

How can courts encourage constitutional replacement?

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Abstract: *Courts often do not play a significant role in constitutional replacement processes. Observers have identified exceptions and theorized about the courts' possible functions during and after those processes. However, little has been said about the courts' work taking place before replacement processes occur. This essay shows that courts can help establish the conditions for constitutional change by encouraging the demand for such change. They can do that by fostering the perception that the Constitution has become a tool to help one side of the political struggle win over politically salient constitutional conflicts, thus contributing to the polarization among competing political groups. Observers have reported that backlash against the courts is possible. I claim that a backlash against the Constitution itself is also possible. Encouraging the losers of the constitutional conflict to either attack the court or the constitution is possibly an unintended consequence of judges deciding cases in politically consequential ways. The implication is that strategic judges must balance the need to resolve cases in ways they perceive correct with the long-term acceptance of the Constitution. Still, a collective action problem makes this task difficult to achieve. The essay explores these ideas using different examples and expands on how the Chilean Constitutional Court contributed to building opposition against the Constitution before the Constitutional Convention was convened.*

1. Introduction

Constitutional replacements—i.e., the process of totally replacing the formal constitution—typically occur during political crises in which polarization can thrive. Replacing a constitution can elevate the stakes of the political conflict, as opening the debate for constitutional replacement can make any political institution up for grabs. Judges ordinarily do not intervene during these constitution-making processes or do so executing secondary roles. Protagonists are typically the revolutionaries, the leaders of social movements or factions, the presidents leading the change, the armed forces, the parties controlling the processes—if they exist—and so on. But not the judges.

Commentators have identified some exceptional but significant roles courts can play *during* and *after* constitutional replacement processes.¹ However, we know little about the courts' role *before* those processes occur, perhaps because we assume that their function can hardly be relevant to the drivers of constitutional change. This overlook may make sense. After all, those courts are creatures of the previous constitutional framework that is being challenged and have little to do,

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I thank Antonios Kouroutakis, José Francisco García, Gila Stopler, and the anonymous reviewers for their comments on an earlier version of this paper.

¹ Nicholas W. Barber & Adrian Vermeule, *The Exceptional Role of Courts in the Constitutional Order*, 92 NOTRE DAME LAW REVIEW 817 (2016).

in theory, to resist the demand for constitutional replacement. Perhaps actors like political parties,² voters,³ and even kings,⁴ can sometimes stop a constitutional replacement process, but we should not expect the judges to be powerful enough to do it alone,⁵ at least not in most cases—I’ll return to this in the next section.

Despite the limitations that courts normally possess, this essay claims that courts can also unintentionally contribute to setting the ground for constitutional replacement *before* such a constitution-making process initiates. When exercising their constitutional powers, judges can intervene in the political struggle and claim to use the authority of the Constitution to decide cases that will produce legal losers. We know that when those losers possess some power or succeed in gaining power later, they may use it against judges. Former President Evo Morales in Bolivia saw a threat against his political agenda in the constitutional court, and he and his allies worked on different strategies to gradually dismantle it.⁶ They forced judicial resignations, threatened impeachment against judges, did not fill judicial vacancies, and pushed for creating a new court. Episodes of “judicial backsliding”⁷ and “court-packing”⁸ abound; this is nothing new. Nevertheless, those political actors who have lost cases and feel threatened by the courts can go beyond judicial backsliding and push for a constitutional replacement to attack the court *and* the constitutional framework.

When the court's previous jurisprudence has made the Constitution a politically salient tool that can be used to win over high-stakes battles, courts are not only defending some constitutional principles but also telling the losers of the cases that the Constitution does not align with their agenda. The courts not only appear to undermine a perception of judicial impartiality in this situation but the Constitution’s authority is also harmed as a result. If the constitutional scheme is unstable, fragile, or vulnerable to new majorities, the losers may seize the chance and attempt to replace the Constitution.

The primary purpose of this essay is exploratory: to identify how assertive courts deciding politically consequential cases can connect with future episodes of constitutional replacement. To

² See, e.g., Jón Ólafsson, *The Constituent Assembly: A Study in Failure, in ICELAND’S FINANCIAL CRISIS: THE POLITICS OF BLAME, PROTEST, AND RECONSTRUCTION* 252 (Valur Ingimundarson, Philippe Urfalino, & Irma Erlingsdóttir eds., 2016); Rafael Rubio Núñez, *El proceso constituyente en Islandia: Un caso de éxito sin final feliz*, 21 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1474 (2023).

³ See, e.g., Andrea Scoseria Katz, *Ninguna ley superior: El plebiscito uruguayo de 1980 como constituyente fallido*, 21 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1428 (2023).

⁴ Consider, e.g., how Fernando VII rejected the Cádiz Constitution in Spain in the XIXth century.

⁵ The relative weakness of courts operating in contexts of fragile democracies is known in the literature. See, e.g., TOM GERALD DALY, *THE ALCHEMISTS. QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS* (2017).

⁶ Andrea Castagnola & Aníbal Pérez-Liñán, *Bolivia. The Rise (and Fall) of Judicial Review, in COURTS IN LATIN AMERICA* 278 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011).

⁷ Stephan Haggard & Lydia Tiede, *Judicial Backsliding: A Guide to Collapsing the Separation of Powers, DEMOCRATIZATION* (2024).

⁸ David Kosař & Katarína Šipulová, *Comparative Court-Packing*, 21 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 80 (2023).

be sure, I am not claiming that the court's decisions are a causal mechanism solely explaining the driver for constitutional change. The courts' actions are not a necessary nor a sufficient condition for constitutional change. The purpose is to show that courts' decisions can partly feed and justify the demand for constitutional replacement from the perspective of the losers of constitutional cases decided by those courts, regardless of whether those perspectives are correct. Advancing a constitutional replacement can be helpful for many reasons, and among them, enacting a set of constitutional norms they perceive to be friendlier to their agenda sometimes makes sense politically. The point is that courts deciding cases against them can unintentionally give them reasons to advance a constitutional replacement agenda.

It could be argued that seeking a total constitutional replacement is unnecessary for losers of constitutional cases because other means are available to them, and those means can be less costly. A combination of amendments and practices influencing the judiciary can sometimes be enough to satisfy the needs of those who want to resist a constitutional court's decision. Perhaps capturing or incapacitating the court suffices. The Polish Law and Justice Party (PiS) regime did not replace the Constitution but maintaining the Polish Constitution probably did not matter much for the PiS, as it could still control the constitutional court—and the interpretation of the Constitution—with other means.⁹ Another example comes from Israel in 2022-2023, where the demand for constitutional change did not translate into a demand for total replacement. Indeed, when the Netanyahu government attempted to resist, constrain, and control the Supreme Court, it proposed amendments to the basic laws.¹⁰ The need for reform existed because the right perceived the court as putting speedbumps on its agenda. My argument does not reject cases like those of Poland and Israel. The point is not that resisted courts always feed a total replacement agenda but that the pressure that courts put on political losers can translate into many reactions, including constitutional reforms, and one of them can be associated with the pursuit of total constitutional replacement.

I hypothesize this happens when significantly powerful losers of the constitutional cases end up perceiving the constitutional framework as one-sided. Maintaining the Constitution becomes costly for them, and sometimes, the costs of advancing a constitutional replacement agenda are lower than keeping the Constitution. They can build a political platform by criticizing the Constitution, associating it with the regime they want to end or replace, and attacking those who have ruled the country under the constitutional framework they resist. Losers may not always succeed in their attempt to replace the Constitution, but this does not undermine the fact that judges have contributed to feeding the demand for constitutional replacement. In other words, even if reaching a total replacement is sometimes unfeasible, it can still be attractive for them to pursue

⁹ Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, 11 HAGUE JOURNAL ON THE RULE OF LAW 63 (2019).

¹⁰ J.H.H. Weiler, *Israel: Cry, the Beloved Country*, VERFBLOG (2023), <https://verfassungsblog.de/cry-beloved-country/>; Yaniv Roznai & Amichai Cohen, *Post-Populist Populism*, VERFBLOG (2023), <https://verfassungsblog.de/post-populist-populism/>.

or claim to pursue it to put pressure against the institutional structures that constrain them. We must take the constitutional replacement attempts seriously, even if unfeasible, because, in the long run, they can help undermine the Constitution's authority.

The claim I am making in this paper is not essentially normative. Constitutional replacement can be fed by a jurisprudence that we can value positively or negatively. Constitutional replacement can be duly justified or not, and well-intended agendas of constitutional replacement can derail and go wrong. As the examples I will develop later show, the phenomenon of constitutional replacement partly acting against the jurisprudence of a court can operate against or in favor of conservative or liberal approaches and also against or in favor of democratic, populist, or authoritarian agendas. They all have in common, though, a relatively consequential court that has decided cases in ways perceived unilaterally in moments that preceded the constitutional replacement attempt. How we value the existence of such a court will largely depend on how we justify the existence of judicial review and the enforcement of a specific constitutional order.

This is not to say that my argument lacks normative implications. If strategic judges care about the authority and wide acceptance of the Constitution as a whole, they should also look beyond the specific cases they decide and care about the long-term acceptance of the constitutional framework. Nevertheless, as I will show, this is a difficult task because collegial courts are often subject to a collective action problem in which individual judges may care more intensely about their individual views in specific cases rather than in the long-term authority of the court. When in tension, they will probably maximize the first view over the second, making it hard to prevent feeding into the demand for constitutional replacement in the same cases. I will come back to this idea.

The essay proceeds as follows. The next section briefly identifies the courts' role during and after constitutional replacement processes and how we know little about courts acting before the constitution-making process launches. The following chapter shows a non-exhaustive list of brief examples of courts that have potentially influenced future constitutional replacement calls and provides some initial thoughts on the phenomenon in an exploratory way. The next chapter expands on another example, presented with more detail to flesh out the phenomenon I am trying to describe: how the Chilean Constitutional Court and the constitution-making attempt in that country were connected. The Chilean constitution-making process has received much attention in the literature. Still, the role of the Court and its connection to that process remains unknown to many non-Chilean scholars. Even though the Chilean case is unique, and we should not expect the same Chilean political dynamics to play out in other places in exact ways, there is much to learn from the case. As I will explain, the case shows a possible way courts can feed a demand for a constitutional replacement in a context of polarization that is not unique to Chile. The paper later shows how the Chilean case illuminates the phenomenon and what we can learn from it.

2. The roles that courts can play during and after constitutional replacement

Given the elevated stakes of constitution-making processes, narratives seeking to reboot the political institutions and replace the political elite can gain track. The recent Latin American constitution-making processes in Ecuador (2008), Venezuela (1999), and Bolivia (2009) show that those processes may boost the existing polarization and allow for unilateral takeovers and winner-takes-all situations. Populist leaders may feed their agenda with the political crisis that justified the demand for a constitutional replacement.¹¹ Constitution-making processes that go wrong can lead to an authoritarian regime, the establishment of a dysfunctional political system, or a dominant party regime.¹² On the other hand, successful constitution-making processes such as those of Spain (1978) and Colombia (1991) can potentially establish the foundations for a competitive multiparty democracy,¹³ but risks still abound.¹⁴ Constitution-makers have much to lose—or win—during and after these processes occur.

We should not expect courts to play a significant role in this context. Although mainstream normative theories of constitutional change consider that courts should be irrelevant in those processes,¹⁵ courts can still sometimes perform specific functions *during* and *after* those constitution-making processes occur.

During a constitution-making process, courts can act as *enablers* for constitutional replacement advocates, as a *constraining* mechanism, or both. First, they can act as *enablers* by helping to validate the establishment of a constituent assembly, as happened in Colombia when the Supreme Court set the legal basis of an illegal ballot included in a referendum aimed at supporting calling a constituent assembly.¹⁶ Courts acting as *enablers* can also help open the way to establishing a constituent organ for authoritarian ends, such as in Venezuela. This function can help bring a sense of legal legitimacy to initiating the constitutional replacement process.¹⁷ Courts can also be weaponized to attack the opposition by, for example, claiming that a constituent assembly favoring

¹¹ On the connection between populism and constitution-making, see Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 EUROPEAN CONSTITUTIONAL LAW REVIEW 6 (2016); Oran Doyle, *Populist Constitutionalism and Constituent Power*, 20 GERMAN LAW JOURNAL 161 (2019). Also, José M Díaz de Valdés & Sergio Verdugo, *The ALBA Constitutional Project and Political Representation*, 17 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 479 (2019).

¹² William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK J. INT’L L. 193 (2012); David Landau, *Constitution-Making Gone Wrong*, 64 ALABAMA LAW REVIEW 924 (2013).

¹³ ANDREW ARATO, *THE ADVENTURES OF THE CONSTITUENT POWER. BEYOND REVOLUTIONS?* (2017).

¹⁴ In the case of the US, see MICHAEL J. KLARMAN, *THE FRAMERS’ COUP. THE MAKING OF THE UNITED STATES CONSTITUTION* (2016).

¹⁵ Mainstream constituent power theories claim that constitution-making processes do not face a question of legality, but of legitimacy. See JOEL COLÓN-RÍOS, *CONSTITUENT POWER AND THE LAW* (2020).

¹⁶ Corte Constitucional [Constitutional Court], No. 138 of 1990 (Colom.).

¹⁷ On the idea of legal legitimacy, see Richard H Fallon, *Legitimacy and the Constitution*, 118 HARVARD LAW REVIEW 1787 (2005).

the incumbent regime can act against sitting legislators opposing the regime, such as in Ecuador¹⁸ and, again, in Venezuela.¹⁹ This is not to say that the court’s decision are essential—it is possible that the replacement process could have happened without or against the courts or that courts could have been packed or controlled. However, their role as enablers is still relevant, as it helps to provide either a sense of legal continuity in an exceptionally troublesome time or justify the rupture.

Courts can also become part of a *constraining* mechanism to set and enforce limits on constitutional designers. They can review a constitutional proposal with an explicit mandate—such as the South African Court ensured that the proposal respected critical principles previously agreed upon in the interim Constitution.²⁰ Courts can sometimes check whether the process follows specific procedures. Related examples include checking administrative matters relevant to the operation of a constituent assembly.²¹ Sometimes, the courts’ actions can become consequential and can even invalidate a constituent organ and push for the establishment of another one, like with the Egyptian Administrative Court²² and the Nepal Supreme Court, which declared that the extensions of the constituent assembly violated the principle of periodic elections.²³

Courts can also perform a relevant role *after* the Constitution is enacted, at least in two ways. First, they can enforce the Constitution and make the promises offered during the constitution-making process more credible.²⁴ Making a constitution stick is no easy endeavor; the court’s prospective role can become critical,²⁵ and the creation of the court itself can provide insurance to prospective political losers who participate in the constitution-making process.²⁶ Suppose the Constitution includes compromises among rival groups.²⁷ In that case, courts can be created to reduce transaction costs and signal that compromises are serious, thus building trust in the new

¹⁸ Alejandro Venegas Maingón & Verónica Hernández Muñoz, *Análisis de los Límites del Poder Constituyente*, 5 DERECHO GLOBAL 41 (2019).

¹⁹ David Landau, *Constitution-Making and Authoritarianism in Venezuela*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 161 (Mark A. Graber, Sanford Levinson, & Mark Tushnet eds., 2018).

²⁰ SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES. CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 166–188 (2015).

²¹ See, e.g., the experience in Tunisia. NIMER SULTANY, LAW AND REVOLUTION. LEGITIMACY AND CONSTITUTIONALISM AFTER THE ARAB SPRING 317 (2017).

²² *Id.* at 309–311.

²³ Guobin Zhu & Antonios Kouroutakis, *The Role of the Judiciary and the Supreme Court in the Constitution-Making Process: The Case of Nepal*, 55 STAN. J. INT’L L. 69 (2019).

²⁴ This can partly justify approaching constitutions as “contracts.” See a discussion in Tom Ginsburg, *Constitutions as Contracts, Constitutions as Charters*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 182 (Denis J. Galligan & Mila Versteeg eds., 2013).

²⁵ See, e.g., the role that Ackerman gives to courts in his comparative framework assessing how constitutional frameworks are built in BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS. CHARISMATIC LEADERSHIP AND THE RULE OF LAW (2019).

²⁶ Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 THE JOURNAL OF LAW, ECONOMICS & ORGANIZATION 587 (2013).

²⁷ See, e.g., how the South African Constitution included “insurance swaps” Rosalind Dixon & Tom Ginsburg, *The South African Constitutional Court and Socio-Economic Rights as “Insurance Swaps,”* 4 CONSTITUTIONAL COURT REVIEW 1 (2011).

constitutional framework. When courts later enforce those compromises, they serve to honor the negotiations. If they do not honor those agreements, they can help turn the Constitution into a one-sided norm, betraying its political foundations.²⁸ This post-constitution-making judicial function is relevant to constitution-making itself, as it helps secure the constitutional compact and gives credibility to the promises made during the negotiations in the constitution-making process. In other words, even though constitutional promises can be broken later, the creation of the courts can help lock in negotiations that were crucial for approving a new constitution.

A second way in which a court can be relevant for the constitution-making process after that process formally ends is by enforcing limits to constitutional amendments to preserve the core structures of the existing constitutional framework that judges believe should be defended.²⁹ Nevertheless, by enforcing limits to partial constitutional reforms claiming that the amending procedure cannot change certain constitutional provisions, they explicitly or implicitly protect the power of those who can totally replace the Constitution. For example, the Colombian Court that prevented former President Uribe from running to serve a third presidential term by declaring the unconstitutionality of the amendment he was trying to pass was not only enforcing its view on how the checks-and-balances framework should work in the context of a hyper-presidential regime.³⁰ The Colombian Court also said that if such a framework must change, it should follow the appropriate channels of total replacement—in Colombia, substituting the core aspects of the constitution requires the election of an extraordinary constituent assembly—and not by the ordinary constitutional amendment procedure. In other words, by preventing a partial change to the constitution from happening, the Court also protects the ability to pursue a total replacement by identifying the requirements for such a change. Thus, the court can condition the procedures for future replacements. In this latter case, the court is not only offering an ex-post role for the constitutional replacement process—in the case of the example, the Colombian Court acts after the 1991 Constitution was enacted. It is also becoming relevant for a possible future constitution-making process.

All these roles typically focus on the courts' functions influencing ongoing constitution-making processes or on a court's role in consolidating a constitutional project. Even though some scholars have tried to engage with some of these functions more or less systematically,³¹ they have yet to fully theorize the relevant function courts can play *before* a constitution-making process can occur.

²⁸ See, e.g., how the Bolivian Constitutional Court broke such a promise in Sergio Verdugo, *The Fall of the Constitution's Political Insurance. How the Morales Regime Broke the Insurance of the 2009 Bolivian Constitution.*, 17 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1098 (2019).

²⁹ YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017).

³⁰ Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 339 (2013).

³¹ Barber and Vermeule, *supra* note 2; RICHARD S. KAY & JOEL I. COLÓN-RÍOS, ADJUDICATING REVOLUTION. COURTS AND CONSTITUTIONAL CHANGE (2022).

We know little about this because it is often assumed that courts play a secondary role during replacement processes and that courts operating before those processes are launched are part of the institutional framework that constitutional designers seek to replace. But we know, from the Colombian example provided above, that if the Colombian President is to advance essential constitutional changes, the jurisprudence of the Court on constitutional change might still help to clarify the appropriate procedural path.

Other things being equal, courts should not be expected to have incentives to challenge the Constitution that provides for their authority. It would be self-defeating for judges to attack the constitutional framework that serves as the legal source for their judicial powers. Thus, if anything, the judges' function should be, at least in theory, to protect the Constitution under which they operate or ignore or avoid entering into political conflicts about the legitimacy of the Constitution itself.³² This may sometimes lead courts to resist changes or to make sure that changes are done under the appropriate procedures—like with the example of the Colombian Court in the context of the Uribe controversy. When Chilean scholars started to speak about the possibility of a constitutional replacement in that country, some scholars were skeptical about the Court's Chief Justice even commenting on it because they saw the Court as part of the regime they sought to change.³³ Either way, courts are unlikely to challenge the Constitution, which serves as the legal basis for their authority.

Given the considerations above, it may appear counterintuitive that a court encourages the total replacement of the Constitution under which it operates. Nevertheless, this is precisely what I claim in this essay: that, even if unintentionally, sometimes courts can help create the conditions for total constitutional replacement. Clarifying the appropriate procedures for constitutional change in advance could be one way. But there are others.

3. How can courts help to create the need for a constitutional replacement?

To understand the role of courts before attempts at constitutional replacement are materialized, it is helpful to identify some of the connected purposes of constitutional replacement attempts, including the aversions constitutional designers had against previous regimes or experiences.³⁴ After identifying those goals, it is possible to speculate on how previous or existing courts have become somehow relevant to feed the demand for enacting a new constitution.

³² This is not to say that the possibility of an unconstitutional constitution is inexistent. See Richard Albert, *Four Unconstitutional Constitutions and Their Democratic Foundations*, 50 CORNELL INTERNATIONAL LAW JOURNAL 169 (2017).

³³ See, e.g., Eduardo Chia, *La Presidenta Del Tribunal Constitucional y Su Oposición a Una Nueva Constitución*, RED SECA (Apr. 14, 2014).

³⁴ Kim Lane Scheppelle, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 296 (2003).

Consider the following examples: (1) the 1947 Italian Constitution was a reaction against the failed Fascist regime and a critical compromise among the new political parties to establish the bases for the new democratic regime. (2) The 2009 Bolivian Constitution was part of a socialist decolonization project reacting against an entire political class that had fallen into a deep crisis. (3) the 2011 Hungarian Constitution resulted from a conservative agenda of democratic decay pushed by the Fidesz regime and a reaction against liberal political narratives in Hungary. (4) A group of Catalan politicians has promoted—but not materialized—a constitutional replacement project that could express their demands, a reaction against the Spanish constitutional framework that prevents or puts speedbumps into their political aspirations. (5) In 2024, President Petro, from Colombia, promoted convening a constituent assembly to circumvent a constitutional scheme that, according to him, undermines the feasibility of his social reform projects. The constitutional scheme, his argument goes, provides for too many constraints to exercising political power.

These examples show different attempts—successful or not—to replace a constitution in diverse contexts. Were there any meaningful previous judicial behaviors that could have influenced those calls for constitutional replacement? A quick look at the examples above can help to sketch initial answers to this question.

(1) In Italy, some judges were arguably seen as enforcers of fascist-era legislation, and this was one of the arguments that Italian constitution-makers used to create, for the first time in Italian history, a separate Constitutional Court using the centralized judicial review model in the new Constitution.³⁵ The Constitutional Court was part of a new framework that, as was common in the post-World War II era, gave courts a meaningful role in enforcing fundamental rights.

(2) In the case of Bolivia, the Constitutional Court was seen as threatening to put speed bumps on Evo Morales' political projects, including his constituent assembly.³⁶ As mentioned in the introduction, Morales decided to dismantle it and establish a new court that was more reliable for his regime. That way, Morales could advance his constitutional replacement process in which a plurinational state would be established. The latest court—the *Tribunal Constitucional Plurinacional*—had explicit plurinational state-related goals and was expected to help implement the new project—to which the old Constitutional Court appeared in tension.

(3) In Hungary, the Constitutional Court—and its old Chief Justice, László Sólyom³⁷—had built a famous liberal jurisprudence in the 1990s that entrenched constitutional limits.³⁸ When the illiberal

³⁵ MARTA CARTABIA & NICOLA LUPO, THE CONSTITUTION OF ITALY. A CONTEXTUAL ANALYSIS 189 (2022). Also, John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication, Italian Style*, in COMPARATIVE CONSTITUTIONAL DESIGN 294 (Tom Ginsburg ed., 2012).

³⁶ Castagnola and Pérez-Liñán, *supra* note 7.

³⁷ Kim Lane Scheppele, *Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments*, in RETHINKING THE RULE OF LAW AFTER COMMUNISM 25 (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 2005).

³⁸ *Id.*

Fidesz regime came into power, it sought to remove the "system of checked powers" that operated before,³⁹ and the court was part of that structure—years of liberal jurisprudence probably helped to persuade Orbán and his supporters that weakening and capturing the Court was necessary for the new constitutional era. By defending a type of liberal democratic regime and taking a particularly consequential and active role, the Court also elevated the importance of the Constitution, making judicial appointments more politically consequential. In the long run, it was perceived as threatening the anti-liberal agenda that would impose itself with the enactment of the 2011 Constitution.⁴⁰ Opponents of the Fidesz regime are now reacting against the Fidesz Constitution and their captured courts, trying to find ways to trigger a constitutional change in that country. In this context and others, questions about when court-packing can become desirable have risen.⁴¹ Should the Fidesz opponents promote constitutional replacement? Should they attempt to pack an already packed Court?

(4) In Spain, after the Constitutional Court released some decisions challenging the constitutionality of the referendum that a group of Catalonia politicians had organized to declare the independence of Catalonia from Spain in 2017,⁴² Catalans held the referendum anyway. After the government tried to repress the referendum and punish the organizers, Catalan separatists might have more reasons to resist the Spanish Constitution. Even though it is possible to defend the secessionist position using a perspective internal to the 1978 Spanish Constitution,⁴³ constitutional drafts have been written,⁴⁴ and explicit calls to the constituent power of the people now exist among influential Catalan public intellectuals to try to circumvent the constitutional limits that the Constitutional Court is likely to enforce.⁴⁵ Responses to protect the original constitutional project of 1978 have criticized such calls.⁴⁶ In Spain, for good or bad, the judicial decisions entailed a judicialization of politics in times of polarization, making the Constitution appear one-sided⁴⁷ and giving reasons to those who opposed the agendas behind those rulings to resist the constitutional frameworks that helped the courts justify their rulings or authority.

³⁹ Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions*, in ON HUNGARY'S 2011 FUNDAMENTAL LAW 237 (2012).

⁴⁰ Gábor Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 243 (Mark A. Graber, Sanford Levinson, & Mark Tushnet eds., 2018); TÍMEA DRINÓCZI & AGNIESZKA BIEŃ-KACAŁA, ILLIBERAL CONSTITUTIONALISM IN POLAND AND HUNGARY: THE DETERIORATION OF DEMOCRACY, MISUSE OF HUMAN RIGHTS AND ABUSE OF THE RULE OF LAW (2021); Kriszta Kovács & Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union*, 51 COMMUNIST AND POST-COMMUNIST STUDIES 189 (2018).

⁴¹ Kosar and Šipulová, *supra* note 9.

⁴² Tribunal Constitucional [Constitutional Court], No. 90 of 2017 (Spain); Tribunal Constitucional [Constitutional Court], No. 114 of 2017 (Spain); Tribunal Constitucional [Constitutional Court], No. 124 of 2017

⁴³ Héctor López Bofill, *Hubris, Constitutionalism, and "the Indissoluble Unity of the Spanish Nation": The Repression of Catalan Secessionist Referenda in Spanish Constitutional Law*, 17 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 943 (2019).

⁴⁴ HÈCTOR LÓPEZ BOFILL, LAW, VIOLENCE AND CONSTITUENT POWER 200 (2021).

⁴⁵ GERARDO PISARELLO, PROCESOS CONSTITUYENTES. CAMINOS PARA LA RUPTURA DEMOCRÁTICA (2014).

⁴⁶ TERESA FREIXES, EN DEFENSA DE LA TRANSICIÓN (2024).

⁴⁷ Jean-Baptiste Harguindéguy, *The Constitutional Court and the Judicialization of Spanish Politics*, EUROPEAN POLITICS AND SOCIETY 1 (2023).

(5) In Colombia, the Constitutional Court has become one of the most powerful courts in the world. It champions social rights enforcement and the unconstitutional constitutional amendment doctrine and effectively enforces constitutional limits against presidents and legislators.⁴⁸ It has perhaps gone too far with its consequential powers.⁴⁹ The newly elected President, Petro, who has offered a more radical leftwing platform than more mainstream left politicians in Colombia, has suggested a constitutional replacement to overcome constitutional limits to his social reform agenda.⁵⁰ Even though he is not explicitly targeting the Court—a Court that leans to the progressives but is not a leftist radical institution and appears hard to capture—it should come as no surprise that the Court has turned the institutional arrangements of the Constitution into such a consequential norm that his proposal can also be partly associated with the role of the Court.

Taking the examples above, it is possible to speculate preliminary on how courts can contribute to feeding the demand for total replacement. In most cases—even if it is obvious—the previous constitutional framework—and not only the court—is perceived as incompatible with the political agenda of those pushing for the replacement, even in cases where the replacement appears unlikely to succeed. The existence of powerful courts is not always the case. Still, they all seem to threaten the goals of the constitution-makers somehow, either by an explicit jurisprudence that appears ideologically inconsistent with the new regime—think of Hungary and Spain, for example—or by merely being perceived as a helpful tool of the constitutional framework that constitution-makers are attacking—think of Italy, Bolivia, and Colombia. Of course, courts may play a role in placating the demand for constitutional replacement if their jurisprudence changes. However, this is not always possible, especially when judges belong to a failed regime—think of Italy. Recent “mutations” of the Spanish Constitution⁵¹ and recent changes in the composition of the Spanish Constitutional Court, for example, may make it more likely to protect demands significant for the secessionists—such as the amnesty law enacted during Sánchez’s administration.⁵²

Constitutional replacement attempts are not always feasible. Replacement is politically unlikely for the Catalan separatists in Spain and President Petro in Colombia, but the demand for total replacement still exists and is politically consequential. The Catalan secessionists are a minority in Spain, and President Petro lacks majorities in the Colombian parliament. The Catalans have

⁴⁸ See, e.g., Andrea Scoseria Katz, *Taming the Prince: Bringing Presidential Emergency Powers under Law in Colombia*, 18 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1201 (2020).

⁴⁹ Vicente F. Benítez-R, *Petrificando La Rama Judicial En Colombia: Autointerés Judicial y Control de Constitucionalidad Inapropiado de Reformas Constitucionales a La Justicia*, 20 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1618 (2022); Nicola Tommasini, *Judicial Self-Empowerment and Unconstitutional Constitutional Amendments*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2024).

⁵⁰ <https://elpais.com/americas-colombia/2024-03-16/petro-abre-la-puerta-a-una-asamblea-constituyente-ante-el-estancamiento-de-sus-reformas.html>. Also, Gonzalo Ramírez Cleves, *La Propuesta de Asamblea Nacional Constituyente de Gustavo Petro. Hacia Unas Primeras Reflexiones*, 15 HECHOS Y DERECHOS (2024).

⁵¹ FREIXES, *supra* note 47.

⁵² Fernando Simón Yarza, *Justicia Constitucional y Polarización Política En España*, 22-forthcoming INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2024).

nonetheless succeeded in pushing the Spanish political agenda to assess important debates, partly seizing the opportunity provided by the fragmentation of the party system and the rise of parties from the far right and the far left, which make the task of building a government in a parliamentary context, particularly difficult. Petro was elected President even though he does not come from the mainstream parties. He has questioned a constitutional framework he considers incompatible with his promises to Colombian citizens. His strategy of putting pressure on legislators in the context of a hyperpresidential regime has shaken Colombia's agenda.

Replacements were achieved in the cases of Italy, Bolivia, and Hungary, and specific measures were taken against the courts that preceded the enactment of the new constitutions in these jurisdictions. Sometimes, a new court is created—Bolivia and Italy—and in others, the court is controlled—Hungary. In the three last cases, for good or bad, the new constitutions—and the courts tasked to protect those constitutions—are linked to political projects rejecting the past. The courts that preceded the new constitutions played a role—even if small—that was perceived as loyal to that past.

To be sure, thinking of a possible counterfactual, it is likely that the lack of judges loyal to the previous regimes would not stop the agenda of constitutional replacement—which is why my argument cannot claim a causal mechanism. However, this does not mean that courts cannot contribute to prospective constitutional replacement by helping to build the need for such a replacement. Petro would probably have more leeway in getting around constitutional limits with a weaker Court or a Court friendly to his reforms, and the Catalans could push for several of their demands within the constitutional structure. In those cases, the constitutional replacement agenda could still exist, but the Constitution would be perceived as less of a threat, and thus, the demand for a replacement can appear less urgent. Courts can provide reasons for constitutional change, but other reasons still exist, and those other reasons may be more powerful.

Of course, more cases and in-depth analyses need to be added and considered to confirm or nuance these preliminary observations and better understand the phenomenon of courts feeding the need for constitutional replacement. For now, we can be sure that constitutional courts can perform a more specific role during the pre-constitution-making time. Even though the nature of this paper is exploratory, the following section seeks to advance the goal of understanding the phenomenon with a more in-depth case study: the Chilean constitution-making attempt. Regarding that case, I hypothesize that courts can contribute to increasing polarization and make the ground for constitutional change more fertile. One way they can do this is by showing loyalty to the institutional structures that constitutional designers are trying to change. These seemed to be the fears associated with Italian and Bolivian constitution-makers and, arguably, Petro. It was also the case of the Catalans' demand for constitutional replacement and the Hungarian resistance against the previously liberal court. As I will show, the criticisms against the Chilean Court fit this idea. Let's try to understand how this happened.

4. How did the Chilean Constitutional Court elevate Chile's perceived need for constitutional replacement?

Even though the demand for a new constitution is older,⁵³ contemporary Chilean politicians have tried and failed to replace Chile's Constitution thrice recently. The first time was a failed attempt by former Socialist President Bachelet to fulfill one of her campaign promises.⁵⁴ The political crisis that led to the need to replace the Constitution had momentum after that failure during right-wing President Piñera's second administration (2018-2022). Piñera had opposed the demand for constitutional replacement, but, in October 2019, he was forced to acquiescence to it when massive demonstrations took over the streets to demand social rights expansions.⁵⁵ The second attempt to replace the Constitution came during that crisis. It was advanced by an elected constituent assembly dominated by a left-wing alliance composed of independents, far-left parties, indigenous leaders, and politicians from the new leftist movements.⁵⁶ They failed to approve their constitutional proposal in the 2022 referendum, which was perceived as too leftwing.⁵⁷ The third attempt, which took place during Gabriel Boric's administration (2022-2026), a leftwing president who had supported the work of the failed constituent assembly, was dominated by a right-wing alliance. They succeeded in controlling the Constitutional Council—a type of elected constituent assembly—and produced a constitutional proposal perceived as too right-wing. The proposal failed in the 2023 referendum. Today, the Chilean Constitution has become an unstable “moving target” subject to continuous formal and informal reforms.⁵⁸

There are competing reasons in the literature trying to explain why, despite those failures, the demand for a new constitution grew strong.⁵⁹ Some scholars and politicians have claimed that the demand for a new constitution connects to institutional arrangements that have arguably helped to protect the conservative and libertarian project of the dictatorship—which ended in 1990.⁶⁰ Despite

⁵³ Sergio Verdugo, *Un Fracaso Constituyente Permanente*, in CONSTITUCIONALISMO CRÍTICO EN TIEMPO REAL: EL PROCESO CONSTITUYENTE EN CHILE (A. López Castillo, J.M. Castella, & R. Ghazzaoui eds., 2024).

⁵⁴ Miriam Henríquez Viñas & José Francisco García, *El proceso constituyente de Bachelet en Chile (2015-2018): razones de un fracaso (previsible)*, 21 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1496 (2023).

⁵⁵ María Cristina Escudero, *Making a Constituent Assembly in Chile: The Shifting Costs of Opposing Change*, 41 BULLETIN OF LATIN AMERICAN RESEARCH 641 (2022).

⁵⁶ Jorge Fábrega, *Ordenamiento Ideológico En La Convención Constitucional Chilena*, 42 REV. CIENC. POLÍT. (SANTIAGO) 127 (2022).

⁵⁷ Scholars disagree on the explanations for the failure. Compare, Jennifer M. Piscopo & Peter M. Siavelis, *Chile's Constitutional Chaos*, 34 JOURNAL OF DEMOCRACY 141 (2023); Eduardo Alemán & Patricio Navia, *Chile's Failed Constitution: Democracy Wins*, 34 JOURNAL OF DEMOCRACY 90 (2023).

⁵⁸ Sergio Verdugo, *Constitutions as Moving Targets*, 13 GLOBAL CONSTITUTIONALISM 250 (2024).

⁵⁹ Elsewhere, I have offered my explanation. Rosalind Dixon & Sergio Verdugo, *Los derechos sociales y la reforma constitucional en Chile: hacia una implementación híbrida, legislativa y judicial*, 162 CEP 31 (2021).

⁶⁰ See some examples and variations of the argument in GABRIEL SALAZAR, EN EL NOMBRE DEL PODER POPULAR CONSTITUYENTE (CHILE, SIGLO XXI) (2011); EN EL NOMBRE DEL PUEBLO. DEBATE SOBRE EL CAMBIO CONSTITUCIONAL EN CHILE, (Claudio Fuentes ed., 2010); FERNANDO ATRIA, LA CONSTITUCIÓN TRAMPOSA (2013); CARLOS HUNEEUS, LA DEMOCRACIA SEMISOBERANA. CHILE DESPUÉS DE PINOCHET (2014).

multiple constitutional amendments to the dictatorship’s Constitution, they claim that its political platform has remained entrenched in the Constitution and that the Constitutional Court was critical to fostering that entrenchment or making the Constitution perceived as one-sided.⁶¹ Even though some of these scholars may exaggerate the importance of the Court’s role and whether the Constitution was one-sided is a matter of controversy, it is generally uncontroversial in Chile to claim that the Court was rejected by the left sectors pushing for constitutional replacement. As I will show, the Court’s jurisprudence and divisions became a target that helped justify and make the need for constitutional replacement more visible—contrary to most judges’ preferences. The Constitution was, at least, *perceived* as one-sided. As I will explain, one factor—not the exclusive one, to be sure—that helped explain how the Constitution was blamed for the country’s problems, connects to the Court’s jurisprudence.

4.1. *The Political and Institutional Context in a Nutshell*

The constitution-making processes—particularly the second and third—occurred in contexts of growing elite polarization. The center had become irrelevant, and the 2021 presidential election saw two rising candidates who did not represent the mainstream parties and won the first round. Before the social outburst took place in 2019, citizens had long experienced a substantial decrease in party identification,⁶² and the distancing and radicalization at the level of the political elites⁶³ partly due to Congress’ fragmentation, which was partly produced by the electoral reforms Bachelet had passed,⁶⁴ and perhaps also due to social media’s impact.⁶⁵ The Chilean “consensual democracy,”⁶⁶ which had produced relatively moderate dynamics due to the multiparty agreements necessary for the system’s functioning, was over.⁶⁷

The fragmentation of the Chilean elites—combined with internal disagreements among coalitions and parties⁶⁸—has made it hard for presidents to build political alliances to pass legislation, and,

⁶¹ See, e.g., FERNANDO ATRIA, CONSTANZA SALGADO & JAVIER WILENMANN, *CONSTITUCIÓN Y NEUTRALIZACIÓN. ORIGEN, DESARROLLO Y SOLUCIÓN DE LA CRISIS CONSTITUCIONAL* (2017); Tania Busch Venthur, *Los problemas persistentes de la justicia constitucional chilena y los procesos constituyentes*, 28 ANU. IBEROAM. JUSTICIA CONSTI. 45 (2024).

⁶² Patricio Navia & Rodrigo Osorio, *It’s the Christian Democrats’ Fault: Declining Political Identification in Chile, 1957–2012*, 48 CAN J POL SCI 815 (2015).

⁶³ See Carolina Segovia, *Affective Polarization in Low-Partisanship Societies. The Case of Chile 1990–2021*, 4 FRONT. POLIT. SCI. 928586 (2022).

⁶⁴ Kenneth Bunker, *La elección de 2017 y el fraccionamiento del sistema de partidos en Chile*, REV. CHIL. DERECHO C. POLÍTICA 202 (2018).

⁶⁵ Andrés Scherman et al., *WhatsApp, Polarization, and Non-Conventional Political Participation: Chile and Colombia Before the Social Outbursts of 2019*, 10 MAC (2022), <https://www.cogitiopress.com/mediaandcommunication/article/view/5817> (last visited Mar 15, 2024).

⁶⁶ See generally Peter M. Siavelis, *Exaggerated Presidentialism and Moderate Presidents: Executive-Legislative Relations in Chile*, in LEGISLAIVE POLITICS IN LATIN AMERICA 79 (Scott Morgenstern & Benito Nacif eds., 2002).

⁶⁷ Jorge Fábrega, Jorge González & Jaime Lindh, *Polarization and Electoral Incentives: The End of the Chilean Consensus Democracy, 1990–2014*, 60 LATIN AMERICAN POLITICS AND SOCIETY 49 (2018).

⁶⁸ Carlos Meléndez, Cristóbal Rovira Kaltwasser & Javier Sajuria, *Chile 2020: pandemia y plebiscito constitucional*, 41 REV. CIENC. POLÍT. (SANTIAGO) 263, 265 (2021).

combined with short presidential terms and presidents that were constitutionally forbidden from running for immediate reelection, there were not many incentives to collaborate during the legislative decision-making processes. When checking the governments, the parties were increasingly indisciplined and prepared to play hardball.

As the following subsection shows, the Court was a consequential body intervening in the political arena, contributing to the polarization described. Nevertheless, this was not always the case. Historically, Chilean Constitutional Law has not been particularly court-centric.⁶⁹ The XIXth century did not have a genuine constitutional court; the 1925 Constitution established a judicial review mechanism that was not politically consequential,⁷⁰ and administrative law was developed mainly outside the courts.⁷¹ The first Chilean Constitutional Court was established in 1970 but did not last long. The Court was closed after the 1973 military coup. The dictatorship established a new Constitutional Court in 1980 when it approved the new Constitution, which played an unexpected democratic role during the transition to democracy in the 1980s.⁷² Still, after civilians got elected and the military Junta that governed the country during the dictatorship was dissolved, the Court rarely intervened in the political arena⁷³ despite adjudicating some separation-of-powers conflicts.⁷⁴

The 2005 constitutional amendment was the starting point of the change. Although the core goal of that amendment was to remove authoritarian enclaves from the Constitution, it also changed the Court’s appointment mechanisms—making them more partisan—and increased the judicial review powers. Judges would be appointed in three different ways, following a mixed judicial selection system. Three judges would be appointed by the President, four by the National Congress—two by each chamber using supermajority rules—and three by the Supreme Court.⁷⁵ A new generation of judges started in this period, with a more academic and politically oriented profile.⁷⁶ The rate of dissenting opinions quickly grew,⁷⁷ judges with more partisan backgrounds tended to dissent

⁶⁹ Julio Faúndez, *Chilean Constitutionalism Before Allende: Legality Without Courts*, 29 BULLETIN OF LATIN AMERICAN RESEARCH 34 (2010).

⁷⁰ Sergio Verdugo, *How Constitutional Review Experiments Can Fail? Lessons from the Chilean 1925 Constitution*, 19 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1062 (2021).

⁷¹ Julio Faúndez, *The Fragile Foundations of Administrative Legality: Chile Between 1932 and 1973*, 2 J. COMP. L. 77 (2007).

⁷² Sergio Verdugo, *How Judges Can Challenge Dictators and Get Away with It*, 59 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 554 (2021).

⁷³ Javier Couso & Lisa Hilbink, *From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile*, in COURTS IN LATIN AMERICA 99 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011).

⁷⁴ Druscilla L. Scribner, *The Judicialization of (Separation of Powers) Politics: Lessons From Chile*, 3 JOURNAL OF POLITICS IN LATIN AMERICA 71 (2010).

⁷⁵ See also LYDIA BRASHEAR TIEDE, JUDICIAL VETOES. DECISION-MAKING ON MIXED SELECTION CONSTITUTIONAL COURTS (2022).

⁷⁶ Diego Pardow & Sergio Verdugo, *El Tribunal Constitucional Chileno y La Reforma de 2005. Un Enroque Entre Jueces de Carrera y Académicos*, XXVIII REVISTA DE DERECHO (VALDIVIA) 123 (2015).

⁷⁷ Royce Carroll & Lydia Tiede, *Ideological Voting on Chile’s Constitutional Tribunal. Dissent Coalition in the Adjudication of Rights*, 11 JOURNAL OF HUMAN RIGHTS 85 (2012).

more,⁷⁸ judicial voting coalitions became unstable,⁷⁹ and the Court was more likely to challenge the president's executive orders than in previous periods.⁸⁰

4.2. *The Chilean Court Enters the Political Arena*

The new Court quickly started to engage in cases politicians cared about and released several decisions during the first Bachelet administration (2006-2010). Politically consequential cases included the challenge against the jurisdiction of tax officers, forcing a tax reform,⁸¹ and several judicial decisions against the interests of healthcare insurance companies to benefit women and the elderly.⁸² Another case that mattered at this time was the Court's rejection of a claim asking to strike down the laws prohibiting same-sex marriage,⁸³ a decision that came after the Court had previously failed to declare the unconstitutionality of a provision punishing sodomy between an adult male and a male between 14-18 years old.⁸⁴ These decisions showed that in sensitive political problems, the Court had a relevant say.

The first visible political backlash came from the morning-after pill case, in which the Court defended a pro-life interpretation of the Constitution in a divided ruling that declared the unconstitutionality of the morning-after pill.⁸⁵ Reacting against the ruling, legislators enacted an ordinary statute legalizing the pill—overruling the Court's interpretation.⁸⁶ One of the judicial votes against the pill came from Mario Fernández, a center-left judge appointed by the Christian Democrats—a party that was part of Bachelet's governing coalition—who was also conservative. Socialists asked for Fernández's resignation, and he resigned from the Court to continue his career as a Bachelet's cabinet member—he could not be trusted to serve in the court, but he could be a secretary of state.

Another politically salient case of that time was the Court's decision to strike down Bachelet's plans to fund Santiago's new public transportation system with a system of loans.⁸⁷ Bachelet was embarrassingly forced to use her emergency powers to allocate the funding. Jorge Correa, another

⁷⁸ Lydia B. Tiede, *The Political Determinants of Judicial Dissent. Evidence from the Chilean Constitutional Tribunal*, EUROPEAN POLITICAL SCIENCE REVIEW 377 (2016).

⁷⁹ Carroll and Tiede, *supra* note 79.

⁸⁰ Pardow and Verdugo, *supra* note 78.

⁸¹ See, e.g., Tribunal Constitucional [Constitutional Court], No. 472 of 2006 (Chile); Tribunal Constitucional [Constitutional Court], No. 681 of 2007 (Chile)

⁸² See, e.g., Tribunal Constitucional [Constitutional Court], No. 976 of 2008 (Chile); Tribunal Constitucional [Constitutional Court], No. 1710 of 2010 (Chile)

⁸³ Tribunal Constitucional [Constitutional Court], No. 1881 of 2011 (Chile)

⁸⁴ Tribunal Constitucional [Constitutional Court], No. 1683 of 2010 (Chile)

⁸⁵ Tribunal Constitucional [Constitutional Court], No. 740 of 2008 (Chile). See Fernando Muñoz León, *Morning-After Decisions: Legal Mobilization Against Emergency Contraception in Chile*, 21 MICHIGAN JOURNAL OF GENDER AND LAW 123 (2014).

⁸⁶ Sergio Verdugo, *La Discusión Democrática Sobre La Revisión Judicial de Las Leyes. Diseño Institucional y Modelos Constitucionales*, 40 REV. CHIL. DERECHO 181 (2013).

⁸⁷ Tribunal Constitucional [Constitutional Court], No. 1153 of 2008 (Chile)

Christian Democrat who had been a cabinet member to former Socialist President Richardo Lagos, was on the wrong side of the confrontation. Even though he was expected to align with the interests of Bachelet's coalition, he voted against Bachelet's interests. When the opportunity to reappoint him came, Bachelet appointed someone else.

The following appointments to the Court were going to be discussed primarily in partisan ways. The parties' interest in ensuring the loyalty of the appointees was warranted because the Court had proved to be a consequential institution that could become a potential asset to them. If, in the past, non-partisan judges were appointed, the new appointments included individuals such as Carlos Carmona, Bachelet's former chief of the legislation office. If the left was securing the loyalty of the appointees, the right could do no less. After Piñera was elected president, he appointed María Luisa Brahm—Piñera's chief of staff—and Iván Aróstica—who had led the legal department of the Ministry of Interior. The chambers of the National Congress distributed the appointments by party quota. They started to appoint politically aligned judges such as Venegas—who led the think tank of one of the rightwing parties— and García, among others. The appointments made by the Supreme Court also selected judges with political identification. It was the case, for example, of Fernández—a Socialist—, Hernández—a Christian Democrat—and Vásquez—with known rightwing views.

The appointment of judges with no good legal reputation, such as Letelier—who had been a losing parliamentary candidate from the right—and Pozo—a left-wing lawyer accused of plagiarism— showed that parties cared little about the quality of the judges and preferred to push more for appointing judges they could rely on.

Left-wing scholars started to complain about the appointments early,⁸⁸ and connecting the problem with the demand for a new constitution would soon appear. An example is a piece written in 2015 by Jaime Bassa, a left-wing legal scholar with partisan connections who would later become the Vice president of the 2022 Constituent Assembly. In his essay, Bassa explained how the appointment mechanisms were helping the right-wing agenda, making the case that the Court was an important reason to replace the Constitution.⁸⁹ He was not the first, as other leftwing scholars, most notably Fernando Atria, had complained earlier about similar issues.⁹⁰ The Court was already part of why many had promoted a total constitutional replacement. The cases cited above gave those reasons more visibility, and public intellectuals started to use them in platforms more available to the public. The Court was now mentioned in TV debates, newspaper articles, and social media.

⁸⁸ Fernando Muñoz León, *Not Only "Who Decides": The Rhetoric of Conflicts over Judicial Appointments*, 14 GERMAN LAW JOURNAL 1195 (2013).

⁸⁹ Jaime Bassa Mercado, *El Tribunal Constitucional En La Constitución Chilena Vigente*, in LA CONSTITUCIÓN CHILENA. UNA REVISIÓN CRÍTICA A SU PRÁCTICA POLÍTICA 253 (Jaime Bassa Mercado, Juan Ferrada Bórquez, & Christian Viera Álvarez eds., 2015).

⁹⁰ Atria has written many essays against the Constitutional Court, dating back to the 1990s. One of his earlier works is Fernando Atria, *El Tribunal Constitucional y La Objeción Democrática*, 20 REV. CHIL. DERECHO 367 (1993).

4.3. *The Chilean Court and the demand for a new Constitution*

With some help from the Supreme Court appointees, the rightwing coalition had a conservative majority in the Court during the second Bachelet administration (2014-2018). In a divided decision, the Court would use that majority to declare that parts of Bachelet’s labor law reform strengthening the unions were unconstitutional,⁹¹ and legislators from the left attacked the Court, including an official statement from the Socialist Party.⁹² Another case involved Bachelet’s abortion bill, which legalized abortion in three circumstances. Even though the Court did not strike down Bachelet’s bill, it still chose to protect parts of the conservative interests involved by declaring that “institutions”—such as Catholic healthcare facilities—could use the conscientious objection not to perform abortions.⁹³ Leftwing Senators asked for a special session to examine the ruling and the Communist Party tried to void it using ordinary judicial procedure, but the ruling stayed. A few weeks later, the presidential candidate of the rightwing coalition, Sebastián Piñera, surprised many by publicly offering to reform the court's appointment mechanisms “to make sure that those mechanisms are not used to distribute a sort of partisan quota.”⁹⁴

Another relevant case involved the Court’s challenge against the key provisions giving powers to the consumer protection agency using a separation of powers argument.⁹⁵ Dissenters accused the majority of judicial activism. Politicians from the left criticized the Court openly, even pushing to replace the Court and suggesting that the Court was “the guardian of the abusers.”⁹⁶ In another case, the Court declared that the budget bill that Bachelet was trying to approve to offer free tuition for higher education in certain types of institutions should be broadened in the name of equality.⁹⁷ At the same time, the Court was also releasing several decisions harming the power of administrative agencies to impose fines on the private sector, a demand that aligned with the preferences of the right.⁹⁸

These cases boosted criticisms against the court, particularly from left-wing politicians. Not only scholars and public intellectuals were criticizing the Court;⁹⁹ criticisms also came from legislators and political parties, and perhaps more importantly, from presidential candidates, who proposed

⁹¹ Tribunal Constitucional [Constitutional Court], No. 3016-3026 of 2016 (Chile)

⁹² Partido Socialista, *Carta Del Partido Socialista Ante El Fallo Del Tribunal Constitucional*, (2016).

⁹³ Tribunal Constitucional [Constitutional Court], No. 3729-3751 of 2017 (Chile)

⁹⁴ La Tercera, *Piñera Plantea Reforma Para Cambiar Sistema de Nombramientos En El TC*, Aug. 10, 2017, <http://www2.latercera.com/noticia/pinera-plantea-reforma-cambiar-sistema-nombramientos-tc/> (last visited May 23, 2018).

⁹⁵ Tribunal Constitucional [Constitutional Court], No. 4012 of 2017 (Chile)

⁹⁶ Alfonso De Urresti, *Sernac y Fallo Del Tribunal Constitucional*, EL MERCURIO (Jan. 20, 2018); Alfonso De Urresti, *Chile Requiere Un Nuevo Tribunal Constitucional*, EL MOSTRADOR (Apr. 18, 2018).

⁹⁷ Sergio Verdugo, *Limited Democracy and Great Distrust. John Hart Ely in Chile and Bolivia*, 19 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2021).

⁹⁸ See, e.g., STC 1,968, STC 2,133, STC 2,722-2,729, STC 8,823

⁹⁹ FERNANDO ATRIA ET AL., EL OTRO MODELO (2013).

replacing or reforming it during the 2016-2017 campaigns.¹⁰⁰ Fernando Atria had popularized the idea that the Constitution established an uneven playing field favoring the right and that the Court was part of the mechanisms benefiting right-wing parties.¹⁰¹ Now, Atria’s ideas were at the front of the political struggle.

After most of the authoritarian enclaves were removed in 2005 and the electoral system—which arguably had benefited the major parties from the right—was replaced in 2015, Atria had fewer textual arguments to show how the Constitution was one-sided. Nevertheless, he found strong evidence in the Court’s jurisprudence that his criticism was not outdated, and the criticisms became even stronger. Bachelet had already attempted—and failed—to change the Constitution by invoking the need to expand rights, particularly social rights. Still, the Court’s cases gave new reasons to support that narrative, which would consolidate during the crisis of 2019.

After the constitution-making process was initiated and the constituent assembly elections were soon to take place, the Court was involved with another politically consequential issue. The Court used the unconstitutional constitutional amendment doctrine to declare an amendment bill presented by legislators unconstitutional.¹⁰² The project aimed at allowing people to withdraw funds from their pension savings during the COVID-19 pandemic, and Piñera opposed it because of the harm that the amendment would trigger to the pension system. It was a highly sensitive issue for voters. The Constitutional Court initially used its right-wing majority to benefit the president. It stopped legislators from amending the Constitution.¹⁰³ However, the pressure was too intense, and the Court would later change its jurisprudence when another similar case arose. Still, the reputational harm the Court suffered in the first case was hard to redeem.

Different left groups won the constituent assembly elections, and the 2022 constitutional replacement proposal included a drastic court reform.¹⁰⁴ After the proposal failed in the referendum, and even though the problems of the Court had become visible, the political dynamic of appointing politically reliable judges and the Court intervening in political issues did not stop. The left managed to change the Court’s political balance, as the new Boric appointments, Yáñez and Marzi, gave a clear majority to the left. The battle for the appointments entailed a long delay of the other judges, and the Court functioned for several months without total capacity. In the end, the new appointments, Peredo, Precht, Lagos, and Mery, included politically aligned judges collaborating with specific parties.

¹⁰⁰ See some proposals in <https://www.servel.cl/programas-de-candidaturas-a-presidente-de-la-republica/>

¹⁰¹ ATRIA, *supra* note 62.

¹⁰² Sergio Verdugo, *How the Pandemic Changed Democratic Regimes*, in PANDEMOCRACY IN LATIN AMERICA 23 (Pablo Riberi ed., 2024).

¹⁰³ See, e.g., *Id.*

¹⁰⁴ See Busch Venthur, *supra* note 63. (Discussing the constitutional proposals about the Court.)

Both political actors and judges have a collective action problem: parties and presidents were not going to stop the practice of trying to influence the Court, even at the expense of getting criticized for it. If the other side of the political spectrum opportunistically uses the appointment powers, it would appear naïve not to do the same. Judges were also going to behave generally in politically reliable ways. The left would now use its majority to favor the Boric administration.¹⁰⁵ Building the Court's reputation in the long term was not a priority for judges, who had long voted to prioritize short-term gains and signal their loyalty and were not going to stop despite the strong warning they received during the 2022 constitutional replacement process.

5. Implications

If politically consequential courts are perceived as acting one-sided, we can expect the political losers of the cases to react at some point. Suppose politicians perceive that they cannot advance their agendas in meaningful ways partly because a constitutional court is using the Constitution as a speedbump for their policies or because that court has replaced relevant legislative roles performed by parliaments. In that case, they will have more reasons to resist the court's constitutional interpretation, capture it, promote constitutional amendments, or, as I have argued in this essay, in some cases—such as in Chile—endorse the demand for a new constitution and advance a total constitutional replacement process.

This is important because the field has yet to fully explore the consequences of courts' decisions for future constitution-making attempts. The Chilean case offers one possible way courts can contribute to attempts to replace the constitution before the constitution-making process can formally be launched. As the case shows, courts can feed the perceived need for total constitutional replacement even against the will of the majority of the judges. The Court had a majority of judges appointed by right-wing sectors, and it can easily be assumed that they opposed the demand for total replacement. Nevertheless, by voting only to advance the agendas they aligned with in politically salient cases, they were construing the Constitution in ways that gave credibility to those claiming that the Constitution had established an uneven playing field—feeding into the demand for constitutional replacement.

Judges were unlikely to use a long-term view about the Court's authority and act strategically to ensure the Constitution they favor could gain authority and acceptance over time. Instead, they were pushed to decide high-stakes cases in ways that favored their stakeholders, which harmed the Court's reputation. Instead of exercising strategic approaches to avoid the political arena or act in ways that can contribute to all political sides, among other possibilities—and after a few years where a couple of exceptions existed—judges consistently operated mainly to satisfy the expectations of those who appointed them in specific cases for short-term political struggles. The

¹⁰⁵ See, e.g., Tribunal Constitucional [Constitutional Court], No. 12,264, 11,786, 11,787, 13,964, 13,965, 13,968, 13,969, 13,970, 13,971, 13,972, 14,539, 13,449 (Chile).

literature has identified many strategic behaviors that courts can use to preserve their power in the long run, even sacrificing some specific battles to build their power over time.¹⁰⁶ Nevertheless, the situation in Chile and the judges’ behaviors encouraged them to avoid more long-term strategic approaches to the high-stakes cases they received. Tom Ginsburg and Rosalind Dixon have argued that courts adopting a jurisprudence that is “two-sided”—i.e., benefiting competing political groups—are more likely to be empowered than one-sided courts.¹⁰⁷ The latter courts can encourage their opponents to resist them. In the case of Chile, the Court was perceived to become an institution unilaterally favoring a specific group. Even though that changed recently, as the judicial composition now favors the left, the reputation of the Court declined in ways that trapped it in its collective action problem. It is unlikely that the Court will go out of that trap any time soon.

Perhaps paradoxically, polarization can help courts gain more power. Polarization can entail political fragmentation, and no side may grow big enough to challenge the court, as has happened in the US with the Supreme Court,¹⁰⁸ and perhaps also in Spain.¹⁰⁹ Even if this may be true, when a demand for constitutional replacement grows, as in the Chilean case, or when a demand for constitutional amendment harming the court grows, as in Israel, the empowered court can become vulnerable despite its consequential powers. Becoming more assertive can help harm the Constitution’s reputation, as has happened in the US and Spain. Judges, then, should be aware that using the court’s powers in ways that appear one-sided can, in the long run, harm the institution itself.

Nevertheless, it is hard for judges to get out of the polarization trap after courts enter into the dynamic identified. The explanation is probably associated with the court being both a victim and an agent of polarization. The Court was a victim because the polarized political scenario influenced the parties’ behavior regarding the partisan approaches to appointing judges, the attempts to use the court to win over political issues, and their criticisms against the Court. Conversely, the court was also an agent of polarization because its judges acted in reliable ways to those who appointed them—only a couple of early exceptions existed—thus becoming a tool for politics and encouraging the parties to continue their practices. A collective action problem exists because politicians play the game of appointing reliable judges for their interests while complaining against the politicization of the court, and academics complain against the politicization. Still, when

¹⁰⁶ See, e.g., Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 683 (2016); Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 285 (2015); Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE LAW JOURNAL 1 (2016).

¹⁰⁷ Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 988 (2018).

¹⁰⁸ Benjamin Bricker, *Party Polarization and Its Consequences for Judicial Power and Judicial Independence*, 10 EUROPEAN JOURNAL OF LEGAL STUDIES 161 (2017). Also, see evidence from Italy and the US in Fortunato Musella & Luigi Rullo, *The Italian Constitutional Court under Stress. How to Respond to Political Inefficiency*, EUROPEAN POLITICS AND SOCIETY 1 (2023); Richard L Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 SOUTHERN CALIFORNIA LAW REVIEW 205 (2013).

¹⁰⁹ Harguindéguy, *supra* note 48.

appointed to the Court, they are loyal to those who appointed them. The problem generates a game that produces winners and losers, elevating the transaction costs across rival parties, reducing the space for compromise, encouraging partisan nominations, and advancing one-sided views. It is possible, though unlikely, that judges will still acknowledge that they are in the same boat and try to save the ship from a reputation cost, but who will start? And, more importantly, why?

This is an interesting question: how do collegial courts get out of the polarization trap? If judges are interested in understanding how they can build toward the need for constitutional replacement, they can learn about their role in polarized settings. The Chilean case suggests a pessimistic view by showing how challenging it is to end the collective action problems. Scholars have yet to find more optimistic paths to answer the question. Still, there is a growing field exploring the problem of polarization in the courts and the issue of judicial empowerment that we can use to continue understanding the phenomenon. Whatever path the field takes in the future, we should undoubtedly remember John Ferejohn's assessment of the judicialization of politics and the politicization of the judges.¹¹⁰ It is a two-way street, a process feeding itself that can sometimes become cyclical.

¹¹⁰ John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW AND CONTEMPORARY PROBLEMS 41 (2002).