) gave little priority to any of these institutions. Not only were they given no role in implementing the constitutional transition, but they themselves would have needed to be set up by the legislature on an open-ended timetable.[316] It seems possible that much of this new battery of institutions would have been set up only after a long period of time, if at all.

Comparatively, both the 1991 Colombian Constitution and the South African Constitution give some evidence of the positive role that these non-judicial institutions can play in pushing implementation of rights and in shoring up democratic weak points.[317] However, experience from these countries and others also suggests several other points: (1) They often are most effective *in conjunction with* courts; and (2) the construction of institutional capacity by these new institutions is often quite difficult, and many will struggle to carve out a strong role.

On the first point, the Colombian Procurator and National Ombudsperson have proven important in helping to push enforcement of the newer rights found in the constitutional text, at times working alongside the Constitutional Court. For example, both bodies played significant roles in monitoring the structural decisions on internally displaced persons and on healthcare.[318] The South African example suggests a similar point—where independent bodies there, like the Public Protector, have had success in pushing back against the pathologies of a dominant party system, it has often been because they have had the backing of the country's Constitutional Court.[319] The 2022 Constitutional text in Chile created some potentially important links between these institutions and the courts, for example, by allowing the new human rights ombudsperson and ombudsperson for nature to bring constitutional and legal claims in appropriate cases.[320] However, the ambivalent stance of the Convention towards the judiciary, and especially the Constitutional Court, may have limited the effectiveness of these links.

The second point is that it is much easier to create high-capacity independent institutions on paper than in practice. Chile, like Colombia in 1991, had

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314. *See generally, e.g.*, Mark Tushnet, *Institutions Protecting Democracy: A Preliminary Inquiry*, 12 L. & Ethics Hum. Rts. 181 (2018); Tarunabh Khaitan, *Guarantor Institutions*, 16 Asian J. Comp. L. 40 (2021).

315. *See supra* Part III.C.

316. *See supra* Part III.C; Chile 2022 Draft, *supra* note 155, arts. 123(b), 144(3), 148(2), 376.

317. *See, e.g.*, Klug, *supra* note 26, at 703–04.

318. *See, e.g.*, Rodríguez Garavito & Rodríguez Franco, *supra* note 95, at 22.

319. *See* Klug, *supra* note 28, at 703–04.

320. Chile 2022 Draft, *supra* note 155, arts. 124(1), 149(4).

some long-standing institutions with extraordinary capacity—the General Comptroller being a striking example. For a century (since its creation in the 1925 constitution), the Comptroller has been a key player in Chilean public policy, analyzing not only finances and administration but also the legality of executive branch actions.[321] The 2022 text left the institution of the Comptroller intact, but it might have considered supplementing it with powers oriented towards enforcing the new battery of rights, as the Colombians did with the Procurator in 1991.[322]

Finally, the question of specialized enforcement institutions for different forms of rights is understudied both in theory and in practice. Several decades ago, Bruce Ackerman suggested the benefit of creating a distributive justice branch charged with enforcing commitments against poverty and inequality.[323] Ackerman's intuition is that many of these tasks would be difficult for courts; it is also plausible, although less clear, that they would stretch the capacities of a general national human rights institution. Ackerman's call, although picked up by some other scholars, has found little support in actual constitutional design. The 2022 Chilean draft, by creating, for example, a specialized ombudsperson for nature, revives some of the intuition that new rights may benefit from specialized modes of enforcement.[324] The question is a difficult and sensitive one—fragmenting authority over rights enforcement may make it more difficult for any one body to carve out institutional authority—but it is at least worth considering.

D. Transition and Transformation

As one of us has written elsewhere, virtually all modern constitutions include a separate set of temporary norms that aim to guide the transition between the old and new constitutional orders.[325] These include provisions that determine the status of existing law and establish timetables and priorities for the passage of new legislation. Transitional provisions also often say something about when and how existing political institutions will be shut down or reconstituted, and

321. Guillermo Jiménez, *Nonjudicial Legal Accountability: The Case of the Chilean Comptroller-General*, *in* Accountability and the Law: Rights, Authority, and Transparency of Public Power 102, 109 (Piotr Mikuli & Grzegorz Kuca eds., 2022).

322. *See* David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 Harv. Int'l L.J. 319, 339 (2010) (discussing the Colombian procurator).

323. *See* Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. 633, 723 (2000). On the role of non-judicial institutions in tackling inequality issues, see generally Rosalind Dixon & Mark Tushnet, *Democratic Constitutions, Poverty and Economic Inequality: Redress Through the Fourth Branch Institutions?*, 51 Fed. L. Rev. 285 (2023).

324. Chile 2022 Draft, *supra* note 155, arts. 148–150.

325. *See* David Landau, *Transitional Norms in Constitutions*, 50 Yale J. Int'l L. 1, 10 (2025) (noting that every Latin American constitution since 1988 has included a section on transitional provisions).

they sometimes establish special, temporary institutions with powers during the transition period, as new institutions are being established.[326]

There is no single answer to how to transition between constitutional orders—some designers opt for a rapid and aggressive transition, while others take a more gradual approach. The aggressive approach raises obvious risks, both of destabilizing the existing constitutional order and of potentially opening a path to a consolidation of power that can lead to authoritarianism.[327] That said, an overly gradual approach may undermine efforts at transformative constitutionalism. The transition period may be crucial in setting up institutions and laws that push a transformative constitutional project forward.[328]

Consider Colombia in 1991. Using a relatively aggressive approach, the Assembly acted quickly to shut down key existing institutions.[329] Thus, the Congress's mandate was revoked while new elections were called, and the new Constitutional Court took over the functions of the Supreme Court. For a defined period of time, the president was given extensive special institutional powers to pass laws (via decree) establishing the functioning of new institutions, including those regulating the court and the new individual complaint (the *tutela*).[330] The Constituent Assembly also set up a special body that it selected (half composed of Assembly members) that would have the power to veto presidential decrees during the congressional recess.[331] These institutional arrangements consolidated power to a much greater degree than the ordinary constitutional provisions, but they also proved at least partially successful in allowing the new constitutional framework to be built out quickly through the combined actions of then-President Gaviria and the interim Constitutional Court.

In contrast, the transitional provisions in the 2022 Chilean draft opted for a much more gradual approach that may have complicated the transformation.[332] As noted above, only the Constitutional Tribunal would have been reconstituted rapidly; all other major institutions (including the Supreme Court and Congress) would have retained their existing composition for years. Furthermore, the transitional provisions provided for relatively few, and quite lax, deadlines for passage of even major new legislation, and they provided no consequences for failure to meet those deadlines. Finally, unlike in Colombia, the

326. *See id.* at 12 tbl.1. *See generally* Sumit Bisarya, *Performance of Constitutions: Transitional Provisions*, *in* Assessing Constitutional Performance, *supra* note 11, at 203 (discussing functions and cases from elsewhere around the world).

327. *See* Landau, *supra* note 325, at 19–20.

328. *See* Bisarya, *supra* note 326, at 203–04.

329. *See supra* Part II.B.

330. *See* Constitución Política de Colombia [C.P.] trans. prov. art. 5.

331. *See id.* arts. 5, 6.

332. *See supra* Part III.C.

draft constitution created no temporary institutional arrangements to promulgate core pieces of the new order.

The result of this omission was that the transition would have been left in the hands of an institution largely hostile to the new draft (the existing Congress), with little guidance or incentive to act. Such a setup would seem inauspicious for the passage of laws constructing the ambitious new institutional and rights provisions found in the draft. Put another way, the timid transitional norms would have weakened the institutional pathways through which transformation might have occurred.

As discussed above, in Chile, this approach seems to have been something of a strategy. As drafters learned (late in the process) that approval in the exit referendum was in doubt, they sought to conciliate opponents by drafting gradualistic and moderate transitional provisions that left power over implementation in the hands of existing institutions and political parties.[333] The logic was to trade strong rights content and ideological content for weak, gradual changes in structural norms, in the hopes of gaining approval of the draft.

This strategy got things exactly backwards. As a way to win votes, it backfired spectacularly—political elites affiliated with the mainstream parties and voters placed considerable weight on the most controversial, ideological aspects of the new draft, like the designation of Chile as a "plurinational" state and the open-ended abortion provision.[334] The moderate institutional pathways through which implementation would have occurred did not feature in the referendum campaign and failed to mitigate the opposition of rightist, centrist, and even center-left political elites. In other words, they did not change the perception of the draft as sociologically utopian in nature. Meanwhile, had the referendum been approved, the gradualist transitional norms would have made implementation of the new content more difficult. A more promising strategy would potentially be the opposite one: prioritizing fewer (and less dramatic) shifts in ideological content but pairing those changes with clearer structural pathways and more aggressive transitional provisions.

The broader point is that the transition, although temporary, will often be a critical structural pathway through which transformative constitutional projects do or do not succeed. The developments shortly after a new constitution (or constitutional amendment) is enacted will determine whether the building blocks are in place and what form they take. Thus, transformative constitutional drafters should pay close attention to how these pathways mesh with the transformations they are working to enact. The failure to do so will increase the odds that the project suffers from the forms of utopianism studied in this Article.

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333. *See* Landau, *supra* note 325, at 30.

334. *See* Javier Couso, *Chile's Failed Attempt to Get a New Constitution: Or the Challenges of Democratic Constitution Making in a Polarized Era*, 30 Sw. J. Int'l L. 1, 15–16 (2024).

E. Abuse and Utopianism in Democratic Decline

In our discussion so far, we have bracketed one important context that has led to some constitutional designs that might be seen as "utopian" in nature. This is what we have elsewhere referred to as "abusive" constitutional change, where the *goal* of the exercise by its prime mover is to weaken democracy and slide towards authoritarianism.[335] Thus, some constitutional drafters may seek to gain support for themselves or a broader package of constitutional changes by offering to support fairly shallow aspirational commitments—with little expectation of being called on to fulfill. As one of us has written, in these contexts, the new rights content acts in some sense as a "bribe."[336]

We have already noted how Erdogan in Turkey (in an amendment referendum) and Correa in Ecuador (in a constitution-making process) did this. In both cases, new rights such as sex equality, economic and social rights, and the rights of nature greased the wheels for approval of a final product that packed the Constitutional Court in the case of Turkey and greatly expanded executive power in the case of Ecuador.[337] There were signs in both cases that the professed commitment to the new rights provisions was less than sincere. In Ecuador, for example, Correa shut down a major environmental group shortly after the new constitutional text went into effect, and he also sent a letter to judges in the country warning them that they could be held personally liable for decisions protecting the environment.[338] In Turkey, Erdogan packed the Constitutional Court and therefore eviscerated the body that would likely have given teeth to the new rights at the same time as he added them.[339]

In other writings, we have discussed the abuse of liberal democratic constitutional norms and concepts, including constitutional rights and transformative constitutionalism, for antidemocratic ends, and tried to think through solutions to a phenomenon we have labeled abusive constitutional borrowing.[340] We will refrain from saying too much along those lines here. However, it is worth emphasizing that the blurry line between transformative and utopian constitutionalism is a big part of the reason the tactic succeeds. Would-be authoritarians can garner credit from domestic and international actors for the wielding

335. *See generally* Landau, *supra* note 148; Dixon & Landau, *supra* note 9.

336. *See* Dixon, *supra* note 48, at 784.

337. *See id.* at 791–801 (on Ecuador); *see also* discussion *supra* notes 49–51.

338. *See* Dixon & Landau, *supra* note 9, at 74–80; Craig M. Kauffman & Pamela L. Martin, *Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail* 11 (paper presented at the International Studies Association Annual Convention, Atlanta, GA, Mar. 18, 2016).

339. *See* Berk Esen, *Judicial Transformation in a Competitive Authoritarian Regime: Evidence from the Turkish Case,* 47 L. & Pol'y 1, 11 (2024).

340. *See generally* Dixon & Landau, *supra* note 9; David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. Davis L. Rev. 1313 (2020) (discussing ways in which courts can undermine democratic constitutions).

of transformative constitutional language, even where they have little intention of carrying out the underlying goals and their true aims are to undermine the liberal democratic order.

Closer attention to the degree to which seemingly transformative projects are actually backed by supportive institutional structures and popular support would therefore help detect the abusive invocation of transformative constitutionalism. The mere fact that the proponents of utopian change may have abusive motives does not mean that the same applies to supporters of that change. Indeed, often the very reason that abusive change succeeds is that its proponents have abusive motives, but supporters have far more idealistic—indeed utopian—understandings. This is one of the main reasons democratic actors may accept a trade-off between pro-democratic and anti-democratic forms of change: They may overestimate the value of aspirational changes, compared to the costs of more regressive structural changes.[341] Both domestic and international audiences must become more savvy about these risks by reflecting on the distinction between transformative and utopian constitutionalism.

Conclusion

There is growing disenchantment with the idea of democratic constitutionalism in many parts of the world. Indeed, a prominent U.K. constitutional scholar recently penned a book labeled *Against Constitutionalism.*[342] In the United States, scholars such as Ryan D. Doerfler and Samuel Moyn have made similar arguments against faith in legal constitutionalism—and the U.S. Supreme Court—as agents of social and economic change.[343] One reason they give is that constitutions "inevitably orient us to the past and misdirect the present into a dispute over what people agreed on once upon a time, not on what the present and future demand for and from those who live now."[344]

Scholars in the Global South provide a related reason to be skeptical about the promise of democratic constitutions: Even ostensibly transformative constitutions can limit the scope to imagine and enact more radical, revolutionary political and economic projects, or be too closely tied to liberal legal and political models. Alternatively, they may promise more than they deliver, in ways that represent serious missed opportunities for more incremental, "small-c"

341. *See* Dixon, *supra* note 48, at 785–89.

342. *See generally* Martin Loughlin, Against Constitutionalism (2022).

343. *See generally* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 Cal. L. Rev. 1703 (2021).

344. Ryan D. Doerfler & Samuel Moyn, *Reform the Court, But Don't Pack It*, Atlantic (Aug. 8, 2020) https://www.theatlantic.com/ideas/archive/2020/08/reform-the-court-but-dont-pack-it/614986/ [https://perma.cc/BDF2-QYXM].

constitutional change, or contribute to a loss of faith in broader democratic constitutional commitments.

In this Article, we suggest that the dangers of constitutional utopianism are real, but also contingent. They depend on a naïve or misplaced view of the relationship between constitutional aspirations, democratic attitudes, and institutional mechanisms for achieving change, or the willingness of the would-be authoritarian actors to exploit that lack of information or understanding.

True constitutional transformation requires a combination of aspiration, democratic support, and institutional pathways for change, whereas utopian constitutionalism depends on the absence of these supporting conditions. An authentic version of transformative constitutionalism is possible, but difficult, and, as we argued in the previous Part, likely depends on a series of shifts in scholarship and practice. Nonetheless, understanding the conditions under which transformative constitutionalism is likely to avoid the pitfalls of utopianism is a crucial task.

What is at stake is the ability of constitutions to produce meaningful change, rather than an empty discourse gesturing at that change. But that is not all, for the failure of constitutionalists to get transformation right breeds disenchantment that threatens the very project of liberal democratic constitutionalism.