‘His advantage over me is that this Constitution –whether I like it or not—is ruling.’ The Role of the Chilean Constitutional Court in times of Change

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Abstract: This essay justifies the lack of a judicial doctrine restricting constitutional reform with substantive limits –as opposed to procedural limits—in Chile. The author examines the recent Chilean constitutional history and the few relevant Constitutional Court decisions, to argue that lacking such a judicial doctrine was desirable because it allowed constitutional amenders to gradually and incrementally democratize the Chilean Constitution. Nevertheless, there may be good reasons to restricting future constitutional reforms if those reforms aim to reverse the democratic achievements of the post-authoritarian era.

Introduction

In April of 2014, a journalist asked the Chief Justice of the Chilean Constitutional Court (hereinafter, ‘the Court’), Marisol Peña, her opinion on whether the Constitution was legitimate. The question was particularly important because of the possibility that the Court could review the constitution-making process that President Michelle Bachelet was promoting at that time. The newspaper reproduced Chief Justice Peña’s response:

> “I had the impression that that discussion was over. First, because in 1989 [politicians…] achieved important constitutional modifications […] and that reform was approved by a referendum […] The second occasion […] was the 2005 constitutional reform […]. Many of us understood that it was a sort of rebirth, a constitutional moment where all the criticisms, problems, and flaws that had been attributed [to the Constitution] were now in the past […]. I think that it is delicate and serious to subject the country to a complete revision of its constituent pact […] the complete revision of the constituent pact always triggers great political tension. We saw it in Bolivia […].”[1]

Although Chief Justice Peña never said that the Court had the power to review Bachelet’s constitution-making process, her opposition to the demand for a new constitution triggered doubts, and some claimed that the Court does not, and should not, have the power to review Bachelet’s process.[2] Until that moment, the Chilean literature had little to say about the possibility of the Court challenging constitutional reforms. The Court had addressed connected

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[1] La Segunda, ‘Marisol Peña, La Defensora de La Constitución’ (4 April 2014).
[2] E.g., Eduardo Chia, ‘La Presidenta Del Tribunal Constitucional y Su Oposición a Una Nueva Constitución’ (*Red Seca*, 14 April 2014).

issues in a few cases –that I will examine later—but, before Bachelet started to push for a total replacement of the Constitution, Chilean scholars commenting on the demand for a new Constitution had primarily focused on other issues.[3] The literature in English that asks the question of whether the Chilean Court can challenge constitutional reforms is, to my knowledge, inexistent.[4]

This essay has two purposes. The first purpose is to summarize and discuss Chile's position on whether the Court can challenge constitutional reforms. A majority of Chilean scholars argue that the Court cannot challenge the Constitution, that it cannot review constitutional reforms on substantive grounds, and that it can only review the procedural aspects of constitutional amendments. The second purpose is to justify the absence of a judicial doctrine limiting constitutional reform on substantive grounds during Chile's authoritarian and post-authoritarian eras. During those historical periods, lacking a doctrine such as the Colombian 'Substitution' doctrine or the Indian 'Basic Structure' doctrine,[5] was useful for removing the authoritarian enclaves of the Chilean 1980 Constitution. The politicians that advanced the democratization agenda through bipartisan agreements during the post-authoritarian context achieved relevant constitutional reforms that changed the nature of the 1980 Constitution from an authoritarian text to a constitutional document that facilitates representative democracy.[6] Any doctrine protecting the authoritarian core of the original 1980 Constitution would have undermined the democratization agenda.

Although some scholars complain that the current version of the Constitution needs revisions,[7] future constitutional reforms should not reverse the democratic achievements of the post-

[3] The literature is too extensive to cite here. E.g., Claudio Fuentes (ed), *En El Nombre Del Pueblo. Debate Sobre El Cambio Constitucional En Chile* (ICSO—Fundación Boll 2010).
[4] E.g., Javier Couso, 'Trying Democracy in the Shadow of an Authoritarian Legality: Chile's Transition to Democracy and Pinochet's Constitution of 1980' (2011) 29 Wisconsin Intl.L.J. 393; Andrew Arato, 'Beyond the Alternative Reform or Revolution: Post Sovereign Constitution-Making and Latin America' (2015) 50 Wake Forest L.Rev. 891; Rachel Kennedy, 'Replacing the Chilean Constitution' (2017) 24 Constellations 456; Claudia Heiss, 'Legitimacy Crisis and the Constitutional Problem in Chile: A Legacy of Authoritarianism' (2017) 24 Constellations 470.
[5] Possibly the most comprehensive book engaging with these sorts of judicial doctrines in a comparative way, is Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017).
[6] The 1980 Constitution was an "authoritarian transformative" document because it planned for a transition to democracy while protecting the political goals of its authoritarian makers. Tom Ginsburg, '¿Fruto de La Parra Envenenada? Algunas Observaciones Comparadas Sobre La Constitución Chilena' (2014) 113 Estudios Públicos 1.
[7] E.g., Pablo Ruiz-Tagle, 'La Trampa Del Neopresidencialismo: La Constitución "Gatopardo"' in Renato Cristi and Pablo Ruiz-Tagle, *La República en Chile. Teoría y Práctica del Constitucionalismo Republicano* (LOM 2006); Javier Couso and Alberto Coddou, 'Las Asignaturas Pendientes de La Reforma Constitucional Chilena' in Claudio Fuentes (ed), *En el Nombre del Pueblo: Debate Sobre el Cambio Constitucional en Chile* (ICSO—Fundación Boll 2010).

authoritarian era. I argue that, in Chile, a future judicial doctrine aimed to prevent strategies of 'abusive constitutionalism' may be useful to preserve those achievements.[8]

In this essay, I deliberately avoid using the term 'constituent power,' except when the Court refers to it.[9] Instead, I use the term 'constitution-making' power to emphasize a descriptive and contextualized approach to the power of creating or reforming the Constitution.[10] According to my conceptualization, sitting politicians hold the 'constitution-making' power; there are authoritarian forms of constitutionalism [11] and authoritarian ways of creating a constitution.[12] Carl Schmitt's theory has influenced the Chilean debate on the 'constituent power,'[13] but I do not aim to contribute to this debate, and I do not use the Schmittian theoretical framework. For my contextualized approach, the military Junta had the constitution-making power during the dictatorship, although that power gradually deteriorated between 1985 and 1990 when four relevant events happened: the Court restricted the Junta's lawmaking power by reviewing the organic laws, Pinochet lost the 1988 plebiscite, the 1989 reform eliminated or softened some of the authoritarian enclaves, and a civilian administration was elected. Since 1990, the incoming civilian politicians replaced the Junta and acquired the constitution-making power, but they could only enact constitutional reforms through bipartisan agreements. I identify three possible judicial challenges against the constitution-making power: the ones that target the Constitution, the ones that target specific provisions included in the original constitutional text, and the ones that target a reform seeking to modify constitutional provisions.[14]

The remainder of this essay proceeds as follows. Section 1 briefly examines the reforms to the 1980 Constitution and provides some context for readers that are not familiar with the Chilean case. Section 2 discusses the Court's powers to challenge constitutional reforms. Section 3

[8] I borrowed the term from Landau, who also explores the possibility of using the doctrine of unconstitutional amendments for protecting democracy. David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis L.Rev. 189, 231–238.

[9] For a conceptual discussion, Carlos Bernal's chapter in this book.

[10] Other scholars that follow this kind of approach are Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (OUP 2016); Zoran Oklopcic, 'Three Arenas of Struggle: A Contextual Approach to the Constituent Power of "the People"' (2014) 3 Global Constitutionalism 200. The normative idea of a modern constitution is discussed in Pasquale Pasquino, 'Classifying Constitutions: Preliminary Conceptual Analysis' (2013) 34 Cardozo L.Rev. 999.

[11] Mark Tushnet, 'Authoritarian Constitutionalism. Some Conceptual Issues' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (CUP 2014).

[12] Gabriel Negretto, 'Authoritarian Constitution Making' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (CUP 2014).

[13] Renato Cristi, 'The Metaphysics of Constituent Power: Schmitt and the Genesis of Chile's 1980 Constitution' (2000) 21 Cardozo L.Rev. 1749, 1775; Renato Cristi, *El Pensamiento Político de Jaime Guzmán. Una Biografía Intelectual* (2nd edn, LOM 2011) 161; Fernando Atria, 'Sobre La Soberanía y Lo Político' (2006) 12 Derecho y Humanidades 47, 53–59; Fernando Atria, *La Constitución Tramposa* (LOM 2013) 63–64, 84; Renato Cristi, 'Precisiones En Torno a La Noción de Poder Constituyente' in Renato Cristi and Pablo Ruiz-Tagle, *El Constitucionalismo del Miedo* (LOM 2014) 168–171.

[14] These challenges are of an exceptional nature, and all of them push the judges to solve hard dilemmas. See Nicholas Barber and Adrian Vermeule, 'The Exceptional Role of Courts in the Constitutional Order' (2016) 92 Notre Dame L.Rev. 817.

focuses on the few Court's decisions that are relevant for this essay. Section 4 concludes and briefly presents the reasons that might justify the creation of a Chilean version of the unconstitutional constitutional reforms doctrine.

1. Establishing and Reforming the 1980 Constitution

Following the 1973 coup, the military Junta led by General Pinochet ruled Chile until 1990. The Junta closed all the elected branches of government and attributed itself the power to enact regulations that could even modify the constitution that existed at that time: the 1925 Constitution. Although parts of the 1925 Constitution remained formally valid, the Junta had the constitution-making power.

The dictatorship's legitimization strategy consisted of a narrative claiming to re-establishing the rule of law and securing the stability of the economy and the political system. The regime's leaders had promised that, after they could guarantee those goals, they would call for elections and the military will return to the barracks. For the success of this legitimization strategy, it was useful to have a submissive judiciary with the appearance of independence.[15] The Supreme Court of that time recognized the Junta's powers, it did not investigate human rights abuses, and the dictatorship did not need to intervene the judiciary.[16] The dictatorship was going to last for 17 years and, in the meantime, it suppressed political rights, frequently used emergency powers, and systematically violated human rights.

Key to the regime's legitimization strategy and the rule of law discourse, the dictatorship enacted the 1980 Constitution. The 1980 Constitution had two parts that operated as "two constitutions in one."[17] The first part was 'permanent' because it regulated the institutions that were supposed to operate indefinitely during the post-authoritarian era –e.g., the Congress and the Electoral Court—although some of them started to function before the return to democracy –e.g., the Constitutional Court. The second part was 'temporary' because it consisted of sunset clauses regulating the institutions of the dictatorship –e.g., the Junta—and the itinerary to return to democracy. The temporary part was supposed to cease its effects after the dictatorship finished. The constitutional itinerary to return to democracy established that in 1988 a referendum was going to decide on whether Pinochet would remain as a 'President' for eight additional years. If Pinochet were to lose the 1988 plebiscite, the Constitution established that the regime should call

[15] About how the judiciary was useful for the dictatorship, see Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (CUP 2007).
[16] Jorge Correa, 'The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence During the Transition to Democracy' in Irwin Stotzky (ed), *Transition in Latin America: The Role of the Judiciary* (Westview Press 1993); Roberto Garretón, 'Chilean Transitional Justice and the Legacy of the de Facto Regime', *The Role of Courts in Transitional Justice : Voices from Latin America and Spain* (Routledge 2012).
[17] Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (CUP 2002) 169.

for presidential elections. Although Pinochet would have preferred a longer dictatorship,[18] in 1980 he accepted this itinerary to secure the Constitution's approval,[19] partly because he did not expect to lose the 1988 plebiscite.[20]

Several constitutional provisions constrained the Junta's power. Among these constraints, the Junta could only modify the Constitution by unanimously approving a reform confirmed by a referendum. It was useful for the Junta to restraint its powers because it was a way to signal a credible commitment with the transition to democracy, it solved coordination issues, and it helped to legitimize the new constitutional system.[21] Robert Barros argues that these constraints created a form of constitutionalism.[22] For him, these constraints were a result of the regime's internal fragmentation and the need to solve interbranch disagreements. The Constitution established a seven-member Court as one of these constraints. Although all the Court's appointment mechanisms were controlled directly or indirectly by the dictatorship, the Court proved to be an independent actor capable of enforcing limits against the Junta, as I will show later.

Many politicians and scholars complained that the Constitution included authoritarian enclaves preventing the establishment of a true democracy,[23] such as the existence of the National Security Council, the non-elected senators, and a provision banning some political ideas. When deciding how to face the dictatorship's constitutional itinerary, the opposition was divided between two rival strategies.[24] The first one rejected the Constitution's legitimacy and advocated for a constituent assembly. The second strategy offered a pragmatic tactic accepting the 1980 Constitution and negotiating more favorable conditions to return to democratic rule. Patricio Aylwin, who was later going to become the first President of the post-authoritarian era, championed the second strategy:

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[18] Darren Hawkins, *International Human Rights and Authoritarian Rule in Chile* (University of Nebraska Press 2002) 107–108.
[19] Jeffrey Puryear, *Thinking Politics. Intellectuals and Democracy in Chile, 1973-1988* (The John Hopkins University Press 1994) 129; Pamela Constable and Arturo Valenzuela, *A Nation of Enemies. Chile Under Pinochet* (Norton 1991) 72.
[20] Constable and Valenzuela (n 21) 304–305.
[21] On the reasons that authoritarian regimes have to constraint their powers, see Tamir Moustafa and Tom Ginsburg, 'The Functions of Courts in Authoritarian Politics', *Rule by Law. The Politics of Courts in Authoritarian Regimes* (CUP 2008); Michael Albertus and Victor Menaldo, 'Dictators as Founding Fathers? The Role of Constitutions under Autocracy' (2012) 24 Economics & Politics 279.
[22] Robert Barros, 'Personalization and Institutional Constraints: Pinochet, the Military Junta, and the 1980 Constitution' (2001) 43 Latin American Politics and Society 5; Barros (n 19).
[23] E.g., Grupo de los 24, *Las Propuestas Democráticas Del Grupo de Los 24* (Patricio Chaparro ed, Corporación Grupo de Estudios Constitucionales 1992); Francisco Cumplido, *¿Estado de Derecho En Chile?* (Instituto Chileno de Estudios Humanísticos 1983).
[24] Edgardo Boeninger, *La Democracia En Chile. Lecciones Para La Gobernabilidad* (Editorial Andrés Bello 1997) 364; Óscar Godoy, 'La Transición Chilena a La Democracia: Pactada' (1999) 74 Estudios Públicos 79, 102.

> "I cannot pretend that General Pinochet recognizes his Constitution as illegitimate, and he cannot demand that I recognize it as legitimate. His advantage over me is that this Constitution –whether I like it or not—is ruling. This is a fact […] that I abide. How to overcome this impasse while, at the same time, preventing everyone's humiliation? There is only one way: to deliberately avoid the issue of [constitutional] legitimacy […]. Let's ask ourselves how we can achieve a constitutional text that is acceptable to everyone […] this requires that we try to search for coincidences […]. We could […] achieve agreements to modify the Chilean constitutional regime to accomplish democracy."[25]

Soft-liner rightwing politicians that were part of the dictatorship's supporting coalition shared many of the opposition's demands and agreed to propose a deal to the Junta, which included accepting the Constitution subject to reforms.[26] Although Pinochet rejected the proposed agreement, it was clear that politicians could only achieve constitutional changes with, and not without, the Junta, and that a popular revolt could not defeat the regime.[27] If the dictatorship was going to be defeated, it was going to be under the dictatorship's rules. In the end, Aylwin's approach proved to be the successful way to do so.

Surprisingly, the opposition succeeded to defeat Pinochet in the 1988 plebiscite.[28] The regime was going to call for elections, and the military was going to return to its barracks in March of 1990. In 1989, the opposition and the regime agreed to include modifications to the 1980 Constitution. Both sides had reasons to agree to the 1989 reform. The incoming center-left civilians could eliminate some of the authoritarian enclaves, and the Junta could enhance the armed forces' autonomy to protect the military career and secure the army's budget,[29] and close two loopholes that had the potential to harm the future rightwing coalition's veto power.[30] Also, the 1989 reform was an opportunity to give the impression that the dictatorship's opponents were legitimizing the 1980 Constitution by agreeing to abide by it. The Constitution was the dictatorship's "masterpiece" and securing its implementation for the post-authoritarian context was critical.[31] Pinochet's proposal did not include many of the opposition's demands, but the center-left coalition still gave its 'acquiescence' to the constitutional deal.[32] After all, the reform

[25] Patricio Aylwin, 'Exposición Del Señor Patricio Aylwin Azócar' in José Polanco Varas and Ana Torres (eds), *Una Salida Político Constitucional Para Chile* (Instituto Chileno de Estudios Humanísticos 1985) 148–149.
[26] Matías Tagle (ed), *El Acuerdo Nacional. Significados y Perspectivas* (Corporación Justicia y Democracia 1995).
[27] Mark Ensalaco, 'In with the New, Out with the Old? The Democratising Impact of Constitutional Reform in Chile' (1994) 26 J of Latin American Studies 409, 424.
[28] On the impressive organization of the 'No' campaign, see Eduardo Engel and Achilles Venetoulias, 'The Chilean Plebiscite: Projections Without Historical Data' (1992) 87 J of the American Statistical Association 933.
[29] Claudia Heiss and Patricio Navia, 'You Win, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy' (2007) 49 Latin American Politics and Society 163.
[30] Patricia Arancibia Clavel, *Carlos Cáceres. La Transición a La Democracia 1988-1990* (Libertad y Desarrollo 2014) 70–72.
[31] J Samuel Valenzuela, 'La Constitución de 1980 y El Inicio de La Redemocratización En Chile' (1997) 242 Kellog Institute for Intl.Studies—Working Paper.
[32] Carlos Andrade, *Reforma de La Constitución Política de La República de Chile de 1980* (Ed.Jurídica Chile 1991) 167–169.

eliminated or softened some of the authoritarian enclaves. For example, it removed the provision that banned some political ideas, it elevated the number of elected senators (so the non-elected senators had less influence), it raised the number of civilians in the National Security Council (so the military had less control over that Council), and it reduced the necessary legislative quorum to modify the organic laws. The 1989 referendum approved the reform with 85.7% of the votes.

Although many criticisms against the Constitution remained, the 1989 reform prevented those criticisms from influencing the electoral debates,[33] and secured the Constitution's authority for the post-authoritarian context.[34] The Junta was dissolved, and the elected center-left administration was going to rule the country constrained by the constitutional framework designed by the dictatorship. The remaining authoritarian enclaves gave the rightwing coalition a strong veto power over the policies of elected presidents, and the rightwing coalition's consent was necessary to approve additional constitutional reforms. Relevant reforms required bipartisan agreements,[35] and a sort of imposed consensual democracy with high levels of cooperation between competing political parties started to operate.[36] The post-authoritarian political system was an "incomplete democracy."[37]

Politicians achieved bipartisan agreements to gradually and incrementally democratize the Constitution by slowly removing the authoritarian enclaves.[38] Amongst other constitutional reforms, the modifications implemented the democratic election of mayors, who were not previously elected, created an autonomous public prosecution agency, and elevated the number of Supreme Court justices to make the Pinochet appointees less influential.[39] The most critical reform came in 2005, when constitutional designers agreed to eliminate the non-elected senators, changed the Court's appointment mechanisms, allowed the President to remove the military commanders unilaterally, and eliminated the National Security Council' powers, among other modifications.[40] Most of the rightwing legislators were not willing to continue defending the

[33] Fredrik Uggla, '"For a Few Senators More"? Negotiating Constitutional Changes During Chile's Transition To Demnocracy' (2005) 47 Latin American Politics and Society 51, 56–60.
[34] Andrés Allamand, 'Las Paradojas de Un Legado' in Paul Drake and Iván Jaksic (eds), *El Modelo Chileno. Democracia y Desarrollo en los Noventa* (LOM 1999) 178.
[35] Patricio Navia, 'Living in Actually Existing Democracies: Democracy to the Extent Possible in Chile' (2010) 45 Latin American Research Rev. 298.
[36] Peter Siavelis, 'Executive-Legislative Relations in Post-Pinochet Chile: A Preliminary Assessment' in Scott Mainwaring and Matthew Soberg Schugart (eds), *Presidentialism and Democracy in Latin America* (CUP 1997); Detlef Nolte, 'El Congreso Chileno y Su Aporte a La Consolidación Democrática En Perspectiva Comparada' (2003) XXIII Rev.Cien.Pol. 43.
[37] The term is from Manuel Garretón, *Incomplete Democracy. Political Democratization in Chile and Latin America* (R.Kelly Washbourne and Gregory Horvath trs, The University of North Carolina Press 2003).
[38] J Esteban Montes and Tomás Vial, 'The Constitution-Building Process in Chile: The Authoritarian Roots of a Stable Democracy' (Intl.IDEA 2005).
[39] On this last reform, see Lisa Hilbink, 'Un Estado de Derecho No Liberal. La Actuación Del Poder Judicial Chileno En Los Años 90' in Paul Drake and Iván Jaksic (eds), *El Modelo Chileno. Democracia y Desarrollo en los Noventa* (LOM 1999) 320.
[40] Some complain that the authoritarian enclaves conditioned the constitutional negotiations. Jorge Contesse, '"Las Instituciones Funcionan": La Falta de Diálogo Constitucional En Chile' (2008) 14 Derecho y Humanidades 51;

authoritarian enclaves because it became too politically costly to preserve Pinochet's legacy and because some of those enclaves started to benefit the center-left coalition by, for example, allowing them to appoint some non-elected senators.[41]

Years later, other political agreements also succeeded to reforming the Congress' electoral system (one of the old center-left coalition's demands),[42] introducing provisions regulating electoral primaries, implementing the principles of probity and publicity as part of the anti-corruption agenda, and strengthening the autonomy of some territories. I cannot explain all these reforms here. Suffice it to say that the most critical modifications had deepened the democratization agenda by eliminating the authoritarian enclaves or by implementing provisions supporting the policies advanced by the elected administrations. If the Court had challenged these reforms based on a judicial doctrine aimed to preserve essential cores of the 1980 Constitution, it would have prevented the enactment of useful democratic achievements. Many of these achievements form the core of Chile's democracy, constitution-makers should consider them as a starting point for future reforms and politicians should not reverse them.

2. The Chilean Court in times of Constitutional Change

The Constitution gives the Court an explicit power to evaluate the constitutionality of constitutional reforms (Article 93, Nº 3, of the Constitution). The Court can only review the constitutionality of these reforms using its ex-ante review power (and not the ex-post review power), if it receives a petition from the President, from any of the Congress' chambers, or from one-fourth of the chambers' active members. The Court has never stricken down a constitutional reform, and most Chilean scholars believe that the Court's power is limited to the review of procedural issues.[43] Only a few scholars claim that the Court can impose substantive limits to constitutional reforms on grounds such as natural law,[44] essential rights,[45] or the republican form of government.[46] Although the Court has never used these arguments, it is important to consider

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Amaya Alvez, 'Forcing Consensus: Challenges for Rights-Based Constitutionalism in Chile' in Colin Harvey and Colin Schwartz (eds), *Rights in Divided Societies* (Hart Publishing 2012).

[41] Claudio Fuentes, *El Pacto* (Universidad Diego Portales 2012) 86; Carlos Huneeus, *La Democracia Semisoberana. Chile Después de Pinochet* (Taurus 2014) 179; Claudio Fuentes, 'Shifting the Status Quo: Constitutional Reforms in Chile' (2015) 57 Latin American Politics and Society 99.

[42] See the constitutional discussion of this reform in Lorena Recabarren Silva, 'Reformas Al Sistema Electoral: Múltiples Aristas Del Principio de Igualdad En Sede Constitucional' [2016] Sentencias Destacadas 2015 307.

[43] E.g., Francisco Zúñiga, 'Control de Constitucionalidad de la Reforma Constitucional' (2006) 4 Est.Const. 415; Miriam Henríquez, 'El Control de Constitucionalidad de La Reforma Constitucional En El Ordenamiento Jurídico Chileno' [2011] Anuario de Derecho Público 461, 476–477. Also, see José Díaz-de-Valdés, 'Algunas preguntas pendientes acerca del control de constitucionalidad de los proyectos de reforma constitucional' [2007] Sentencias Destacadas 2006 145, 168–173.

[44] Cristóbal Orrego, 'Vigencia de Los Derechos Esenciales Que Emanan de La Naturaleza Humana y Su Reconocimiento En El Ordenamiento Jurídico Chileno' (1993) 20 Rev.Chil.Der. 59, 63.

[45] Humberto Nogueira, 'Consideraciones Sobre Poder Constituyente y Reforma de La Constitución En La Teoría y La Práctica Constitucional' (2009) 15 Ius Et Praxis 229, 262.

[46] Alejandro Silva Bascuñán, *Tratado de Derecho Constitucional*, vol X (Ed.Jurídica Chile 2004) 264.

that the post-authoritarian Court has not received significant claims challenging constitutional reforms.[47]

Nevertheless, the Court has played a role in evaluating the constitutionality of the organic laws and their modifications because the Constitution empowered the Court to review this sort of legislation *ex officio* (Article 93, Nº1, of the Constitution). The organic laws are not part of the formal Constitution, but some of them are critical for the functioning of constitutional institutions.[48] In reviewing organic laws that specify the organizing rules of constitutional institutions (e.g., the Congress), the Court has not declared the unconstitutionality of critical parts. Although the Court has challenged minor rules included in some of those legislative bills, such as it happened when legislators replaced the electoral system that was designed by the dictatorship,[49] and when the Court evaluated the constitutionality of its new organizing statute of 2008,[50] these types of decisions have not challenged the key modifications of the corresponding organic laws.[51] The Court has not prevented democratization reforms, and it has even collaborated with the democratization agenda by giving its advice during the constitutional negotiations of the 2005 reform.[52]

During her second presidency (2014-2018), Michelle Bachelet pushed for a total constitutional replacement, but her constitution-making process failed before the Court could have the chance to evaluate it.[53] Before that failure happened, some scholars argued that the Court should not review Bachelet's process because the Court could only review procedural flaws of constitutional reforms,[54] or because the Court should not review the unconstrained 'constituent power' (they used Schmitt's approach),[55] even if that power had followed preestablished

[47] The Court has discussed procedural aspects that have not affected the content of constitutional reform bills. STC-269/1997, STC-464/2006.
[48] Sergio Verdugo, 'How to Identify Quasi-Constitutional Legislation? An Example from Chile' in Richard Albert and Joel Colón-Ríos (eds), *Quasi-Constitutionality and Constitutional Statutes* (Forthcoming).
[49] STC-2777/2015
[50] STC-1288/2009
[51] This is not to say that the Court has not challenged other organic law modifications. In recent years, the Court has challenged important organic law modifications, but those modifications are not connected to critical regulations of key constitutional institutions like the Congress and the electoral organs. I cannot develop this issue here.
[52] Biblioteca del Congreso, 'Historia de La Ley Nº 20.050' 29–53.
[53] On the failure of Bachelet's process, see Sergio Verdugo and 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*, 2018).
[54] Miriam Henríquez and George Lambeth, '¿Son Válidas Las Modificaciones Al Capítulo de Reforma Constitucional? Una Reflexión Sobre La Autorreferencia Normativa de Alf Ross y Sus Detractores' 13 Estudios Constitucionales 153, 163–164.
[55] Atria, *La Constitución Tramposa* (n 14) 91; Fernando Muñoz, '"Chile Es Una República Democrática": La Asamblea Constituyente Como Salida a La Cuestión Constitucional' [2013] Anuario de Derecho Público 60, 83–87.

constitutional reform rules.[56] During these debates, the prevailing view among legislators was that a total reform to the Constitution was constitutionally permitted.[57]

3. Judicial Challenges against the Constitution-Making Power

This section explores the few cases where the Court has engaged with a challenge against the constitution-making power. Note that the Court enacted all these decisions before Bachelet's constitution-making process, and before the 2005 constitutional reform had eliminated the remaining authoritarian enclaves.

3.1. Deciding Not to Decide During the Allende Period.

The first case in which the Court was asked to review the constitution-making power was before the military coup took place, under the framework of the 1925 Constitution, and during President Allende's Marxist-inspired administration. Allende's coalition did not control the Congress, and the opposition succeeded to approve a constitutional reform restricting the government's power to intervene the economy as part of a counter-revolutionary strategy.[58] Allende vetoed the reform, but the Congress overrode Allende's veto by a simple majority.

The Constitution lacked an explicit rule establishing the required quorum for a congressional override, so the debate focused on what the default rule was.[59] The opposition claimed that simple majority was the default rule, but Allende opposed that interpretation. Allende had the choice to call for a referendum to solve the conflict, but he preferred to bring the case to the Constitutional Court.[60] The opposition claimed that the Court lacked jurisdiction to review constitutional reforms and that the only way to solve the conflict was through a referendum. The opposition also warned the Court that it would not obey the Court's decision should that decision be favorable to Allende.[61]

The Court distinguished two kinds of possible constitutional flaws, the procedural and the substantive ones, and it denied jurisdiction to evaluate both. It first argued that reviewing a reform on the ground of substantive arguments would involve "usurping the genuine function of

[56] Atria, *La Constitución Tramposa* (n 14) 97–99, 103–109; Pablo Contreras, Domingo Lovera and Ernesto Riffo, 'Proceso (¿)Constituyente(?)' (2015) 23 Revista de Estudios de la Justicia 69, 79–80, 85–86.
[57] Contreras, Lovera and Riffo (n 58) 78–79.
[58] Luis Maira, 'Estrategia y Táctica de La Contrarrevolución' in Federico Gil, Ricardo Lagos and Henry Landsberger (eds), *Chile 1970-1973. Lecciones de una Experiencia* (Editorial Tecnos 1977) 258–274.
[59] Paul Sigmund, *The Overthrow of Allende and the Politics of Chile 1964-1976* (University of Pittsburgh Press 1977) 168.
[60] Allende probably thought that most of the judges could benefit his petition. On the Court's composition of that time, see Sergio Verdugo, 'Birth and Decay of the Chilean Constitutional Tribunal (1970–1973) (2017) 15 Intl.J.Const.L. 469.
[61] Enrique Silva C., *El Tribunal Constitucional de Chile (1971-1973)*, vol 38 (2nd edition (2008), Cuadernos del Tribunal Constitucional 1977) 141.

the constituent power,"[62] and that although challenging a constitutional reform on procedural grounds was the only way the Constitution could give jurisdiction to the Court, the Constitution did not explicitly establish that kind of judicial review power.[63] Also, enforcing procedural limits to constitutional reform might inevitably push the Court to limit the 'constituent power' on substantive grounds indirectly.[64]

Even though it is possible that the Court did not enact a sincere ruling because it probably tried to avoid solving a conflict that was threatening to become violent,[65] this decision included Chile's landmark doctrine on whether the Court could limit constitutional reform. The text of the 1925 Constitution differs from the current constitutional text in that the current Constitution gives the Court an explicit power to review constitutional changes. However, the Court's 1973 ruling is still relevant because some contemporary scholars use it to argue that the 1980 Constitution only added the possibility to review procedural limits and not substantive limits.[66]

3.2. Legitimizing the 1980 Constitution

The 1980 Constitution included the infamous Article 8, which prohibited organizations inspired in Marxist doctrines –among other forbidden ideas—and punished individual members of those organizations, giving the Court jurisdiction to solve these cases.

The dictatorship's secretary of interior asked the Court to use Article 8 against Clodomiro Almeyda, a leader of a socialist faction that was accused to allegedly use radio channels to encourage revolutionary actions against the regime.[67] Almeyda's legal defense argued that Article 8 was 'illegitimate' because, among other reasons, it was part of an 'illegitimate' Constitution. They argued that the people did not properly participate in the constitution-making process and that the Constitution rejected democracy and human rights. Almeyda's argument challenged the Junta's constitution-making power.

The Court rejected Almeyda's argument and upheld the Constitution. It argued that it "absolutely lacks jurisdiction to decide about the legitimacy of the 1980 Constitution" [68] because it could not review the manifestation of the "original constituent power."[69] The Court said that both the 1980

[62] STC-15/1973/20
[63] STC-15/1973/21
[64] STC-15/1973/22
[65] Verdugo, 'Birth and Decay of the Chilean Constitutional Tribunal (1970–1973) (n 62). On this kind of judicial strategy, see Erin F Delaney, 'Analyzing Avoidance: Judicial Strategy in Comparative Perspective' (2016) 66 Duke L.J. 1.
[66] E.g., Henríquez (n 45) 473; Sergio Verdugo, 'La Objeción Democrática a Los Límites Materiales de La Reforma Constitucional' (2013) 28 Actualidad Jurídica 229, 300.
[67] Eduardo Aldunate, 'Chile' in Markus Thiel (ed), *The 'Militant Democracy' Principle in Modern Democracies* (Routledge 2009) 70.
[68] STC-46/1987/33
[69] STC-46/1987/34-35

Constitution and the Junta's 'constituent power' were a consequence of the 1973 "institutional rupture,"[70] and that the Court could not "situate [itself] over the original constituent power" because the Constitution was the legal source of the Court's powers. If the Court were to accept the illegitimacy of the Constitution, then, the Court "would be a legally disqualified body to rule."[71] The ruling recognized the legitimacy of the 1980 Constitution.[72]

After the 1989 constitutional reform eliminated the infamous Article 8, the Court modified its decision and annulled Almeyda's punishment.[73] Although the Court merely offered a legal reason (i.e., the elimination of Article 8), the Court's decision illustrates that the Court was no longer serving the interests of the Junta, but of the group of politicians that were advancing the transition to democracy, who had agreed to restore all the political rights.

3.3. Advancing the Transition to Democracy

During the 80's, the Court collaborated with the transition to democracy by reviewing the organic laws that the Junta enacted to regulate the electoral institutions and procedures for the 1988 plebiscite. That plebiscite was a crucial moment for the transition, and although the Junta was expecting the Court rubber-stamp the organic laws, the Court had other plans. With the leadership of Justice Eugenio Valenzuela, the Court restricted the administrative power to cancel citizens' electoral inscriptions,[74] lowered the requirements for the creation of new political parties,[75] and eliminated some critical rules limiting electoral propaganda, among other rulings.[76] These decisions forced the Junta to remove the contested provisions and modify the organic laws.

The most critical decision was the one reviewing the Electoral Court statute.[77] The constitutional itinerary for the transition established that the Electoral Court was going to start operating after, and not before, the 1988 plebiscite. When reviewing the bill that implemented that part of the constitutional itinerary, the Court declared its unconstitutionality and obliged the Junta to implement the Electoral Court before the 1988 plebiscite took place.[78] The Court's decision directly challenged the 1980 Constitution's 'temporary' part by opposing to the literal and originalist interpretative constitutional approach that used to prevail at that time.[79] Pinochet

[70] STC-46/1987/35
[71] STC-46/1987/36. This type of argument is not surprising because we cannot expect courts to challenge the legal source of their authority. Barber and Vermeule (n 16) 841–847, 850–853.
[72] Cristi, *El Pensamiento Político de Jaime Guzmán* (n 14) 166–168.
[73] STC-113/1990
[74] STC-38/1986
[75] STC-43/1987
[76] STC-53/1988. Also, see STC-41/1986
[77] STC-33/1985
[78] Also, Carlos Cruz-Coke, 'La Sentencia Del Tribunal Constitucional de 24 de Septiembre de 1985' (1985) 37/38 Rev.Der.Publ. 143.
[79] Patricio Zapata, *Justicia Constitucional* (Ed.Jurídica Chile 2008) 203–209.

obeyed the Court's decision probably because he believed that he was going to win the plebiscite in any event and challenging the Court's authority would have undermined the dictatorship's constitutional legacy.[80]

The implementation of the Electoral Court was critical for the credibility of the 1988 plebiscite and to signal the dictatorship's opponents that they had a fair chance to win that plebiscite.[81] Without the Court's decision, the Electoral Court would not have supervised the plebiscite, and it would have made things easier for Pinochet should he have decided to cheat. For these reasons, the Court's decision, along with the other judicial decisions that contributed to ending the Pinochet regime.[82]

3.4. Avoiding to Decide Again

The 1980 Constitution established that the 'former Presidents of the Republic' that served for at least six years, could assume as life-senators. Pinochet had the title of former 'President,' and he wanted to assume as a senator. The reformers of 2005 removed this rule but, before that reform could be approved, Pinochet became a senator in 1998. It was a controversial decision because many politicians rejected the idea of having the former dictator as an active political actor. A group of center-left legislators petitioned the Court to declare Pinochet's inability to be a life-senator, arguing that Pinochet was never a 'President of the Republic' because Presidents are elected –Pinochet was never elected—and because Chile was not a 'Republic' during the dictatorship.

Even though the Court had an explicit power to decide the case (Article 83, Nº 11, of the Constitution), it declared that it lacked jurisdiction on the ground that the petition implied judging the legitimacy of the corresponding constitutional rules.[83] The Court was supposed to "supervise the strict application of the Constitution" and not to "violate its essence."[84] The Court cited the first Almeyda decision to claim that it could not review the 'original constituent power' that had emerged as a consequence of the 1973 coup.[85]

However, unlike the first Almeyda decision, the Court did not enforce the Constitution but declared that it lacked jurisdiction, implicitly delegating the solution to the Senate. If the Court had been committed to the Junta's constitution-making power, it should have rejected the petition claiming the Constitution allowed Pinochet to become a senator, but the Court probably

[80] Constable and Valenzuela (n 21) 311; Valenzuela (n 33).
[81] Ascanio Cavallo, Manuel Salazar and Oscar Sepúlveda, *La Historia Oculta Del Regimen Militar. Historia de Una Época, 1973-1988* (Editorial Grijalbo 1997) 477–479.
[82] Eugenio Valenzuela, *Contribución Del Tribunal Constitucional a La Institucionalización Democrática*, vol 30 (Tribunal Constitucional 2003).
[83] STC-272/1998/5-9
[84] STC-272/1998/6
[85] STC-272/1998/10-12

wanted to avoid intervening in the conflict. Even though the Court did not champion the democratization agenda in this case –for that, the Court should have accepted the petition—allowing the politicians to solve the issue was a compatible approach with the fact that the power to reform the Constitution was in the hands of the political elite that was advancing the transition. Since that elite was divided on this precise issue, Pinochet became a senator. Later, in 2005, the elite decided to remove this authoritarian enclave.

4. Towards a Chilean Unconstitutional Constitutional Reform Doctrine?

Most Chilean scholars state that the Chilean Court can only review constitutional reforms if the reforms violate the procedural limits –as opposed to the substantive limits—, and that it lacks the power to review the Constitution. The Court has recognized the authority of the 1980 Constitution, it has never challenged a constitutional reform on substantive or procedural grounds, but it has defied organic laws that implemented original constitutional provisions when it saw that those organic laws could undermine the transition to democracy. By doing that, the Court collaborated with the political goal of changing the authoritarian nature of the original 1980 Constitution. Subsequent reforms of the post-authoritarian era have deepened the democratization of the 1980 Constitution, and the Court has not imposed substantive limits to those reforms. The Court played an active role for the democratization agenda when the Junta had the constitution-making power, and it played a silent role when the politicians of the post-authoritarian era controlled the constitution-making power by allowing those politicians to implement their bipartisan agreements and gradually eliminate the authoritarian enclaves.

The absence of a judicial doctrine establishing substantive limits to constitutional reform was desirable during the post-authoritarian era because of the need to eliminate the authoritarian enclaves. A judicial doctrine defending the 1980 Constitution's authoritarian basic structure would have slowed down the democratization of the Constitution because anti-democratic ideas like the 'national security' and the 'protected democracy' doctrines inspired that basic structure. It is not controversial to assume that any acceptable notion of what democracy requires, should conclude that the Chilean political system of 2018 is more democratic than the one of 1980.

In the future, though, there may be good reasons for the Chilean Court to enforce a narrow judicial doctrine limiting constitutional reform on substantive grounds if forthcoming constitutional reformers try to reverse the democratic achievements of the post-authoritarian era. For example, if there is a Chilean president that seeks to become hegemonic by removing presidential term limits in a way that undermines the competitiveness of the political system, the creation of a sort of 'substitution' doctrine might be useful,[86] such as it proved to be useful in

[86] Even narrow reasons supporting the use of such a doctrine in the context of a hyper-presidential regime, can be helpful against authoritarian impulses. Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 Intl.J.Const.L. 339.

Colombia against President Uribe's actions.[87] On the contrary, the lack of a constitutional court willing to enforce a judicial doctrine limiting the president from eliminating term limits may compromise the democratic system if the political opposition is not strong enough to stop that president. The example of the Bolivian Plurinational Constitutional Tribunal, which helped President Evo Morales to remove the limits to reelection in the absence of a competitive opposition, illustrates this danger.[88]

Although a judicial doctrine preserving the Chilean democratic achievements by imposing substantive limits to constitutional reformers is currently inexistent in Chile, using those achievements as Chile's democratic minimum core and a starting point for future constitution reformers could be useful for preventing a possible democratic backsliding.[89] Although much more work needs to be done to develop that doctrine's content, I claim that such a doctrine is not inconsistent with Chilean Constitutional Law. First, the Chilean Constitution gives the Constitutional Court the power to review constitutional reforms, without explicitly distinguishing between procedural and substantive limits to constitutional reform. Second, the Court could ignore inconsistent past decisions by recognizing that, after reformers have eliminated the authoritarian enclaves, the Chilean Constitution is no longer an authoritarian document. The Court released the decisions stating that it cannot impose substantive limits to the constitution-makers before the elimination of those enclaves and an originalist argument that ignores those reforms would be unacceptable today. Third, the Court could always look back at the remarkable decisions that it enacted during the 80's to find additional reasons to enforce democratic principles by flexibly construing the Constitution. These decisions contributed to the democratization agenda of the 1980 Constitution by limiting the constitution-making power of the Junta and helped to create the conditions for a successful transition to democracy. The following constitutional reforms democratizing the 1980 Constitution were possible, in large part, because of those judicial decisions. Therefore, it would make sense for the Court to cite those cases to limit the power of constitution-makers that seek to reverse the democratic achievements of the post-authoritarian Chile.

[87] See Samuel Issacharoff, *Fragile Democracies. Contested Power in the Era of Constitutional Courts* (CUP 2015) 146–152.
[88] See Sergio Verdugo, 'The Fall of the Constitution's Political Insurance. How the Morales Regime Broke the Insurance of the 2009 Bolivian Constitution.' (2019) 17 forthcoming-Intl.J.Const.L.
[89] See a useful approach in Rosalind Dixon and David Landau, 'Competitive Democracy and the Constitutional Minimum Core' in Tom Ginsburg and Aziz Z Huq (eds), *Assessing Constitutional Performance* (CUP 2016).