Accepted Manuscript

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DOI: https://doi.org/10.1007/s40803-021-00161-7

Publication: Hague Journal on the Rule of Law

Citation: Prieto, M., & Verdugo, S. (2021). How political narratives affect the self-enforcing nature of interim constitutions. Hague Journal on the Rule of Law, 13(2), 265-293.

The Hague Journal on the Rule of Law, vol. 13, issue 2-3
The Version of Record of this article is available online at https://link.springer.com/article/10.1007/s40803-021-00161-7

How Political Narratives Affect the Self-enforcing Nature of Interim Constitutions

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Abstract: This essay seeks to contribute to the literature that asks how interim constitutions can become self-enforcing norms capable of producing a successful constitution-making process. It uses the Chilean constitution-making process as an example to theorize on how the political narratives associated with the November 2019 Agreement, which sets the framework for constitutional change, can influence its self-enforcing capacity. The authors identify and reconstruct the two prevailing normative theories underlying the Chilean constitution-making process: the evolutive and the revolutionary narratives. These present themselves in both radical and moderate versions. While evolutive ideas emphasize institutional continuity, consensus-building, and an incrementalist approach to constitutional change, revolutionary arguments rely on the constituent power theory and push for a profound social transformation that can break with the past. Even though these narratives are in tension with each other in many respects, they have both influenced the design of the rules of the constitution-making process. The authors claim that the self-enforcing capacity of the interim constitution partly depends on whether, and to what extent, the moderate versions of these narratives succeed or prevail in the political discourse.

Keywords: Interim constitutions · Constitutional enforcement · Constitution-making · Chile

I. The "Agreement" as a Self-Enforcing Interim Constitution

Constitutional scholars and political scientists have discussed what exactly explains the enforcement of constitutions and how a constitution can become a self-enforcing norm.[3] Contractual approaches seeking to explain the enforcement of a constitution typically claim that constitutional self-enforcement requires reinforcing dynamics that involve politically relevant actors to have an interest and an increasing stake in the established political institutions.[4] Established provisions can reduce transaction costs and lower political stakes. However, the optimal conditions for a constitutional agreement can change over time, and political actors may

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We would like to thank José Francisco García, Ronald Janse, Raúl Sánchez-Urribari, and the anonymous reviewer, for useful comments on an earlier version of this article.
[3] See, for example, Weingast 1997 and Susan et al. 2012
[4] See, e.g., Ginsburg, 2013, p. 200

have incentives to renegotiate them. Insurance theories have helped to explain how some institutional arrangements, such as constitutional courts and prosecutorial organs, are likely to be drafted when, for example, prospective electoral losers have negotiating power during a constitutional bargaining process.[5] Those arrangements are more likely to be maintained and respected when political actors keep an interest in them. These types of approaches are not only helpful in explaining the constitution's self-enforcing ability, but also in explaining why rival constitution-makers have incentives to draft and respect core interests included in interim constitutions.

Interim constitutions are temporary norms that constitutional drafters deliberately adopt so they can be replaced later by a constitutional text intended to be permanent.[6] Even though the literature on interim constitutions is still small, we know they can be used in multistage constitution-making processes involving roundtable negotiations and provide a crucial role during the constitutional process.[7] Interim constitutions can provide procedural certainty, reduce the transaction costs for constitutional drafters, secure particular—and even competing—interests that the different factions may have, escalate the costs of reversal, and increase the chances of success while also reducing the stakes of political negotiations.[8] What exactly explains the self-enforcement capacity of an interim constitution?

Ginsburg and Dixon (2018) have used their "two-sided" insurance framework—which claims that the insurance is stronger when multiple competing parties have mutual commitments in it—to explain how the South African interim constitution of 1993 was respected by both the National Party (NP) and the African National Congress (ANC).[9] While the NP was interested in protecting property rights and preserving a "power-based insurance for the white minority,"[10] for the ANC, the interim constitution ensured a transition to full democracy.[11] For the two-sided insurance to work, the interim constitution needs to protect the core interests of both opposing parties, and those interests need to remain relevant during the constitution-making process. Scholars like Ozan Varol have also valued the benefits of South Africa's interim constitution, for example, by emphazising how South Africans succeeded to avoid a violent turn and promote consensus building.[12]

This article aims to contribute to the understanding of how two-sided insurances included in interim constitutions can work and be maintained. We claim that, even though continued support for the interim constitution by the competing parties is necessary for the constitution to be self-enforcing, political narratives are a relevant factor for such support. We distinguish between core interests and political narratives justifying those interests. The parties' core interests can vary depending on the context. Sometimes they include substantive principles that

[5] See, e.g., Ríos-Figueroa & Pozas-Loyo, 2010; Ginsburg & Versteeg, 2013; Epperly, 2013
[6] See a discussion of the concept of an interim constitution in Goss, 2018
[7] In particular, see the work of Arato, 2016
[8] See, e.g., Dixon & Ginsburg, 2011a, p. 665
[9] Also, see Dixon & Ginsburg, 2011b
[10] Dixon & Ginsburg, 2018, p. 996
[11] Dixon & Ginsburg, 2018, p. 1004
[12] Varol, 2014, pp. 435–436

are reflected and protected in the rules of the interim constitution, such as property rights. Other times, the parties' core interests include crucial procedures that aim to promote consensual or inclusive approaches to constitution-making, such as supermajority rules or specific processes for electing the constitutional designers. The parties accept to respect and preserve the core interests of their rivals in exchange for including their own core interests in the interim constitution. Core interests are specific and can be written in the form of rules. By contrast, political narratives are the discourses that politicians use to justify their support for the interim constitution, such as a more abstract need for decolonization or transformation. Politicians do not trade nor necessarily include those narratives in the interim constitution, but they still use them to communicate their political agendas and gain support. Their narratives typically justify the parties' core interests at an abstract level, and they are normally used to communicate ideas to public opinion. However, even though the parties may have agreed to respect certain compromises—which include preserving the core interests of the opponent—they may be less interested in adapting their narratives to justify the adversary's core interests. Thus, a tension between the utilized political narratives and the core interests of political opponents may arise.

The distinction between core interests and political narratives is useful because it can help to explain the self-enforcing capacity of an interim constitution that rival parties have agreed upon. If those narratives can support the core interests of the adversaries, then it is more likely that the interim constitution becomes self-enforcing. If the narratives do not support the core interests of the rival factions, then the threat against the interim constitution increases. We argue that the stability of the interim constitution can be threatened when the core interests of political adversaries relate to political narratives that are, or become, incapable of supporting the adversary's core interests. This may happen because political narratives can radicalize over time.

Therefore, we also distinguish between two versions of similar political narratives: radical and moderate. While moderate narratives give sufficient normative justification for tolerating the core interests of the rivals reflected in the interim constitution—thus maintaining it—radical narratives are incompatible with the core interests of the adversaries. As the core interests of each faction can stay constant over time but the narratives that sustain and justify those interests can become more or less radical, the self-enforcement ability of the interim constitution may be threatened when radical versions of those narratives appear. If radical narratives become predominant, we can probably expect a partial or total infringement of the interim constitution.

This essay illustrates our argument using Chile's ongoing constitution-making process as an example. Chile's constitution-making process occurs in a democratic country where representative institutions are elected, rotation in power is frequent, and judicial institutions are reasonably independent. Thus, political actors in Chile have electoral incentives, and the voters' preferences shape relevant external audiences.

The Chilean constitution-making process started with a multiparty agreement (hereinafter, the "Agreement") signed by most political parties after massive demonstrations took

over the streets in October 2019.[13] The "Agreement," later operationalized in more detail and included in the current Constitution through a constitutional amendment that took place in December 2019, regulates a multistage constitution-making process that maintained the temporary validity of the present Constitution until voters confirm the new constitution in an exit plebiscite. The Agreement includes an entry plebiscite, the establishment of a Convention, and an exit plebiscite at the end of the process, among many other rules.

The Chilean Agreement is an interim constitution. Goss (2018) associates interim constitutions with the existence of a critical juncture that pushes parties to deliberately negotiate temporary constitutional norms that will later be replaced by a permanent constitution. Goss also claims that interim constitutions can be aimed at influencing the content of the permanent constitution. The Chilean Agreement has all of these elements: the critical juncture relates to the October massive demonstrations that took over the streets, there was a negotiation among rival parties,[14] and its legal validity is deliberately temporary. Indeed, the Agreement was added to the the current Constitution, which is supposed to be replaced by a new constitution following the Agreement's procedure. Additionally, the Agreement is more than a mere temporary "placeholder," as it includes pre-commitments that aim to influence the content of the future constitution by, for example, forcing multiparty compromises and containing substantive limits to the norms that the constitution-makers can approve.

Chile's Agreement involved compromises between the right-wing and left-wing parties that participated in it. There were several factions within the right and within the left. What follows is a simplification that seeks to capture the common agendas that are easily identifiable. The right-wing parties' core interests consisted of both procedural and substantive rules, though we mainly focus on the procedural interests. These rules included a supermajority requirement that could secure that the new constitution would result from a significant political compromise. As the right-wing parties expected to control at least one-third of the seats of the Convention, [15] they only agreed to open the constitution-making process if a two-thirds majority rule for the approval of constitutional norms was recognized in the Agreement.[16] The right-wing parties have elaborated a narrative based on what we call an "evolutive" approach to constitutional change to justify these core interests.[17] The evolutive narrative emphasizes legal continuity, institutional stability, and multiparty agreements that can give some minorities veto power over the outcomes.

[13] Even though there is no scholarly consensus on the reasons that sustain the demand for constitutional replacement, the Chilean constitutional problem can easily connect with the growing dissatisfaction regarding social rights protections and legislative inertia on sensitive matters. See some tentative explanations in the work by Heiss, 2020; Peña, 2020; Dixon & Verdugo, 2020; Salgado Muñoz, 2020; Atria, 2020

[14] See Soto Velasco, 2020, pp. 41–48; Escudero, 2021, p. 9

[15] This didn't materialize. Right-wing delegates achieved only 37 seats int the Constitutional Convention. See the electoral results in https://2021.decidechile.cl/#/ev/2021/ct/2021.N/

[16] On the incentives that the parties had to agree on the interim constitution and the way they were pushed to accept opening a constitution-making process, see Escudero 2021. Also, see the works by Soto 2020 and Fermandois 2021, two rightwing constitutional scholars that represented the right in the 2019 negotiations.

[17] During Bachelet's constitution-making process, the evolutive narrative can be found in the work of many scholars and public intellectuals supporting the right. See, for example, the volume edited by García García, 2014.

On the other side, the left-wing parties were interested in securing the transformative nature of the constitution-making process and making sure that the current Constitution, which was initially imposed by the Pinochet dictatorship in 1980—despite several reforms that aimed at removing the authoritarian enclaves—was not going to be used as a default rule that could condition the outcome of the process.[18] For this reason, the left's core interests consisted of having a popularly elected body writing the new constitution on a "blank slate" (*hoja en blanco*) to break from the transitional politics that gave strong veto power to the heirs of the Pinochet regime. The left generally used a narrative based on what we call a "revolutionary" approach to constitutional change. The revolutionary approach appealed to social rights and the "people" and directly emphasized the use of the popular constituent power, including indigenous peoples and other minorities.

These set of core interests are related to the distribution of power in the constitution-making process. The core interests of the right (the supra-majoritarian rule and the limits on the convention) can be seen as a way of ensuring that the right-wing parties have a powerful voice within the convention (and even a veto power) and preventing the existence of a too powerful constituent assembly. The core interests of the left (the blank slate and an elected assembly) can also be understood as a way of ensuring control of the left over the process and preventing a convention deadlocked by the right.

Even though the left expected to obtain a majority in the Convention, it was willing to tolerate the right's core interests—the two-thirds majority rule and the process's limitations—in exchange for having a popularly-driven constitution-making process that would draft the new constitution without using the current constitution as a default rule. The Agreement reflected this key compromise.

Both the evolutive and the revolutionary narratives involved the rejection of some negative constitutional models. In a previous article, we claimed that constitutional drafters aimed at rejecting both the Pinochet model and the neobolivarian model—which follows the experience of the constitutional processes of Bolivia, Venezuela, and Ecuador.[19] In this new article, we focus on the Agreement, understood as an interim constitution, to claim that there are radical versions of both the evolutive and the revolutionary narratives that, if predominant, will threaten the self-enforcing nature of the rules of the process by bringing the negative models, as positive ones, to the political debates. The normative implication of our argument, for people who agree that the Chilean process should end in enacting a new constitution that can be inclusive and respectful of the Agreement, is that we should prefer the moderate versions of both narratives. Of course, this is not a sufficient condition for the overall success of the process, nor the only factor that matters for the self-enforcement of the interim constitution. We only claim that it is one relevant factor that scholars should consider.

The radical version of the evolutive narrative—which is incompatible with the core interests of the left-wing parties—seeks to preserve the veto power of the right-wing parties and emphasizes a robust legal continuity between the current Constitution and the future constitution.

[18] See, e.g., Salgado Muñoz, 2020, p. 65
[19] Verdugo & Prieto, 2021

It is generally skeptical of the idea of the blank slate and has developed procedural ideas that can threaten to boycott the process. An example of this is the right-wing political platform that rejected the initiation of a constitution-making process but offered a constitutional amendment agenda instead ("*Rechazar para Reformar*"). This proposal was incompatible with the left's core interest of not using the current constitution as a default rule. By contrast, the moderate version of the evolutive narrative accepts the need for constitutional change. It seeks to produce significant agreements with the left to take the best of Chile's democratic tradition while also rejecting a purely majoritarian process and seeking a predictable procedure that can respect the limits placed on the Agreement.

The radical version of the revolutionary narrative—which is incompatible with the core interests of the right-wing parties—seeks to establish a majoritarian procedure that does not need to compromise with the right-wing parties and ignores the procedural and substantive limits of the Agreement insofar as they conflict with majoritarian interests. The moderate version of the revolutionary narrative also pursues an important transformation, but renounces the majoritarian emphasis of the radical version by accepting the need for consensus-building mechanisms and the procedural limits of the process. Both the radical and the moderate versions of the revolutionary narrative appeal to different variations of the constituent power theory. The radical version connects the constituent power theory with a majoritarian approach that values political equality, believing that the people's power should not be constrained.[20] Thus, the radical approach allows the Convention not only to enact a constitutional text but also to intervene in other matters with superior authority. The moderate version believes that the people's constituent power is limited at least in a procedural way—and possibly by human rights—and argues, for example, that its sole purpose is to enact a final constitutional text.[21] While the radical version can be connected with constitution-making processes that have operated as negative models in Chile—such as Maduro's constituent assembly[22]—the moderate version of the revolutionary theory is compatible with the core interests of the right.

We claim that for the Agreement to succeed as a self-enforcing interim constitution, the moderate narratives should prevail in the Constitutional Convention. However, both the right-wing and the left-wing parties have inner tensions in the way they use these narratives, and some of the proposals they have tried to approve, such as lowering the majority requirements for approving the rules of procedure, threaten to harm the core interests of the other. These tensions can call into question the self-enforcing capacity of the Agreement. Since the right-wing parties obtained fewer elected constitution-makers than the left in the elections of 2021 and, as a result, do not have enough votes to exercise veto powers, the struggle within the left between both versions—moderate and radical—of the revolutionary narrative seems politically more salient. However, the increasing support for the far-right presidential candidate may mean that the internal struggle of the evolutive narrative will gain more political salience in the short-term.

[20] See, e.g., Palma & Elgueta, 2020
[21] See, e.g., Bassa et al., 2020
[22] Landau, 2018

In the remainder of the article, we first provide a categorization of the ideological debate in Chile and connect it to the political narratives we identify (section II). In section III, we briefly expand upon the political normative narratives that can justify certain types of constitution-making processes and explain how they have developed in the Chilean constitutional debate, using examples from scholars that have influenced the discussion, such as Fernando Atria and Jaime Bassa—both scholars that were elected to the Convention—and Arturo Fermandois, who represented the UDI (a conservative party) in the committee that drafted the rules of the process. In section IV, we present and discuss some episodes from the Chilean public debate as examples of the ways the narratives have been present during the process. This section shows how the radical versions of each narrative can clash with their opponents' core interests, threatening the stability of the interim constitution.

In order to identify and analyze the core interests and political narratives at stake, we consider the discussions that led to the Agreement. The informal negotiations of the political parties are not available to the public, but the rest of the process is. All the plenary meetings of the *Mesa Técnica* (the drafting committee that detailed the rules of the procedure) were recorded and are publicly available, and the discussion that took place in Congress to approve the regulations drafted by the *Mesa* was uploaded to the Library of Congress's website. We also transcribed and watched the electoral campaigns that appeared on TV before the entry plebiscite.[23]

II. Political narratives and ideological debates in Chile

In order to show that the Agreement's capacity to remain a self-enforcing norm depends partly on the sufficient moderation of the political narratives so that they can tolerate the core interests of the rival parties, we first need to examine how to distinguish between core interests and political narratives in the Chilean example. We then categorize the political narratives into moderate and radical versions.Even though this categorization serves the purposes of this article well, there are, of course, other ways to classify the ideological positions in the Chilean constitutional debate. Escudero (2021), for example, divides the Chilean political groups across two dimensions: whether the groups are closer to the politics of the transition to democracy and whether the groups favor the existence of institutional or informal actors.[24] This classification helps to explain the type of constitution-making process the diverse groups pushed for. While some advocated for a constitutional replacement via constitutional amendment, others advocated for a constituent assembly. Escudero's ultimate purpose is to show how these different groups came to accept the constituent assembly alternative—which is helpful for understanding the core interests of each group. Even though our essay does not contradict Escudero's findings, Escudero's classification is not useful for distinguishing the radical and moderate versions of the political narratives. Escudero also claims that the establishment of the Agreement helped to

[23] See accompanying document
[24] See a graphic classification in Escudero, 2021, p. 10

reduce uncertainty across the diverse groups. Our argument can be supportive of this last part of Escudero's claim. We add to that claim that the radicalization of the narratives can threaten the stability of the Agreement.

Another example can be found in Zapata (2015), who distinguished three groups. The first group, which he calls *pelucones*, defends the 1980 Constitution and opposes any change, even Burkean-type modifications. Today, this group is most closely associated with the forces that promoted the *Rechazo* (Reject) vote during the opening plebiscite. The second group, which Zapata calls *pipiolos*, advocates for an anti-elitist process and plebiscitary forms of democracy.[25] In the middle, Zapata claims that "republican" groups defend democracy, positively value the results of post-authoritarian Chile, and prefer that the Constitution limits political power to protect constitutional rights. These groups, for Zapata, typically recognize that the 1980 Constitution interrupted Chile's democratic tradition. Still, they also value the subsequent amendments to that text and believe that the constitution-making process should follow a regulated and institutional path, including popular participation.[26] It is possible that both the *pipiolos* and the *republicans* voted in favor of the *Apruebo* (Approval) option in the opening plebiscite, even if one would expect the *pipiolos* to have rejected the Agreement (and the Communist Party and some other factions from the far left in fact did so.)

Zapata's classification is compatible with our categories, but it is unhelpful for our purposes. Given that we aim to show how the Agreement can serve as a self-enforcing deal across rival political parties, and how compromises between these parties can be maintained, a framework that puts rival parties that drafted the Agreement within the same category—the republicans, in Zapata's terms—would erase essential differences between them. In treating both perspectives as pushing for similar political agendas, such categorization cannot identify nor see how those factions conceded or consented to their adversaries' core interests.

The way we distinguish between radical and moderate versions of the political narratives connects to the constitutional mechanisms of constitutional change associated with those narratives. Both versions of the revolutionary narrative emphasize the power of the people and use the constituent power theory. Nevertheless, the radical version takes seriously—even literally—the idea that the people's power is unlimited and that the Convention should be unconstrained. On the other hand, the moderate version believes that the Convention is limited by its single purpose—i.e., to enact a constitutional text—and that the use of previously established institutions was necessary to enable the constitution-making process. The most radical version of the revolutionary group can include proposals to remove sitting politicians via extraordinary means and to establish a new state order with a sovereign assembly that is unconstrained by any legal norms.[27] But the moderate version, exemplified by Salgado (2020), claims that even though the constituent power of the people cannot be justified by any norm—she partly follows Schmitt, Bockenforde, and Loughlin—it needs an institutional representation mechanism that can articulate that power and give it a juridical form that limits it.[28] This version

[25] Zapata Larraín, 2015, pp. 93–100
[26] Zapata Larraín, 2015, pp. 100–101
[27] An example of these more radical approaches can be found in Palma & Elgueta, 2020
[28] Salgado Muñoz, 2020, pp. 64–69

of the revolutionary theory is compatible with the core interests of the right, because it can be used to defend the Agreement's procedural limits.

Both versions of the evolutive narrative emphasize institutional continuity. However, while the radical version seeks to preserve the current Constitution more firmly—even though it accepts the path of change via constitutional amendment—the moderate version of the evolutive narrative aims to build large agreements that can recover the best of Chile's democratic tradition.[29] Moderate versions of the evolutive narrative can range from Burkean approaches to the constitution-making process to a "minimalist" approach to Chilean constitutional change.[30] This version of the evolutive narrative can agree to the blank slate that has been promoted by the left as a core interest, while leaving space for its transformative aspiration within the Agreement's framework.

The narratives we identify are not necessarily explicitly or consciously endorsed in their entirety by the actors who discuss them. These actors often hold various inter-related normative commitments. Some of them fall squarely within the purview of the theories we identify, but others do not. Therefore, identifying and analyzing these theories requires a certain level of abstraction. In practice, what is present is not the idealized or relatively abstract form of these theories but a diverse group of ideas that share an understanding about what is—and what is not—desirable in the path to constitutional change.

These categories are also an exercise in simplification. We do not imply—nor do we argue—that only two normative narratives are influencing the constitution-making process. First, because the two narratives we analyze present themselves in different versions. And second, because there are other ways of categorizing the political narratives that underlie the process, such as the feminist narratives that have driven the successful demand for parity in the constitutional Convention, and the ones we have discussed so far.

III. Identifying the evolutive and revolutionary narratives

Constitution-making tends to present itself as requiring a choice between two alternatives: revolution (replacement) or reform (amendment).[31] It is often assumed that revolution requires a complete constitutional replacement via the exercise of popular sovereignty.[32] Reform, by contrast, proceeds by constitutional amendment according to the rules present in the current constitutional text, operating within a framework of institutional continuity. A revolutionary theory of constitution-making is associated with the idea that constitution-making is a moment that is distinctively different from ordinary politics,[33] and it is typically accompanied by prescriptions

[29] Examples of the radical version are Bertelsen, 2020; Rojas, 2013; Van de Wyngard, 2013. Examples of the moderate version are Zapata Larraín, 2015
[30] García, 2014. Also, see García & Verdugo, 2015
[31] Arato, 2015, pp. 892–893
[32] Arato, 2015, p. 892
[33] Landau, 2013, p. 927

suggesting how to organize the constitutional replacement procedure. It usually requires that the people act through an extraordinary body—often a specialized constituent assembly, different from the ordinary legislature.[34] The constituent power theory has provided arguments to justify the unlimited and unconstrained power of the people,[35] the need for participatory mechanisms, and the existence of majority rule as an expression of political equality.[36]

The dichotomy described above can be challenged from many perspectives. First, it is not true that assemblies can be unconstrained as the law typically plays a central role even in the most radical constitution-making exercises.[37] Second, the dichotomy is false: a complete constitutional replacement could be achieved via amendment without ever calling for a constituent assembly or by regular legislators discussing a new constitutional text.[38] The superiority of constituent assemblies over ordinary legislators seems to be more assumed than demonstrated.[39] Additionally, an unconstrained constituent assembly could potentially preserve the substance of the old constitutional text.[40] Other alternatives seek to reduce the risks of the standard constituent power theory in the authoritarian way presented by scholars such as Carl Schmitt.[41] They include, for instance, bodies with a unique and exclusive aim,[42] the existence of elite-driven agreements that can ensure that the process will preserve and enforce liberal principles,[43] and multistage processes that fall within Arato's post-sovereign paradigm.[44] These corrections to the constituent power theory challenge the traditional way the sovereign model is typically portrayed and moderate the revolutionary nature that generally underlies the demand for constitutional replacement.[45]

Despite the points above, the idea of an unconstrained assembly has been particularly prevalent in Latin American constitution-making processes.[46] The constituent power theory has also impacted Chile's constitutional debates. The theory was introduced by a group of Chilean scholars, and they have long used the idea of the constituent power in the past, for example, to claim that the popular constituent power has never been used in Chile,[47] that the transition to democracy did not involve transferring the power to the people,[48] that the constituent power of the Junta remained during post-authoritarian Chile,[49] or that the 1980 Constitution was drafted by

[34] The landmark work on this is Elster, 1995
[35] For an intellectual history to the concept, see Rubinelli, 2020
[36] This idea can be traced back to Sieyes' classic work Sièyes, 2014
[37] See Colón-Ríos, 2020
[38] This is not to say, of course, that the difference between ordinary and constitutional politics should be rejected. There are good normative reasons to sustain it, though those reasons should not assume an idealized version of constitutional assemblies. See Partlett & Nwokora, 2019
[39] Also, see G. L. Negretto, 2018
[40] Arato, 2015, pp. 892–893
[41] Schmitt, 2008
[42] See, for example, Partlett, 2017
[43] See G. Negretto & Sánchez-Talanquer, 2021
[44] Arato, 2016, 2017
[45] Also, see an attempt to correct the Schmittian paradigm in Braver, 2018
[46] Landau, 2013, p. 932. Also, see Colón-Ríos, 2020
[47] Salazar, 2011
[48] Atria, 2006)
[49] Heiss, 2020, p. 73

scholars inspired in Schmitt's constituent power theory.[50] Chilean scholars have long theorized about the work of Sieyes and Schmitt,[51] and some of them even used the idea during the failed constitution-making process advanced by former President Bachelet[52] or to criticize that process.[53] These ideas about the constituent power are part of the revolutionary narrative. Indeed, they have served to justify a break with institutional continuity by replacing the constitutional text in its entirety.

An important example of how the revolutionary narrative is presented in the Chilean debate can be found in the work of Jaime Bassa, the vice-president of the Convention, who is also a constitutional scholar. Bassa has long written about the connection between the constitution-making process and the constituent power theory. In a recent article, he claims that the purpose of the constituent moment is to find a way in which the people can turn into a political subject that can be genuinely habilitated to make sure that the power relations of the Chilean regime can change.[54] For Bassa, the people possess the "original constituent power" which is equivalent to the idea of popular sovereignty.[55] The logical consequence of this idea is not to use constituted powers for constitutional change, such as the Congress, but a special assembly.[56] Bassa is not alone: many scholars have recently claimed that Congress should not replace the Constitution, arguing that the constituent power theory requires a body that is unconstrained from the limitations imposed by the 1980 Constitution.[57] Another example of the revolutionary approach in scholarship is Fernando Atria's use of Schmitt's theory. Atria has long justified the need for constitutional replacement in Chile, and he explicitly interprets the October 2019 social outbreak as a manifestation of the constituent power.[58] However, both Bassa and Atria have also defended keeping the two-thirds rule established in the Agreement against more radical revolutionary impulses. For them, the Convention is sovereign in establishing the content of the new constitution, but not in deciding the main aspects of its procedures or deciding that it can interfere with other organs of the state. This moderate version of the constituent power idea seems to dominate a large group of legal scholars and political scientists from the left and the center-left. An open letter signed by 262 scholars, responding to the skepticism shown by certain factions of the left against the Agreement, argued that the Agreement did not involve the "cheating" logic of the Pinochet Constitution—probably paraphrasing Atria's language in his book on the *constitución tramposa* (the “cheating constitution”).[59] The open letter argued that the people had a unique opportunity to replace the

[50] Cristi, 2011
[51] See, for example, Nogueira Alcalá, 2009
[52] Zúñiga Urbina, 2014
[53] Muñoz, 2015
[54] Bassa Mercado, 2019, pp. 37–39
[55] Bassa, 2020, p. 193; Bassa Mercado, 2019, pp. 19–25
[56] Of course, modern political theory is careful to separate these ideas. For example, Rubinelli has claimed that Sieyes used the concept of the constituent power to separate his ideas from the more radical sovereign approaches that people like Robespierre were advocating. See Rubinelli, 2019, 2020. However, even though mistaken, the connection between sovereignty and constituent power is a common place among Chilean scholars Ríos Álvarez, 2021
[57] See, for example, Carrasco Jiménez, 2020, pp. 65–74; Muñoz, 2015, pp. 174–175; Ríos Álvarez, 2021, pp. 748–751
[58] Atria, 2020
[59] 262 legal scholars and political scientists, 2019. See Atria, 2013

cheating constitution via democratic procedures involving wide agreements, which justified the two-thirds majority requirement (a core interest of the right). For them, this requirement is not a trick because it involves drafting the new constitution on a blank slate (one of the core interests of the left), which secures that the process will differ from a mere constitutional amending procedure that could have benefited the right's veto power.

However, the defense of the two-thirds rule has a limit. For the left, this rule should not allow the right-wing constitutional drafters to veto the new constitution proposed at the end of the assembly's functioning in order to preserve the current Constitution. Because of this fear, the left was opposed to the right-wing proposal to include a final vote on the entire text. The Agreement did not involve such a norm, but it remained vague as to when and how the two-thirds rule would be utilized.[60] This issue arose again during the Mesa Técnica's discussions, as we will see below.

Other versions of the revolutionary narrative are more radical and have shown skepticism against the Agreement and/or the Convention. They typically claim that a genuine sovereign assembly should not be subject to restrictions and that the design of the Convention imposes substantive and procedural limits aimed at reproducing the practices established by the 1980 Constitution, for example, by electing the members of the Convention using a similar mechanism to the one used to elect the Chamber of Deputies, or by having the two-thirds majority rule, which they see as a representation of the old political dynamics of the "protected democracy" model that the Pinochet regime designed.[61] These types of arguments have been used to push to eliminate or reduce the scope of the supermajority rule in the Convention. The Communist Party presented a formal proposal, and the *Lista del Pueblo* has continuously questioned this rule. An important example is a statement signed by 33 elected constitutional designers that are part of the "Voice of the Peoples" group (*Vocería de los Pueblos*).[62] In that statement, the constitution-makers declared that they would not follow the rules of the Agreement nor the mandates of the country's institutional system. They claimed that the Convention was a sovereign assembly that can exercise an autonomous original constituent power and that their only limit is the respect for fundamental rights. They also rejected the approval of the Trans-Pacific Partnership agreement that Congress was discussing at that time. If these radical versions of the revolutionary narrative become dominant in the Convention's procedures, they will be unable to support the core interests of the right, and the Agreement will likely lose its self-enforcing capacity.

Indeed, reflecting some core interests of the right, the Agreement established some concrete limits on the powers of the future constitution-making body. It emphasized that the only function of the constitutional Convention would be to draft a new constitutional text, and prevented constitutional designers from interfering with the attributions and jurisdiction of other organs of the state. The Convention would dissolve once its function—i.e., drafting the new constitutional text—was completed, and it would not have the power to change the quorum or procedures established in the Agreement. This limitation referred to the two-thirds majority required to approve the new constitutional norms and the Convention's regulations of its own voting

[60] See Soto Velasco, 2020, p. 65
[61] Palma & Elgueta, 2020, pp. 104–105. The first author has been one of the main advisors of the constitution-makers that were elected within the Lista del Pueblo alliance.
[62] Vocería de los Pueblos, 2021

procedure. A time limit for the Convention's functioning was also established: nine months, which could be extended for three additional months only once. These ideas are only compatible with the revolutionary narratives that moderate the constituent power idea, and not with their radical versions.

Examining the work of right-wing scholars that helped to draft the Agreement can shed light on how their core interests relate to the evolutive political narratives that come from that sector. An interesting example is the work of Arturo Fermandois, the conservative scholar that proposed the limits clauses. According to him, the limits on the Convention were aimed at preventing the Chilean process from following the path of other assemblies, such as the Ecuadorian one—which followed the sovereign model—the Venezuelan assembly—which had conflicts with the Supreme Court—and the Bolivian process—which had disputes over the applicable majority rules.[63] The limits clauses were supposed to serve as "a solid connecting bridge between two legal times—the time of the 1980 Constitution and the possible new Constitution."[64] According to Fermandois, quoting one of the leftwing drafters, they accepted the limits clause because it seemed to give certain tranquility to the right-wing members of the drafting committee.[65]

As already described above, the evolutive narrative associated with the right emphasizes certain features of the constitution-making process, such as consensus building, the imposition of constraints on the constituent power, and a certain continuity with the status quo. The latter has occasionally manifested in Chile as a preference for constitutional amendment rather than complete constitutional replacement, particularly among right-wing parties. This radical version of the evolutive theory challenges the core interest of the left to draft a constitution on a blank slate, because it entails that the current Constitution will remain as a default rule if agreements on amendments are not achieved. Thus, if the right is to respect the core interest of the left, it needs a more moderate evolutive narrative that can concede the blank slate idea. This is no easy task, as the evolutive narrative is related to a particular vision of constitutional change which emphasizes the importance of gradual and incremental changes over a complete or radical transformation.

One example of the moderate version of the evolutive theory accepts the idea of the blank slate. Still, it claims that the constituent nature of the constitution-making process should limit the Convention from engaging in ordinary politics, which also limits the substance of the new constitutional text in the sense that the new constitution should not be used to establish a political platform equivalent to those that presidential candidates offer for the elections.[66] This moderate approach does not need to agree with the constituent power theory but is compatible with its moderate version. The idea of separating ordinary politics from constitutional politics is used to justify the Convention's power and limit it.[67] Other examples include scholars who believe that the Convention lacks constituent power but can only exercise a sort of "derivative" power[68] or a hybrid

[63] Fermandois Vohringer, 2021, pp. 710–711
[64] Fermandois Vohringer, 2021, p. 716
[65] Fermandois Vohringer, 2021, pp. 716–717
[66] Cazor Aliste & Núñez Poblete, 2021, pp. 43–44
[67] For example, citing Ackerman's dualist democratic model, see García, 2014
[68] Fermandois Vohringer, 2021, p. 713

type of power,[69] as well as scholars who uncritically assume that the constituent power can be constrained.[70] Some prefer to argue that the process does not respond to the classic constituent power distinctions[71] or use a post-sovereign approach to understand it.[72] As long as these formulations agree on giving the Convention discretion over deciding the content of the new norms without the Pinochet model acting as the default option, the evolutive narrative can concur with the left's core interests.

IV. Narratives, tensions, and core interests in different stages of the Chilean constitution-making process

The narratives sketched above can be observed at different stages of the constitution-making process. As previously explained, the Chilean process began with an Agreement setting out the framework for the constitution-making process. We can see how the Agreement contains some core interests of both the right and the left, which were justified by both the evolutive and the revolutionary narratives. As we explained before, the Agreement was a compromise between both.

The left's core interests were present in the plebiscitary and electoral mechanisms contemplated in the Agreement that would guarantee an elected constitution-making body, as well as in the lack of a default rule in case the two-thirds majority is not achieved regarding constitutional issues. These types of features are consistent with the transformative aims of the revolutionary theory. The right's core interests are reflected in the two-thirds majority rule, the limits of the Convention, and the procedural rules forcing the Convention to dissolve itself after finalizing its task. These interests are justified by the consensus-building and continuity approaches advanced by the evolutionist narrative.

Some features of the Agreement can only fit with the moderate versions of both narratives. Take, for example, Articles 131 and 135 of the current Constitution. Those rules state that the constituent body's sole objective is to draft a new constitutional text, that the Convention cannot interfere nor affect the functions of other institutions, and that it cannot alter the two-thirds majority requirement, among other limitations. These limits are consistent with the evolutive theory, which shies away from the idea of an unconstrained sovereign assembly, and with the moderate version of the revolutionary narrative. Still, they are incompatible with a radical version of the latter.

In the following sub-sections, we explain different episodes that are illustrative of the tensions that exist and the way the narratives are present. We first focus on the earlier disagreements that took place in the debates of the *Mesa Técnica* (hereinafter, the *Mesa*). The *Mesa* was a multi-partisan committee in charge of drafting a more detailed document that could

[69] Serey Torres, 2021
[70] Núñez, 2021, pp. 26, 33
[71] Núñez Leiva, 2021, p. 11
[72] Tschorne, 2020; Verdugo, 2020

operationalize the November Agreement. We then briefly explore some episodes from the later discussions that took place in the Congress and in other instances.

1. The debates of the *Mesa Técnica*

The rules limiting the Convention, as cited above, were drafted by the *Mesa*. Even though the *Mesa* agreed on establishing those limits and using some Congressional regulations for the election, inabilities, and incompatibilities of the constitutional designers,[73] the members of the *Mesa* compromised on several items about which they disagreed. The *Mesa* negotiations can help to understand possible swaps and identify core interests.

An important issue was the way the two-thirds majority requirement was going to be implemented. The representatives of the *oficialismo*—i.e., the members of President Piñera's supporting coalition—argued that the Convention needed to vote on each provision separately and have a final vote on the totality of the agreed-upon constitutional text. This final vote, they proposed, should also be subject to the two-thirds majority. The opposition rejected this idea fearing that the right-wing constitutional designers may use the opportunity to boycott the process at the very end.[74] Claudia Heiss, a political scientist in the *Mesa*, stressed that the Convention should be a constituent body, not a constituted one. The approval of the final text should be left for the people to decide.[75] Aylwin accused the proponents of the rule of seeking an opportunity to keep the current Constitution.[76] The *oficialismo* rejected those arguments. Fermandois argued that the final vote proposal aimed at preventing constitutional fragmentation,[77] and Soto and other representatives of the *oficialismo* claimed that the final vote would secure the constitutional text's internal coherence.[78] Moreover, Soto argued that the two-thirds final vote could prevent some critical constitutional issues from being left by the Convention for ordinary legislation.[79]

Gómez, representing the *oficialismo,* claimed that the members of the *Mesa* were in no position to solve the political tension surrounding the issue, which was an expression of the fears of both political sectors: the opposition's fear of having a deadlocked convention and the

[73] https://www.youtube.com/watch?v=uATkEvIrayA&feature=emb_logo min 13:00; https://www.youtube.com/watch?v=uATkEvIrayA&feature=emb_logo min 17
[74] Aylwin, Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube; Osorio Min 34. Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube; Figueroa Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube 1 hour 23; Heiss, Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube 1:hour 28; Heiss (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 1:07:03
[75] Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube 1:hour 28
[76] Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube 1 hour 39
[77] Min 46 Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube
[78] Soto, 1 hour :12 Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube; Silva, Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube 1 hour 30; Soto Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube 1 hour 45; Gomez, (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 1:47:06
[79] Soto, (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 1:39:57

oficialismo's fear of being "steamrolled."[80] Ultimately, the members of the *Mesa* were unable to reach a consensus on this issue and decided to replicate the vague text of the Agreement. They expected the Convention to eventually solve this issue,[81] which it did.[82]

The supra-majority rule is a core interest of the right which is rejected by radical versions of the revolutionary narrative. It is rejected both on the basis of its tension with constituent power theories that would call for simple majority and what some see as its continuity with supra-majoritarian quorums for legislation and constitutional amendment contained in the Pinochet constitution that have operated as deadlocks in Chile. A moderate version of the revolutionary theory can, however, accommodate the rule on the basis of the desirability of reaching a text that is representative of a large societal consensus, but it is likely to be reluctant to expand its application beyond what is strictly necessary (as can be seen by the opposition of certain members of the *Mesa* against including a final supra-majoritarian vote of the text).

The *Mesa* also had difficulties agreeing on the deadline for writing a new constitution and the Convention's immediate automatic dissolution.[83] The opposition argued that requiring a two-thirds vote for extending the Convention's functioning would give a one-third minority a veto power that would potentially make the constitution-making process fail, a result which they saw as nonsensical given the objectives of the process.[84] The *oficialismo* argued that a convention that could work indefinitely would betray the Agreement, which explicitly included a deadline with a single possible extension.[85] During the discussion, Gómez and García were open to the possibility

[80] Gomez, (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 1:47:06
[81] Garcia, (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 1:02:33; Garcia, (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube1:04:02; Escudero, [81] (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 1:04:50, Huiña, (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 1:09:54; Aninat, (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 1:11:42; Oñate, (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 1:12:22; Oñate, (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 1:14:04; Silva, (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube1:38:21; Soto (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 1:39:57
[82] In the end, after three months of negotiations, the Convention's rules of procedure eventually respected the two-third rule majority for approving the norms of the new constitution and the revisions suggested by the Convention's armonizing committee, but it rejected the idea of having the new Constitution approved by a supermajority vote as a whole. Also, the Convention was criticized because of its proposal to plebiscite the norms that achieved only 3/5ths of the constitution-makers, seeking to establish a mechanism that could overcome the high threslhold of the two-third rule.
[83] Aylwin (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:06:00; Osorio, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:10:00; Oñate, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:15:19; Gomez, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:12:59; Garcia (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:22:28
[84] Oñate, Mesa técnica 59 Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube; Heiss, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:11:00; Osorio, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:10:00; Oñate, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:30:03
[85] Fermandois Min 46 Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube; Garcia Mesa técnica, 52 Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube;

that the extension of the deadline would be automatic.[86] Huiña argued that he was happy to concede on this point and combine the goal of facilitating the constitution-making process with having some sort of act that would extend the deadline without a supermajoritarian vote requirement.[87] Silva, however, disagreed and pointed out that a faithful interpretation of the Agreement counseled against an automatic extension.[88] Aylwin, a member of the opposition, agreed with Silva and stressed that they should interpret the dispositions of the Agreement in a way that would make them have consequences. An automatic extension would be against that. He opposed a two-thirds vote on the extension, but he did not favor an automatic postponement.[89]

Ultimately, an agreement coalesced within the members of the *Mesa.* The extension would not operate automatically, but it would be a relatively non-stressful procedure that would not hinder the constitution-making process.[90] The constitutional reform proposed by the *Mesa* and approved by Congress reflected this compromise. It established that the original nine-month deadline could be extended by three additional months by a petition of the President of the Convention or of one-third of its members within an established timeframe. Once the petition has been submitted, a special session shall be convened, where the President of the Convention shall account for the advances made in the elaboration of the constitution, after which the extension would be considered granted with no further requirements. Finally, the compromise also included a norm stating that, once the constitution is drafted and approved by the Convention, or after the deadline for its functioning has passed, the Convention shall dissolve itself *ipso iure*.[91]

Another issue debated by the *Mesa* concerned the procedural and substantive limits that would constrain the attributions of the Convention. The initial proposal by the opposition stated that the Convention was not to intervene or exercise functions that belonged to other organs of the state. The only role of the Convention was to draft a new constitutional text and propose it to Chileans.[92] The *oficialismo* repeated this same provision (which was contained in the Agreement) and added new substantive limits: the Convention would not be entitled to modify the current constitution, which would remain in force until the exit plebiscite; sovereignty would still belong to the people—in a provision reminiscent of Article 5 of the Pinochet Constitution—so that the Convention could not claim that sovereignty resided in itself exclusively.[93]

This issue was relatively pacific within the *Mesa*. The disagreement was triggered after Fermandois, a member of the *oficialismo*, presented a proposal establishing substantive limits to the Convention. The proposal prevented the Convention from approving norms that could modify

[86] Gomez, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:12:59; Garcia [86] (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:22:28
[87] Huiña, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:25:41
[88] Silva, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:18:20
[89] (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:33:29
[90] Escudero, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:36:40; Huiña, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:39:10; Garcia, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:41:02; Silva, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:42:46
[91] Art. 137, Prorroga del plazo de funcionamiento de la Convención, Propuesta Reforma Const, Mesa Tecnica. Also see Ley 21200, Modifica el Capitulo XV de la Constitución Política de la Republica, 23 December 2019, art. 137.
[92] https://www.youtube.com/watch?v=uATkEvIrayA&feature=emb_logo min 13:00
[93] https://www.youtube.com/watch?v=uATkEvIrayA&feature=emb_logo min 17

the democratic regime, final judicial rulings, international treaties, and contracts.[94] The opposition agreed with all but the latter.[95] Fermandois explained that he wanted to add "contracts" as a limit to the Convention's power to signal stability and certainty due to the deteriorating economy.[96] However, he conceded that this was contained in the general principle of non-regressivity of fundamental rights, which was already covered by the limitation of the international treaties.[97] Osorio, a member of the opposition, explained that someone could contend that this clause could lead to the petrification of the current dispositions on fundamental rights. This would be problematic, particularly regarding property rights and water rights, among others, and if the clause were to be interpreted in such a way, he would be opposed to it.[98]

Fermandois answered that this was not the point of the provision: a reconfiguration of these rights was the essence of a new constitutional regime. The paragraph was simply intended to avoid sudden changes that would break people's trust in the previous legal regimes. The point was also for the essential core of fundamental rights to be maintained, sending a message about transitions needing to occur within specific parameters of sensibility and graduality but not impede the Convention's autonomy.[99]

The final text agreed upon by the *Mesa* established substantive limits along those lines. Both the evolutive and the revolutionary narratives could be used to justify the compromise because there are elements of continuity and rupture: the established limits are unenforceable and do not constrain the Convention's autonomy too much. However, a radical interpretation of both narratives could compromise the core interest of the rival understanding, thus threatening the Agreement, by, for example, offering some sort of judicial review over the content of the new constitution for the sake of continuity, or by saying that fundamental rights are irrelevant for the transformative narrative associated to the blank slate idea.

The *Mesa* also disagreed on whether there should be a court with jurisdiction to enforce the procedural and substantive limits of the interim constitution. The *oficialismo*, in its original proposal, suggested a provision that had two parts. First, the Convention could not be controlled by other external institutions such as courts. And second, there should be an organ in charge of resolving controversies regarding procedures.[100] Soto argued that a mechanism to resolve controversies about procedural norms was necessary. The Convention itself could not fulfill this role—it should be an impartial third party.[101] Silva and Huiña agreed and stressed that the lack of a mechanism to solve controversies would hinder the Convention's functioning.[102] Oñate initially

[94] Soto, (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 23:30; Fermandois,
[95] Oñate, (1) Mesa Técnica Asesora - Proceso Constituyente - 28 de Noviembre 2019 (Parte 2) - YouTube 48:35
[96] Fermandois, (1) Mesa Técnica Asesora - Proceso Constituyente - 2 de Diciembre 2019 - YouTube 2:12:02
[97] Fermandois, (1) Mesa Técnica Asesora - Proceso Constituyente - 2 de Diciembre 2019 - YouTube 2:12:02
[98] Osorio, (1) Mesa Técnica Asesora - Proceso Constituyente - 2 de Diciembre 2019 - YouTube 2:22:03
[99] Fermandois, (1) Mesa Técnica Asesora - Proceso Constituyente - 2 de Diciembre 2019 - YouTube 2:24:58
[100] https://www.youtube.com/watch?v=uATkEvIrayA&feature=emb_logo min 17
[101] Soto, 1 hour :12 Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube
[102] Silva, Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube 1 hour 30; Huiña, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 31:40 min

considered the organ of control unnecessary,[103] and Escudero and Osorio mentioned that they knew of no other constitutional processes where there had been an external enforcement organ.[104] Heiss believed that the Convention should resolve its own conflicts, and she stressed that the existence of an external institution was not part of the November Agreement. She also considered it a mechanism distrustful of democracy rather than facilitative of it.[105] Aylwin proposed certain principles: the organ of control would have to act based on basic Chilean public law principles, and the claim should be regarding procedural norms and formal acts of the Convention, not substantive issues, among others.[106]

The *Mesa* compromised on those terms.[107] The norms of the new constitution were not going to be subject to judicial review, but the Supreme Court could revise the procedures. The left opposed having the Constitutional Court performing this function because that Court had been criticized as part of the constitutional structure that has benefited the right's veto power. Gomez and Fermandois, members of the *oficialismo*, had argued that an organ composed of members of both the Supreme Court and the Constitutional Court would be the best alternative, given that they both exercise jurisdiction over constitutional matters.[108] Escudero, a member of the opposition, leaned towards the Supreme Court,[109] and so did Zuñiga, supporting Heiss's point regarding the Constitutional Tribunal's lack of legitimacy.[110] Soto, a member of the *oficialismo*, emphasized that the most important thing was to ensure that there would be "a veil of ignorance" as to the identity of the members of the organ of control. He was also open to Heiss's point about the lack of legitimacy of the Constitutional Court. He argued that the organ of control was an important part of a democratic procedure and deliberation.[111]

Eventually, the *Mesa* settled on a few members of the Supreme Court.[112] The organ will be composed of five Supreme Court ministers, assigned randomly by the same Court for each claim. Additional rules regarding who was entitled to file a claim, deadlines, and contents of the claim itself, as well as the effects of the judgment granting the claim were also included. Finally, a

[103] Oñate, Mesa técnica 59 Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube
[104] Escudero, Mesa Técnica Asesora - Proceso Constituyente - 26 de Noviembre (Parte 3) - YouTube 1 hour 45; Osorio(1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 20 min
[105] Heiss, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube min 16
[106] Aylwin (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 4min 07
[107] Oñate, however, remained unconvinced. (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 27: 17 min
[108] Gomez (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 11:00 minñ Fermandois (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 36:26 min
[109] Escudero (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 14 min
[110] Zuñiga, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 23 min
[111] Soto, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 17 min
[112]Gomez, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 53 min; Escudero, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:01:00; Aninat, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:02:00; Oñate and Huiña, (1) Mesa Técnica Asesora - Proceso Constituyente - 27 de Noviembre (Parte 2) - YouTube 1:03:00-1:04:00

provision stating that no authority or tribunal had jurisdiction over claims related to the tasks that the Constitution had assigned to the Convention was also included.[113]

This compromise is inconsistent with the radical version of the evolutive narrative, as the norms approved by the Convention are subject to substantive unenforceable limits and the Constitutional Court lacks jurisdiction. Thus, nothing guarantees that the current Constitution will remain. This compromise is also inconsistent with the radical approach of the revolutionary theory, as there is a formal mechanism to enforce the procedural limits of the Convention rather than an unconstrained constituent assembly. But the compromise secures enough elements of continuity and rupture for it to gain the support of the moderate versions of the narratives.

2. The Later Debates

The discussion in Congress centered on the inclusion of gender-parity in the composition of the Convention, the inclusion of reserved seats for the indigenous peoples of Chile, and norms regarding independent candidates. Most of the interventions by members of Congress emphasized the importance of respecting the terms of the Agreement.

The parties who did not sign the original November Agreement voiced their disagreement with the two-thirds majority requirement. We found some explicit commitments to the radical version of the revolutionary narrative in the arguments they gave. For example, Carmen Hertz argued that the two-thirds majority limited the popular will and could prevent the constitutionalization of social rights.[114] Mulet claimed that the two-thirds majority rule came from the Pinochet Constitution, constraining the majority and preventing the approval of a genuinely democratic constitution.[115] Felix Gonzalez contended that the two-thirds majority prevented the assembly from becoming a sovereign assembly.[116] The constitution-making process, he continued, was going to proceed under the "tutelage" of Pinochet's Constitution.[117] Sepulveda criticized the Agreement saying that it was the product of "blackmail" under the threat of a coup.[118] Vallejo lamented that the Agreement was primarily a compromise with the right-wing parties incorporating "Jaime Guzman's doctrine." She stressed the difference between a derivative and original constituent power and argued that they were voting a derivative organ, lacking in sovereignty.[119] Gutierrez argued that the elected delegates would not have constituent power because Congress was limiting and conditioning the exercise of popular sovereignty.[120]

[113] Art. 136, De la reclamacion, Propuesta Reforma Const, Mesa Tecnica. Also see Ley 21200, Modifica el Capitulo XV de la Constitución Política de la Republica, 23 December 2019, art. 136.
[114] Hertz, Historia Ref Constitucional, pg. 266
[115] Mulet, Historia Ref Constitucional, 278
[116] Gonzalez, Historia Ref Constitucional, 280
[117] Gonzalez, Historia Ref Constitucional, 280
[118] Sepulveda, Gonzalez, Historia Ref Constitucional, 299
[119] Vallejo, Historia Ref Constitucional, 307.
[120] Gutierrez, Historia Ref Constitucional, 319-320

On the other side, politicians made reference to moderate versions of both the revolutionary and the evolutive narratives that can agree on the importance of consensus-building. Desbordes defended the democratic credentials of the two-thirds majority requirement.[121] Lagos argued that it would guarantee that no one would monopolize the Convention and incentivize compromises.[122] Pugh and Castro also said that the two-thirds rule would incentivize consensus.[123] In the end, Congress approved the two-thirds majority requirement despite the disagreement manifested by some left-wing legislators in their speeches.

After the Congress passed the rules, both the revolutionary and evolutionary narratives showed some elements for and against the drafting of a new constitution during the TV campaigns that preceeded the constitution-making process' entry plebiscite. These campaigns did not include specialized debates on the rules of the process, and are thus not particularly useful for identifying the core interests. However, they are additional evidence of the fact that both the evolutive and revolutionary narratives were present in the public debates.

The *Rechazo* campaign, seeking to convince voters to vote against a constitutional replacement, is a good example of the radical version of the evolutive narrative and as such, it is incompatible with the core interests of the left reflected in the Agreement. Part of the campaign pushed for an alternative: to reform the current constitution rather than to completely replace it.[124] This argument was incompatible with the blank slate idea, as it promoted a reform plan within the framework of the existing Constitution. It was also skeptical of the mechanisms to elect a Convention, and in favor of the Mixed Convention, suggesting that it would be better prepared to draft a constitution.[125] The impulse for a new constitution was considered to be motivated by an "emotion," not a pragmatic approach to social problems in need of solving.[126] The current Constitution was also lauded as the Constitution under which the most progress had occurred in Chilean history.[127]

The *Apruebo* campaign, which aimed at opening the constitutional replacement process, emphasized the importance of drafting a new constitution through an inclusive and democratic procedure that would break Pinochet's legacy and advance social change.[128] The need to let go of

[121] Desbordes, Historia Ref Constitucional, 267
[122] Lagos, Historia Ref Constitucional, 452
[123] Pugh, Historia Ref Constitucional, 465; Castro, Historia Ref Constitucional, 472
[124] UDI campaign, VIDEO 1: Emisión 25 de septiembre / Hora: 12:45 / Duración: 17:26 https://www.youtube.com/watch?v=8Q66vZZslB0&list=PLtiWGJPe_EXJSjVAjsQFxb7dAiqYF5fuv
[125] UDI campaign VIDEO 1: Emisión 25 de septiembre / Hora: 12:45 / Duración: 17:26 https://www.youtube.com/watch?v=8Q66vZZslB0&list=PLtiWGJPe_EXJSjVAjsQFxb7dAiqYF5fuv
[126] VIDEO 2: Emisión 25 de septiembre. Hora: 20:45. Duración 17:02 https://www.youtube.com/watch?v=lY1CKPZTiPE&list=PLtiWGJPe_EXJSjVAjsQFxb7dAiqYF5fuv&index=2 ; VIDEO 3: Emisión 26 de septiembre. Hora: 12:45. Duración: 15:09 https://www.youtube.com/watch?v=ZMuzZ9xxRL8&list=PLtiWGJPe_EXJSjVAjsQFxb7dAiqYF5fuv&index=3
[127] VIDEO 2: Emisión 25 de septiembre. Hora: 20:45. Duración 17:02 https://www.youtube.com/watch?v=lY1CKPZTiPE&list=PLtiWGJPe_EXJSjVAjsQFxb7dAiqYF5fuv&index=2
[128] PS campaign; DC campaign; PR campaign; VIDEO 1: Emisión 25 de septiembre / Hora: 12:45 / Duración: 17:26 https://www.youtube.com/watch?v=8Q66vZZslB0&list=PLtiWGJPe_EXJSjVAjsQFxb7dAiqYF5fuv; Apruebo campaign VIDEO 2: Emisión 25 de septiembre. Hora: 20:45. Duración 17:02

a constitution drafted during a dictatorship that had entrenched a neoliberal regime without any popular participation was also emphasized.[129]

The *Apruebo* campaign won, and later the Constitutional Convention was elected. On June 8, 2021, thirty-four delegates issued a declaration that reflects radical elements of the revolutionary narrative.[130] The declaration stated that they would end the Pinochet Constitution and manifested their democratic commitment to the sovereign exercise of the peoples.[131] They called upon each other to make the Convention's popular sovereignty effective without subordinating itself to the Agreement which, they emphasized, was never subscribed by the people. They called upon each other to "shake off, once more, the heavy normality with which political and undemocratic conditions are trying to be imposed on the process," and to materialize the "extraordinary character of the political moment, consolidating the conditions for the new political cycle in Chile," which should signal a break with the "continuity of state violence." The declaration contains six main points or "calls." Five of them pertained to issues of human rights, some of them related to immigrants and the Mapuche people. The sixth one contained a declaration regarding the constituent power:

> "The original constituent power is a fully autonomous power that is established to reorder the political body of a society; it is limited by respect to fundamental rights. As a consequence, the process opened by the peoples cannot be limited to the drafting of a new constitution under immovable rules; it must be expressive of the popular will, reaffirming its constituent character supported by ample popular deliberation and social mobilization both inside and outside the Convention. […]"[132]

The declaration received the support of Daniel Jadue, presidential candidate for the Communist Party, who said that he prefered "real constituent assemblies."[133] He added that if he won the election, he will make sure to modify the Agreement—though he later lost the primary

https://www.youtube.com/watch?v=lY1CKPZTiPE&list=PLtiWGJPe_EXJSjVAjsQFxb7dAiqYF5fuv&index=2;
VIDEO 4: Emisión 26 de septiembre. Hora: 20:45. Duración 20:25
https://www.youtube.com/watch?v=bBlXbSdcehg&list=PLtiWGJPe_EXJSjVAjsQFxb7dAiqYF5fuv&index=4

[129] PR, DC, VIDEO 3: Emisión 26 de septiembre. Hora: 12:45. Duración: 15:09
https://www.youtube.com/watch?v=ZMuzZ9xxRL8&list=PLtiWGJPe_EXJSjVAjsQFxb7dAiqYF5fuv&index=3

[130] Vocería de los Pueblos, 2021

[131] https://reddigital.cl/2021/06/09/voceria-los-pueblos-34-constituyentes-reafirman-soberania-la-convencion-constitucional/

[132] https://reddigital.cl/2021/06/09/voceria-los-pueblos-34-constituyentes-reafirman-soberania-la-convencion-constitucional/

[133] https://www.latercera.com/politica/noticia/siempre-he-sido-partidario-de-las-asambleas-constituyentes-de-verdad-jadue-fija-postura-tras-carta-de-34-constituyentes-sobre-reglas-de-la-convencion/G6SJQRKJBVGLNCP4W452WAKJNU/

elections against Gabriel Boric, from the *Frente Amplio*.[134] He also stressed that the most important thing was not to put the constitution-making process at risk of failure.[135]

Another example involves Eric Palma's work. Palma is a constitutional historian that supports some constitutional drafters from the far left and has argued that the two-thirds rule could be modified insofar as the Constitutional Convention exercises the original constituent power, understood as the power that "organizes and gives legal form to a state or permits the state to reestablish its legal order after a revolutionary process, a coup, or a pacific decision by the political body of society…"[136] Palma argued that a derivative and delegitimized constituent power, such as the Chilean Congress, could not legitimately force the Convention to operate with a supra-majority requirement that originated in the dictatorship.[137] If the two-thirds majority requirement has the effect of preventing the inclusion of certain social rights or the modification of the socioeconomic regime, the Chilean people would perceive the process as illegitimate, potentially voting against the approval of the Constitutional text and resulting in the further radicalization of politics.[138]

These understandings of the constituent power as unbounded are an important element of the radical versions of the revolutionary narrative. As can be seen, they are also in tension with the two-thirds majority requirement (i.e., a core interest of the right).

After the Vocería de los Pueblos' statement, ninety-one politicians and public intellectuals, mainly from the center-left, issued a declaration of their own manifesting their support of the Agreement and, more generally, of democratically established agreements.[139] The statement uses some elements from moderate versions of the revolutionary and evolutive narratives by reiterating the importance of broad consensus—a constitution "by everyone and for everyone"— in the drafting of a constitutional text and the significance of respecting and accepting rules that have been democratically legitimized by "the Chilean people" through the Agreement and the 2020 Plebiscite.

All these episodes help to understand the core interests of each party involved and identify the kinds of political narratives that have been used during the debates. They show that radical narratives tend to go against the core interests of the adversaries and that moderate versions of those narratives are more helpful to build a discourse that can support the Agreement. If the moderate narratives prevail within the constitutional convention, the Agreement is then less likely to be breached.

[134] https://www.latercera.com/politica/noticia/siempre-he-sido-partidario-de-las-asambleas-constituyentes-de-verdad-jadue-fija-postura-tras-carta-de-34-constituyentes-sobre-reglas-de-la-convencion/G6SJQRKJBVGLNCP4W452WAKJNU/
[135] https://www.latercera.com/politica/noticia/siempre-he-sido-partidario-de-las-asambleas-constituyentes-de-verdad-jadue-fija-postura-tras-carta-de-34-constituyentes-sobre-reglas-de-la-convencion/G6SJQRKJBVGLNCP4W452WAKJNU/
[136] https://www.elmostrador.cl/noticias/opinion/columnas/2021/06/03/fuera-los-2-3-de-la-convencion-y-de-la-nueva-constitucion/
[137] https://www.elmostrador.cl/noticias/opinion/columnas/2021/06/03/fuera-los-2-3-de-la-convencion-y-de-la-nueva-constitucion/
[138] https://www.elmostrador.cl/noticias/opinion/columnas/2021/06/03/fuera-los-2-3-de-la-convencion-y-de-la-nueva-constitucion/
[139] https://static.emol.cl/emol50/documentos/archivos/2021/06/11/2021061112336.pdf

V. Conclusion

Even though scholars have advanced explanations to understand how constitutions can become self-enforcing norms, the literature is yet to theorize deeply on how interim constitutions can be respected and enforced by competing parties in the context of a constitution-making process. Constitution-making processes often take place in times of crisis and constitutional designers may distrust each other. We know that interim constitutions can reduce transaction costs, enhance the credibility of the process and preserve core interests of the different factions, thus serving to build a predictable procedure that can reduce the political stakes and restore trust among opposing politicians. This article has used the Chilean constitution-making process to illuminate how interim constitutions can be destabilized while theorizing on the types of political narratives that can harm the interim constitution's self-enforcing capacity.

We have shown how political narratives need to be sufficiently moderate in order to avoind rejecting the core interests of the rival parties that have agreed on the interim constitution. This can be an important condition for negotiated constitution-making processes pushed by competing parties. Assuming that the core interests of the multiparty compromise remain stable, we argue that radical versions of the political narratives that politicians use to justify their agendas with external audiences can put pressure on relevant rules included in the interim constitution. If party A appeals to radical versions of political narratives and thus threatens the core interests of its rival party (party B), then party B may lose interest in respecting the parts of the interim constitution that benefit party A. As a result, the interim constitution's self-enforcing ability may be reduced.

Chile's constitution-making process is still ongoing (we are writing this article in August 2021). We do not know yet whether Chile's interim constitution will remain stable and capable of producing a new permanent constitution. However, our research has shown several episodes in which the radical versions of the rival narratives dominating the debates have threatened the Agreement's enforceability. Until now, it seems that the interim constitution is still a self-enforceable norm because it has operated as a two-sided insurance that has served to protect the core interests of the right and of the left—except perhaps for the leftist factions that did not sign the Agreement. The normative implication of these findings is to continue promoting the moderate versions of the political narratives so that the interim constitution can serve its function as a reliable blueprint for constitutional change.

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