

WORST PRACTICES AND THE TRANSNATIONAL LEGAL ORDER
(OR HOW TO BUILD
A CONSTITUTIONAL “DEMOCRATORSHIP” IN PLAIN SIGHT)

*Kim Lane Scheppelle**

I. THE END OF HISTORY

In the middle of 1989, Francis Fukuyama famously pronounced “the end of history.”¹ It was an exaggeration even then, but it has become a cautionary tale now. As he wrote, one state after another in Eastern Europe was throwing off its Soviet past and hurtling toward a liberal constitutional-democratic future. Following two “waves” of prior democratization in Southern Europe and Latin America,² the changes in Eastern Europe heralded a world in which liberal constitutionalized democracies became the international norm. As one newly liberated people after another became able to chart their own futures, they seemed to converge on a common model of governance: Liberal. Democratic. Constitutional.

Of course, we all knew then -- and we know better now -- that history never stops. At any given historical moment, it is all too easy to imagine that we stand at the end of a grand narrative that has led to us, to here and to now, when of course later developments will change that narrative so that our present moment is but a way-station on the way to a different ending (which in turn will be provisional). Premature conclusions like “the end of history” are routine but almost always wrong.

That said, our general frameworks for understanding the history through which we are passing seem to get stuck at particular moments. Constitutional consultants are still in the grips of the “end of history” narrative. Globe-trotting academics,³ international organizations,⁴ rule-of-law development programs⁵ and

* Laurance S. Rockefeller Professor of Sociology and International Affairs in the Woodrow Wilson School and the University Center for Human Values, Princeton University.

¹ Francis Fukuyama, *The End of History*. 16 NATIONAL INTEREST 3-18 (Summer 1989).

² Perhaps the most famous chronicle and explanation of the three waves of democratic change from the 1970s through the 1990s is JUAN LINZ AND ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE. Johns Hopkins University Press, 1996.

³ For the various players in constitutional consulting, see Jennifer Widner, *Constitution Writing in Post-conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513 (2008) and for skepticism about the practice see Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473 (2008).

⁴ For example, within the UN, no fewer than five different departments work on constitutional drafting assistance: Department of Peacekeeping Operations, the Office of

designed-for-purpose NGOs⁶ have gone into the constitutional consulting business, dispensing advice about new constitutions as if it were still the end of history. The constitutional consulting community gives lip-service to the idea that each constitution has to be designed for a specific time and space,⁷ but it otherwise acts as if we are still in that heady moment of the 1990s when the protection of human rights, rule of law, checked and balanced powers, powerful independent judiciaries, open states engaged in transnational cooperation, liberalized economies, and internal and external peace – along with many other things – were universal goals that all could be counted upon to share.⁸

the High Commissioner for Human Rights, the UN Development Programme, the United Nations Children's Fund, and UN Women, in addition to specific country missions. For their newsletter, which one suspects is at least as much for internal coordination as for public consumption, see <http://peacemaker.un.org/Constitutions/Newsletter>. Beyond the UN, there are many other transnational groups that work in constitutional advising of which International IDEA, an intergovernmental organization, is perhaps the most distinguished: <http://www.idea.int/cbp/>.

⁵ For an account of the various rule of law development programs and their track records, see RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM*. Carnegie Endowment for International Peace, 2012.

⁶ For example, Interpeace is largely devoted to constitution-building: <http://www.constitutionmakingforpeace.org/?q=about-constitution-making-peace>.

⁷ For example, the UN General Secretary's Guidance Note states:

The UN should recognize that constitution-making is a sovereign national process, and that to be successful the process must be nationally owned and led. The UN should be particularly sensitive to the need to provide advice and options without causing national actors to fear that UN or other international assistance could lead to a foreign imposed constitution. Any assistance will need to stem from national and transitional authorities' requests. The options and advice provided must be carefully tailored to the local context, recognizing there is no "one size fits all" constitutional model or process, and that national ownership should include official actors, political parties, civil society and the general public.

GENERAL SECRETARY, UNITED NATIONS, GUIDANCE NOTE ON UNITED NATIONS ASSISTANCE TO CONSTITUTION-MAKING PROCESSES 4, at https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf.

⁸ Having noted that all constitutions have to be locally owned, the General Secretary's guidance note goes on to make certain features of constitutions non-optional:

The UN should consistently promote compliance of constitutions with international human rights and other norms and standards. Thus, it should speak out when a draft constitution does not comply with these standards, especially as they relate to the administration of justice, transitional justice, electoral systems and a range of other constitutional issues. The UN should be the advocate of the standards it has helped to develop. Accordingly, the UN should engage national

We are no longer in that moment.⁹

Each year between 2006 and 2016, more countries have declined than improved on various Freedom House measures of democratic performance.¹⁰ For the first time in 2015, Freedom House lowered the status of a country, Hungary, from a “consolidated” democracy to a “partially consolidated” one,¹¹ despite the fact that the very definition of a consolidated democracy was that it was the “only game in town”¹² and had no ideologically attractive competitors. While the validity of Freedom House’s indicators has been contested, even critics of the Freedom House view of the world can see that democracy is in crisis.¹³ At a minimum, there has been a growth in the number of countries that are hard to classify one way or another as democracies or autocracies.¹⁴

Among the casualties in the shrinking democratic ecosystem are a number of once relatively clear liberal, constitutional democratic states that have now fallen victim to ideological decay.¹⁵ A new survey documents that, even in Western Europe and the United States, growing numbers of citizens are so disillusioned

actors in a dialogue over substantive issues, and explain the country’s obligations under international law and the ways in which they could be met in the constitution. The UN should address the rights that have been established under international law for groups that may be subjected to marginalization and discrimination in the country, including women, children, minorities, indigenous peoples, refugees, and stateless and displaced persons. For example, the principle of equality between men and women should be embedded in constitutions, and states should be encouraged to consider special provisions on children recognizing their status as subjects of human rights.

Id.

⁹ I should note that I am writing in July 2016, a moment when history is moving quickly. As my colleague David A. Bell explains, history sometimes seems to speed up because events interact. One major event becomes the reason for others – and so one often gets cascades of good news or cascades of bad news all at once. He quotes a probably apocryphal remark by Lenin: “there are decades where nothing happens, and weeks where decades happen.” Summer 2016 has seen weeks when decades happen. David A. Bell, *2016: The Theory Behind a Very Bad Year (and It’s Only Half Over)*. FOREIGN POLICY, 20 July 2016, at <https://foreignpolicy.com/2016/07/20/why-decades-do-happen-in-weeks-brexite-coup-turkey-trump-isis/>.

¹⁰ FREEDOM HOUSE, FREEDOM IN THE WORLD 2016, at https://freedomhouse.org/sites/default/files/FH_FITW_Report_2016.pdf.

¹¹ Freedom House, Nations in Transit 2015, 8, at https://freedomhouse.org/sites/default/files/FH_NIT2015_06.06.15_FINAL.pdf

¹² Juan Linz and Alfred Stepan. *Toward Consolidated Democracies*. 7(2) JOURNAL OF DEMOCRACY 14-33 (1996).

¹³ Philippe Schmitter, *Crisis and Transition but Not Decline*. 26(1) JOURNAL OF DEMOCRACY 32 (January 2015).

¹⁴ Larry Diamond, *Facing up to Democratic Recession*. 26(1) JOURNAL OF DEMOCRACY 141, 142 (January 2015).

¹⁵ Id.

with democracy that many are open to other alternatives - raising the possibility that deconsolidation of even established liberal, constitutional democracies may be occurring.¹⁶ Liberal, democratic constitutionalism is – to borrow the language of marketing – a damaged brand.

All this has occurred at the same time that it appears that the constitutional consulting community at the international level has achieved the trademark characteristics of a transnational legal order (TLO): “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”¹⁷ Other articles in this volume/issue show how transnational actors have developed a network of institutions and norms that now preside over the birth of almost every new constitution world-wide.¹⁸ But at the same time that there is a transnational consolidation of liberal, democratic and constitutional norms around constitution-writing, more and more national governments are moving away from a sincere defense of these norms. The trend has continued already for ten years and shows little signs of reversing.

The transnational legal order may be present at the creation of constitutions, but its norms no longer seem to hold up very well when challenged. In particular, we can count among the ranks of countries that were once liberal, constitutional democracies an increasing number of states that can be better described as “democratorships.” Democratorships are, as the term implies, suspended between democracy and dictatorship with features of both. In

¹⁶ Roberto Stefan Foa and Yascha Mounk, *The Democratic Disconnect*, 27(3) JOURNAL OF DEMOCRACY 5 (2016).

¹⁷ Terrence Halliday and Gregory Shaffer, *Transnational Legal Orders* in TRANSNATIONAL LEGAL ORDERS 5 (TERRENCE HALLIDAY AND GREGORY SHAFFER eds.) (emphasis in original).

¹⁸ For a normative justification of the practice, see Hans Agné, *Democratic Founding: We the People and the Others*, 10 INT. J. CONSTITUTIONAL LAW 836-861 (2012). For evidence that this has become a major consulting activity, see the United Nations Development Program recent call for experts, at https://jobs.undp.org/cj_view_job.cfm?cur_job_id=41268:

The United Nations support constitution-making making processes throughout the world. Several UN entities, including UNDP, UN Department of Political Affairs, UN Women, UN Department of Peacekeeping Operations, and OHCHR are collaborating to respond to the growing demand of UN agencies, member states and other partners who are frequently called upon to field constitutional experts to support UN Missions, UN Country Teams and Governments. Such constitutional advice and support is required in various settings. . . . UNDP and DPA are now soliciting highly-qualified experts and experienced consultants (individuals, not firms) to be considered for inclusion in a new UN Constitution Experts' Database, which will be used to rapidly identify and deploy constitutional expertise in support of constitutional processes.

democratorships, ambitious leaders are swept to power with (often large) plebiscitary mandates but they seek to govern thereafter outside a framework of separated and checked powers that is the hallmark of a liberal state. As we will see, many of these new democratorships have invested a great deal in constitutional legitimation even as they deny the most important elements of constitutionalism: limitation of public power by law, the exercise of public power in a transparent and accountable manner, the importance of checks and balances in the design of the state, the unconditional and nondiscriminatory protection of rights. This careful attention to constitutional form while hollowing out liberal constitutional content is what marks democratorships as a special category among competitive authoritarian regimes.¹⁹

How can it be the case that a transnational legal order around constitution-writing has come into being while the number of states that are in fact guided by this international normative consensus shrinks? In this article, I will suggest that the way that constitutional norms are being skirted in backsliding states indirectly reinforces the transnational legal order. Constitutionally backsliding states often go to great lengths to appear *as if* they still value liberal, constitutional and democratic norms even while they undermine them in practice. In the world of the democrators (dictators with democratic features), hypocrisy now guides the creation of new forms of government, as leaders bent on consolidating power do so wielding the shield of constitutionalism and acting in the name of democracy while they concentrate inordinate and unchecked powers in very few hands. The transnational legal order around constitutionalism is held together by empty tributes and evasive legal tricks as much as it is held together by sincere belief and compliant practice. As Francois de La Rochefoucauld famously observed, “Hypocrisy is the tribute that vice pays to virtue.”

That said, when it comes to converting a liberal constitutional democracy into a democratorship, successful hypocrisy is not easy to accomplish. Learning how to hide under constitutional cover while gutting constitutionalism’s spirit requires some fancy footwork. The aspiring demagogue needs to assemble a constitutional toolkit that gives him the right tools for the job. Advisors to such democrators know that their job is to recommend not the constitutional best practices advocated by TLO experts, but *constitutional worst practices*. Constitutional worst practices pass constitutional muster somewhere and therefore are hard to criticize without being accused of double standards, but they assist in

¹⁹ Competitive authoritarian governments hold nominally competitive elections on a decidedly non-level playing field; they uphold civil liberties most of the time, but not always. They are structured primarily to keep the governing forces in power. STEVEN LEVITSKY AND LUCIAN WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* (Cambridge University Press, 2010). As I will elaborate below, a democratorship is also a hybrid regime in which there are nominally competitive elections which the opposition parties are highly unlikely to win. But democratorships make a big show of constitutionalism along with a public display of legality, making them a particular subset of competitive authoritarian regimes.

undermining the functioning of sincere constitutionalism in the place to which they have been moved.

Take one example: Germany – usually a model of constitutionalist propriety – has an election system featuring highly unequal district sizes for the single-member districts that elect representatives to the Bundestag. The German election law formally permits district size deviation of up to 25% and doesn't require redistricting until the variation reaches 33%,²⁰ despite the fact that the European Commission for Democracy through Law (the Venice Commission) recommends that district sizes vary by no more than 10%²¹ and the German Federal Constitutional Court has on multiple occasions found the election law to be in violation of the constitutional requirement of equal suffrage.²² As it turns out, the disproportionate effects of skewed district sizes are minimized because half of the representatives in the Bundestag are elected on party lists, and the method of calculating the allocation of seats from party lists restores proportional representation.²³ But the huge deviation from international norms on district size and the standing violation of Constitutional Court decisions on point is a huge embarrassment to constitutional lawyers.

If Germany tolerates a particular legal practice, however, how can it be wrong for another country to copy their system? The Hungarian government of Viktor Orbán amended the constitution almost immediately after taking office in 2010, cutting the number parliamentary seats in half. This required redistricting the whole country and, in the end, the new district sizes varied by up to 25%,²⁴

²⁰ *Germany: Delimiting Districts in a Mixed Member Proportional Electoral System* (2012), ACE: THE ELECTORAL KNOWLEDGE NETWORK, at http://aceproject.org/ace-en/topics/bd/bdy/bdy_de .

²¹

The permissible departure from the norm should not be more than 10%, and should certainly not exceed 15% except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity).

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), CODE OF GOOD PRACTICE IN ELECTORAL MATTERS: GUIDELINES AND EXPLANATORY REPORT 7, Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), Opinion No. 190/2002, CDL - AD (2002) 23 rev., at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2002\)023rev-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2002)023rev-e.aspx)

²² For a summary and excerpts from the decisions of the Federal Constitutional Court on the constitutional requirement of equality of district sizes, see DONALD KOMMERS AND RUSSELL MILLER, *THE JURISPRUDENCE OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY* 249-254, 3d Ed., 2012.

²³ *Germany: Delimiting Districts in a Mixed Member Proportional Electoral System* (2012), ACE: THE ELECTORAL KNOWLEDGE NETWORK, at http://aceproject.org/ace-en/topics/bd/bdy/bdy_de .

²⁴ Kim Lane Scheppelle, *An Election in Question Part II: Writing the Rules to Win: The Basic Structure*, on PAUL KRUGMAN'S, CONSCIENCE OF A LIBERAL BLOG, 28

the exact variation tolerated in the German system. The political opposition and a number of international organizations were convinced that there had been gerrymandering.²⁵ But what could be wrong with the Hungarian system if the Germans had done the same thing?²⁶

Putting together a complex constitutional system that passes muster as an agglomeration of worst practices requires expertise. Even though there is a constitutional consulting consensus that now underwrites the constitutionalism TLO, experts working for these new democratorships are recommending and road-testing constitutional worst practices. These practices permit constitutional values to be undermined even as constitutional forms are preserved. If creating responsive, transparent, human-rights respecting, constitutionalist governments has become the goal of the “do-gooding” international community operating within the TLO, then use of constitutional tactics for anti-constitutional purposes will be valorized by their “do-badding” opponents.

I should say at the outset that by using the language of “democracy” and “democratorships,” “best practices” and “worst practices,” “do-gooders” and “do-badders,” I don’t mean immediately to engage only the normative argument – at least not before I get a descriptive account of what is going on out on the table. Instead, I want to point out that the current constitutional consulting consensus that has been incorporated into the TLO has naturalized a particular normative model (liberal, constitutional, democratic) that can be easily turned on its head by democrators who give lip service to constitutionalism and democracy but have no truck with liberalism. These new democrators talk the talk of constitutionalism while not walking the walk, which means that they run afoul of the dominant normative consensus in practice while often appearing to honor it in theory. They can do this because the practical realization of constitutionalism occurs in an uneven landscape in which even “good” countries, constitutionally speaking, continue to support “bad” practices, as our example of the German

February 2014, at <http://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-2/>.

²⁵ “The delimitation process was criticized by several OSCE/ODIHR LEOM interlocutors and international organizations for lacking transparency, independence and consultation, and allegations of gerrymandering were widespread.” ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE/OFFICE OF DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, HUNGARY PARLIAMENTARY ELECTIONS 6 APRIL 2014 FINAL REPORT, at <http://www.osce.org/odihr/elections/hungary/121098?download=true> .

²⁶ Hungary’s election system was constructed à la carte from the election systems of a number of different European states. While Hungary has an election system most formally similar to Germany’s and it used German standards for redistricting, it used the Italian system for “winner compensation” on the party list side of the calculation, which made the Hungarian system one of the most disproportionate in Europe. For the “winner compensation” rules, see Kim Lane Scheppelle, *An Election in Question Part III: Compensating the Winners*, on PAUL KRUGMAN’S, CONSCIENCE OF A LIBERAL BLOG, 28 February 2014, at <http://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-3/> .

election law shows. If the transnational legal order has codified a normative consensus, then these new do-badding challengers want to appear to sign onto it, while simultaneously undermining what makes the consensus valuable. They can do so by searching the constitutional landscape for worst practices that exist in imperfect liberal, constitutional democracies and using those practices as models for their own new constitutional orders. The landscape on which this contest plays out is normative through and through because the TLO has normative goals that the democrators seek to evade through adopting the worst practices of compliant states.

Perhaps ironically, the countries I will discuss in this article – Hungary, Poland, Russia, Venezuela, Ecuador, Turkey – passed through liberal, democratic constitutionalism as they emerged from the dictatorships that once undermined such values. In developing their first “post-horror” constitutions,²⁷ many of these countries’ transitional leaders embraced the end-of-history model along with international assistance that helped them to create their first liberal-democratic constitutions in the first place. Many of these countries were the star pupils for the end-of-history narrative when they rode the early waves of international constitution-building assistance. The democratorships that we will be examining are not engaged in the *first* constitution-making efforts after the fall of the prior dictatorships, but rather are promoting second or later constitutional revisions after constitutional democratic liberalism had already been introduced. This is why these countries often go under the label of “backsliders” because they once had – or at least appeared to have – liberal, democratic constitutions. Just as the transitional democrats embraced the normative model that rejected the history of dictatorship, so too the democrators reject liberalism because they believe it has failed.²⁸ Because of the international consensus, however, democrators want to appear to be in the normative mainstream while they go off in their own directions. How do these new democrators do what they do? They learn from constitutional imperfections and worst practices elsewhere.

The international network that has grown and sustained the consensus around liberal, democratic constitutionalism as well as the efforts by the new democrators to undermine these principles are the focus of this article. To see

²⁷ “Post-horror” constitutions are the ones that follow dictatorships that were pervasive violators of human rights. Kim Lane Scheppelle, *Constitutional Interpretation after Regimes of Horror* in LEGAL INSTITUTIONS AND COLLECTIVE MEMORIES 233-258 (Susanne Karstedt, ed., 2009).

²⁸ I have long argued that we should think about constitutional creation not as the building of bright futures, but instead as the rejection of immediate pasts. Kim Lane Scheppelle, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1(2) I-CON (INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW) 296-324 (2003) and Kim Lane Scheppelle, *A Constitution between Past and Future*, 49 WILLIAM & MARY LAW REVIEW 1377-1407 (2008). The current widespread rejection of liberalism by the new democrators is another example of this general tendency.

the terrain on which the democrats are playing, we first need to learn how the “end of history” – where there was global normative consensus on the desirability of the liberal, democratic, constitutionalist model – ended.

II. THE END OF THE END OF HISTORY

If we look at the state of governance around the world in recent decades, there is some good news to go along with the bad news about the declining number of democracies in good standing. The *ways* that democracies are being undermined are changing for the better.

During the Cold War, before the present international consensus had sedimented into a TLO, the international struggle over governance models was polarized. At that time, there were ideological models advocated as normatively justifiable on both sides of the conflict. Communism and people’s democracies were held out as both a development strategy and a route to social justice. Capitalism and “real” democracies were offered as a route to prosperity and freedom. Both the USSR and the US believed that winning hearts and minds was a legitimate tool of both war and diplomacy, so the battle was in fact often waged in normative terms.²⁹ The Cold War was a conflict over which of these two normative models would win.

The “end of history” marked the victory of one normative model over another: Liberal. Democratic. Constitutional. The very existence of a TLO says as much. If the UN, regional bodies, NGOs, many national governments, and networks of experts are all advocating the same model of governance now, then deep normative contestation no longer exists at the level of the “international community.” Of course, there are variations in the standard model (parliamentarism v. presidentialism, federalism v. unitary state, diffuse v. concentrated judicial review) but there are many more pervasive non-negotiable common features (the rule of law, a long list of rights, constitutionalism as such).

In fact, one could not have a TLO if there really were multiple claims to normative primacy that were equal on the world stage. A TLO exists, as the definition says, because there are “*formalized legal norms . . . that authoritatively order the understanding and practice of law across national jurisdictions.*”³⁰ The “end of history” was the moment when the single winning normative model emerged from the Cold War competition.

If there is now a dominant liberal, democratic constitutional consensus that characterizes the do-gooders in the world, how do those who want to topple or radically change this consensus proceed? How do “do-badders” counter the “do-gooders” in normative terms? The do-badders do not all agree on an alternative

²⁹ Kenneth A. Osgood, *Hearts and Minds: The Unconventional Cold War*. 4 J. COLD WAR STUDIES 85-107 (2002); YANGWEN ZHENG; HONG LIU; MICHAEL SZONYI, *THE COLD WAR IN ASIA: THE BATTLE FOR HEARTS AND MINDS*. Brill, 2010.

³⁰ Halliday and Shaffer, *supra* note __ .

model. As a result, they cannot unite to put forward a new normative vision of governance. Instead, they are united in adopting a similar tactic for hiding behind elections and constitutions: first, they come to power in democratic elections and then they pull up the constitutional ladder after themselves so that no one else can win the next election, or the one after that.

We can see these kinder, gentler tactics in the way that liberal, constitutional, democratic governments are now toppled. The most frequent way to oust an existing government used to be by coup.³¹ But the good news for those who believe the normative model of the TLO is that coups aren't what they used to be. The number of successful coups peaked in the early 1960s at the height of the Cold War and has been declining ever since, until there was a small uptick again after 2000.³² Perhaps more crucial, however, is the sharp decline in what Nancy Bermeo has called the "open-ended coup." Open-ended coups used to bring down governments in one fell swoop with devastating consequences for democratic governance and for the rights of those living in the country.³³ But open-ended coups have become rare.

Over the last several decades since the end of the Cold War, we have seen a rise in what Bermeo calls "promissory coups" or gradual "executive aggrandizement" instead. According to Bermeo, promissory coups are disruptions in the democratic order carried out in the name of improving the democracy itself. The new leader (or old leader with new powers) claims to be ridding the democracy of its enemies, not undermining democracy as such. He may even promise to create a better democratic state in the future, hence the term "promissory coup." Alternatively, one now sees in democratically backsliding states a gradual accumulation of executive power under an existing constitution, rather than a complete break with a prior constitutional order. In these less devastating breakdowns of prior governments, the new leaders are typically affirmed through elections (though sometimes with a little help from strategic manipulation). Democracy may be battered, but it still lives. And the coup leaders pledge fealty to their electorates and to governing by constitution.

Ozan Varol points to a similar set of changes when he describes the new face of military coups: the "democratic coup d'état:"

[A]lthough all coups have anti-democratic features insofar as they place the military in power by force or the threat of force, some military coups are

³¹ For seven Cold-War-era coups carried out by the US CIA, see Diana Stuster, *Mapped: The 7 Governments the U.S. Has Overthrown*, FOREIGN POLICY, 20 August 2013, at <http://foreignpolicy.com/2013/08/20/mapped-the-7-governments-the-u-s-has-overthrown/>. For Soviet instigation of coups around the world, see Steven R. David, *Soviet Involvement in Third World Coups*, 11(1) INTERNATIONAL SECURITY 3-36 (Summer 1986).

³² Nancy Bermeo, *On Democratic Backsliding*. 27(1) JOURNAL OF DEMOCRACY 5, 7 (2016).

³³ *Id.*

distinctly more democracy-promoting than others. In these coups, the military responds to popular opposition against an authoritarian or totalitarian regime, overthrows that regime, and facilitates fair and free elections within a short span of time.³⁴

Bermeo and Varol thus show with their many examples that the new democratic backsliders are not like the old-fashioned government-topplers. The new set of leaders often gives lip-service to the democratic values that their activity seem to be undermining.

As we will see below, an important subset of the leaders of these new kinder, gentler coups works under constitutional cover. These democrators do not usually overthrow constitutions in a sharply illegal way, but they accompany their takeover with constitutional amendments, invocations of constitutional emergency clauses, or sometimes even wholly new constitutions. They portray themselves as leaders dedicated to constitutional order. They, too, seek legitimacy through the (sometimes stuffed) ballot box. As with Bermeo's and Varol's modern-day coup-leaders, these constitutional autocrats purport to share the values of constitutional democracy even as they shake those values to the core.

Compared with a half-century ago at the height of the Cold War, then, the political events that cause democratic decline now are less radical and aim at a less sharp break with the dominant normative order of liberal, democratic constitutionalism. Backsliding is a less drastic and harmful form of democratic decay than a radical overthrow.

What accounts for the change? If there weren't such a consensus about what counts as a legitimate government these days, we would not see so many leaders of questionable motives attempting to justify themselves in the name of constitutional democracy. If there weren't such a consensus about the need for a democratic pedigree of a national leader, we would not see elections occurring nearly everywhere in the world. In short, the transnational legal order (TLO) itself may be responsible for the kinder, gentler face of coups these days.

How do we know that the TLO is having these effects? Governments that are overthrown without constitutional niceties are sanctioned.³⁵ But governments that operate within constitutional parameters – even when those constitutions are radically altered – do not attract such harsh global reactions and even pass as

³⁴ Ozan Varol, *The Democratic Coup d'État*, 52 HARVARD INTERNATIONAL LAW JOURNAL 292 (2012).

³⁵ The government of Pervez Musharraf, who seized power in a military coup in Pakistan in 1999, was widely sanctioned despite the fact that his government had a great deal of popular support and he promised to restore democracy as soon as possible. Suzanne Goldberg, *Musharraf Seeks to Soften Coup Image*, THE GUARDIAN, 16 October 1999, at <https://www.theguardian.com/world/1999/oct/16/pakistan.suzannegoldenberg> . For a summary of world reaction, see the Federation of Atomic Scientists, Pakistan: *A Coup in Dangerous Territory*, at <http://fas.org/news/pakistan/1999/www9o14.htm> .

democracies in good standing.³⁶ International practice clearly demonstrates a preference for the kinder, gentler coup, especially if there is no radical break with the prior regime. No wonder that “constitutional coups” are now the preferred method of consolidating and wielding power! In the next section, we will test this by looking at a set of democrators and their constitutional reforms to see whether leaders who stay within constitutional tracks are sanctioned less than those who do not.

Against this overwhelming normative pressure coming from the constitutionalism TLO, then, what’s a 21st century aspiring dictator to do? It is clear that someone who would like to seize power without sanction should make an effort to keep up appearances by continuing to hold elections and by maintaining or writing new constitutions. Such budding dictators should even (sometimes) promote liberalism, even if only in soundbites. But if a budding dictator hollows out these constitutional forms so that they do not work as advertised, this is much harder to check. When constitutional forms are followed, change on the ground does not ring alarm bells – at least not loudly or quickly.

Winning elections and hiding illiberal change behind liberal-sounding constitutions is not a strategy used by all do-badders. For example, the most obvious governments that shun liberal, constitutional democracy are portrayed as nationally specific deviations from global norms with their own distinctive (and therefore non-transmittable) local cultures. China, for example, has never gone in for constitutionalism, nor have the Islamic world’s most important challengers to Western hegemony: Saudi Arabia, the Gulf States and Iran.³⁷ Liberal, democratic constitutionalism is simply not on their maps; they offer no international normative alternative but instead rely on their distinctive national or religious traditions for normative support. They are not challengers to transnational legal order; they have simply opted out of it by claiming a form of exceptionalism.

From our standpoint, the more interesting do-badders are the new crop of democrators who take the constitutionalist TLO seriously enough to try to hide behind it. These democrators come to power in countries that had in place liberal, democratic constitutional governance, however flawed. These leaders try to maintain that democratic and constitutional façade while they undermine its values. They are often acting in ideological terms, but these are not ideologies that explicitly attack the normative value of democratic and constitutional government. Democrators have a variety of home-cooked reasons for opposing

³⁶ See the cases in the next section.

³⁷ JOHN W. GARVER, *CHINA AND IRAN: ANCIENT PARTNERS IN A POST-IMPERIAL WORLD* (University of Washington Press, 2006) make the argument that China and Iran have over time developed a joint rhetoric of difference from the west and a common rhetoric of ancient civilizations that have had close ties for millennia. For Saudi Arabia and the Gulf States, see NATHAN BROWN, *CONSTITUTIONS IN A NON-CONSTITUTIONAL WORLD* (SUNY Press, 2001).

the parts of the transnational legal order even as they don't challenge the democratic and constitutionalist hegemony of the constitutionalist TLO.

For example, some democrators are opposed to the unipolar world that emerged after 1989 in which the United States and its allies dominate the framework for global governance. These democrators believe that the lack of competition for leadership in the global community has worked to the disadvantage of countries that do not always play along. For example, while Russia started out as one of the end-of-history cheerleaders, the painful collapse of the Russian economy under neoliberal reform and the visible corruption of the new governing elite soured the public on liberal constitutionalism.³⁸ Moreover, the fall from being a superpower to being an ordinary middle-sized economy and the accompanying decline in influence in international affairs was more than the new Russian leadership and its battered public could tolerate.³⁹ Under the leadership of Vladimir Putin, Russia turned its back on liberalism and set its sights on building up state strength that could protect it from second-class status. But however challenging Putin's actions have been to the hegemony of the "West"⁴⁰ in international terms, Putin never abandoned the public commitment to democracy and constitutionalism at home. Within Russia, Putin consolidated power within a constitutional footprint and continued to have regular (if flawed) elections. He governs – as he always reminds us – as a democratically elected leader who promised and delivered on "the dictatorship of the law."⁴¹

Other countries departed from the end-of-history narrative by opposing neoliberal economic policy in the name of restoring a vibrant new vision for the left. Leaders like Hugo Chávez (followed by Nicolás Maduro) in Venezuela and Rafael Correa in Ecuador developed policies that were intended to free their countries from the grip of neoliberal international financial institutions to send

³⁸ STEPHEN KOTKIN, *ARMAGEDDON AVERTED: THE SOVIET COLLAPSE 1970-2000* (Oxford U Press, 2001).

³⁹ For one insider's account, see YEGOR GAIDAR, *COLLAPSE OF AN EMPIRE: LESSONS FOR MODERN RUSSIA* (Brookings Institute Press, 2007).

⁴⁰ The "West" is no longer a description of a place, but instead a description of an ideology. This ideology is characterized by a self-conscious dedication to a particular political trajectory that began with the late 18th century revolutions and that has since followed a path toward expanding the democratic franchise, increasing the respect for rights, developing governance systems that constrain the power of executives and engaging in liberal internationalism. In short, it is the "end of history" that is now institutionalized in the TLO. This path is obviously not hard-wired into a country's history, nor is it necessarily followed in a linear fashion. And the creation of a liberal, democratic constitutional order is not – as we will see – an irreversible achievement.

⁴¹ This was the slogan used in Putin's first election campaign in 2000. Vladimir Gel'man, *Dictatorship of the Law: Neither Dictatorship Nor Rule of Law*, PONARS Policy Memo 146 European University at St. Petersburg, at https://www.gwu.edu/~ieresgwu/assets/docs/ponars/pm_0146.pdf.

their states on the path of socialism.⁴² But both Chávez and Correa wrote new constitutions rather than proceed without one or operating openly as dictators. And both proceeded to legitimate themselves (and in Chávez's case, his successor) through winning elections. They may have challenged neoliberalism but they did not challenge the need for electoral mandates or constitutional legitimacy.

Still other countries that blew past the end of history narrative did so for religious reasons. Mohamed Morsi's brief Muslim Brotherhood government in Egypt and Recep Tayyip Erdoğan's longer-lived AKP government in Turkey claimed popular support on the basis of restoring Islam to public life.⁴³ Both Morsi – who presided over drafting a new constitution – and Erdoğan – who may yet do so – made much of governing under a constitution. Here, too, election victories sealed their legitimacy and their constitutional reforms sealed their accumulated power, until they proved their undoing (or not).⁴⁴

Another siren-call to depart from the end-of-history narrative has come from nationalists. Viktor Orbán in Hungary and Jaroslav Kaczyński in Poland rode waves of popular discontent to overwhelming election victories by campaigning against the globalizing elites that had preceded them by promising pride in national sovereignty free of meddling external influences. To seal the deal, Orbán brought in a new constitution while Kaczyński has so far not had the parliamentary supermajority to do so – but he clearly aspires to constitutional change nonetheless. Both claim their personal legitimacy derives from their ability to win elections and their normative legitimacy derives from their willingness to adhere to nationalist constitutional principles.

As this list indicates, the motivations for challenging the some aspects of hegemony of the “West” on the part of the democrats are many. But each of these countries that challenges particular facets of the hegemonic control of the end-of-history narrative also sees itself as crucially tied to democratic constitutionalism at the same time. While all these leaders have struck out on their own in some ways, they also wanted to legitimate their rule through democratic and constitutional (if not perhaps liberal) form. It is this apparent public support of the constitutionalist transnational legal order on the part of its biggest challengers that shows that liberal, democratic, constitutional government is the only legitimate game in town.

⁴² Stephen Ellner, *The Distinguishing Features of Latin America's New Left in Power: The Governments of Hugo Chavez, Evo Morales, and Rafael Correa*, LATIN AMERICAN PERSPECTIVES 17 January 2012, available through [Venezuelanalysis.Com](http://Venezuelanalysis.com), at <https://venezuelanalysis.com/analysis/6754>.

⁴³ Tariq Ramadan, *Democratic Turkey Is the Template for Egypt's Muslim Brotherhood*, 28(2) NEW PERSPECTIVES QUARTERLY 42-45 (Spring 2011).

⁴⁴ Yaroslav Trofimov, *Turkey's Erdogan Avoids the Fate of Egypt's Morsi*, WALL STREET JOURNAL, 17 July 2016, at <http://www.wsj.com/articles/turkeys-erdogan-avoids-fate-of-egypts-morsi-1468672547>.

III. CONSTITUTIONAL COUPS AND CONSTITUTIONAL COVER

How can we understand these new democrats who challenge aspects of the global order⁴⁵ while maintaining a public commitment to democracy and constitutional government? I have called these new constitution-respecting, democracy-maintaining revolutions against prior liberal governments “constitutional coups”:

A constitutional coup is constitutional because there is no break in legality, never a moment when a government does something formally illegal to attain its desired goals. It is nonetheless a coup because the end result turns the prior constitutional order on its head without a legitimating process to confirm the changes. Through a series of perfectly legal moves the constitutionally devious leaders of a state can achieve a substantively anti-constitutional result, including, in the extreme case, transforming a state in plain sight from a constitutional democracy to an autocracy, all the while appearing to honor the constitution.⁴⁶

Constitutional coups gut the prior democratic, liberal, constitutionalist ideology of state by keeping constitutional and democratic forms while removing the liberal content.⁴⁷

By now, constitutional coups follow a well-traveled trajectory. Democrats often take office under unfriendly (to them) constitutions. The constitution is unfriendly because it has deep liberal elements that establish checked and separated powers, guarantee an independent judiciary, and create transparency and accountability agencies to curb the abusive exercise of power. A democrat who intends to govern with broad executive power for as long as possible may feel the need to remove or weaken these constitutional impediments.

The script for doing so is now familiar. First, an aspiring power-hungry leader wins a domestic election, sometimes as freely and fairly as the country’s preexisting election laws permit, but sometimes with a little help from electoral manipulation. Sometimes this leader takes advantage of a national or international crisis to do so. Armed with an electoral mandate and speaking in its name, the democrat then undertakes constitutional or other major institutional changes to

⁴⁵ The “global order” is broader than any particular transnational legal order and includes a set of organizing practices that go beyond law.

⁴⁶ Kim Lane Scheppelle, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)*. 23 JOURNAL OF TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 51-117 (2014).

⁴⁷ Javier Corrales has something similar in mind when he describes “autocratic legalism.” Javier Corrales, *Autocratic Legalism in Venezuela*. 26(2) JOURNAL OF DEMOCRACY 37-51 (2015).

consolidate power quickly before the bloom is off the electoral rose, to so speak. These constitutional moves are sometimes accomplished through drafting wholly new constitutions, sometimes constitutional amendments suffice. Sometimes the democrat amends ordinary laws to change structural features of key institutions. Sometimes capturing the appointments process for particular offices is enough to achieve the desired aims. Whichever path is taken, the targets to be neutralized are clear: the independent judiciary, particularly constitutional courts (where they exist); the pluralistic media; independent agencies, particularly the transparency and accountability institutions; and civil society, particularly the organizations controlled by the political opposition. All of this has to be done under cover of law and in the name of a democratic mandate. This is no easy trick.

In what follows, I will sample from the tactics used to consolidate power within constitutional boundaries used by some of the most visible and successful constitutional democrats, including Vladimir Putin of Russia, Hugo Chávez in Venezuela, Rafael Correa in Ecuador, Recep Tayyip Erdoğan in Turkey, Viktor Orbán in Hungary, and Jaroslav Kaczyński in Poland. By examining these cases, we can see not only how each of these leaders consolidated their power in constitutional terms, but also how the “international community” (that is, the TLO) reacted to these developments.

All of the changes that I will discuss happened in plain sight, especially for people who pay attention to comparative constitutional law and who therefore know how to analyze legal changes beyond press releases and political speeches. The fact that some of these tactics spread from place to place could easily have been a function of the constitutional advisers in one country picking up from public sources what they have seen in other places, or it could have been constitutional advisers moving from place to place. But the spread of constitutional worst practices suggests that there is a toolkit in use that provides handy fixes for overly liberal systems while maintaining the façade of democratic constitutionalism, especially if other democrats get away with the particular fix first without being criticized by the community that constitutes the TLO.

Presidents Chávez in Venezuela and Correa in Ecuador used their first term in office to rewrite their national constitutions. Later, Prime Minister Viktor Orbán of Hungary did the same. While Vladimir Putin contemplated rewriting the Russian constitution in his first term of office to move the country from a presidential to parliamentary system, ultimately he decided against it,⁴⁸ but he

⁴⁸ I know this because I worked as a researcher at the Russian Constitutional Court in 2003, where some staffers had seen a draft constitution produced by the Presidential Administration at Putin’s request. The reason for the constitutional rewrite was the eventual problem of term limits that would bite in 2008. In a parliamentary system, prime ministers do not typically have term limits because it is assumed that they are accountable to parliaments that will hold them in check. But, in the political context of Russia at the time, there was really only one well-organized party and that party would

consolidated powers in other ways. Recep Tayyip Erdoğan in Turkey has pushed to rewrite the constitution to move from parliamentarism to presidentialism but, so far, has been blocked at the final stages.⁴⁹ He has nonetheless amassed a great deal of power already through constitutional amendments. Jaroslav Kaczyński in Poland aspires to change the constitution, but has moved forward with unconstitutional legislation in the absence of a constitutional majority in parliament. To get away with it, he has attempted to disable the Constitutional Council so that it cannot nullify the unconstitutional laws. In this section, we will look at the constitutional changes that each of these leaders has attempted.

Hugo Chávez was elected president of Venezuela in 1998 with the rallying cry that the country was in crisis and needed a new constitution. He won the election by a narrow margin but won a referendum to start a new constitution-making process with an overwhelming vote: 81% approved, though on a low

invariably support Putin. In the end, Putin opted to swap places with his prime minister for one term, during which time the constitution was amended to increase the length of the presidency from four to six years.

My sources who said that a draft of a new constitution was in circulation within the presidential administration were confirmed by others who heard the same whispers in Russian elite political circles:

One ostensibly fundamental change now being quietly discussed in Moscow is a shift to a parliamentary system. Interestingly, parliamentarism is favored by some of the more hardline Putin associates, including officials in the security services and the presidential apparatus. One of its appeals is that it would eliminate fixed terms for the country's leader, in theory allowing President Putin to be succeeded by Prime Minister Putin for years to come. The pro-parliamentary faction is convinced that once the Kremlin's dominance over independent centers of power is solidified, it could safely maintain an unassailable grip on the legislature. Were this faction to convince Putin of the rightness of this course, we would soon see yet another constitutional experiment unfold in Russia—one that again would challenge and thereby help to refine comparative understandings of institutional politics and political change.

Timothy Colton and Cindy Skach, *The Russian Predicament*, 16(3) JOURNAL OF DEMOCRACY 113-126, 122 (July 2005).

⁴⁹ Patrick Scharfe, *Erdoğan's Presidential Dreams, Turkey's Constitutional Politics*, 8(5) ORIGINS (February 2015), at <http://origins.osu.edu/article/erdo-s-presidential-dreams-turkey-s-constitutional-politics>. As I write, the immediate aftermath of the attempted coup against Erdoğan has resulted in tens of thousands of arrests, firings and a general purge against everyone opposed to Erdoğan. He has already indicated that he intends to use the crisis to write a new constitution. Said Abdul Razzack, *Turkey to Draft New Constitution Following Failed Coup*, ASHARQ AL-AAWSAT, 27 July 2016, at <http://english.aawsat.com/2016/07/article55355200/turkey-draft-new-constitution-following-failed-coup>.

turnout.⁵⁰ He designed the rules for election of representatives to a constituent assembly in a way that gave his party 95% of the seats in the assembly with 60% of the popular vote.⁵¹ The new constitution that resulted from a convention full of “Chavistas” (as Chávez supporters were called) gave Chávez everything he wanted. It established a strong presidency and eliminated the Senate which had been an important constraint on executive power before that time. It gave the president the power to call referenda to recall specific legislators, which gave the president a Sword of Damocles to hang over the head of any legislator who resisted his programs. It banned funding for political parties, weakening the opposition. And it gave the president the power to propose constitutional amendments, giving him effective control over any future constitutional change.⁵² The sum total of the changes greatly strengthened the power of the president.

Were any of these changes outside of the constitutional consensus typical of the TLO? Not really. Many democracies in good standing have no upper house of parliament,⁵³ so eliminating the Venezuelan Senate – while a radical move in the local context – could not be deemed to have removed an essential element of constitutional design.⁵⁴ Ditto on the recall of specific legislators. While it may be a bit unusual to give the power to call a recall referendum to the president, citizen recall of legislators through referenda is explicitly contemplated in the advice given by the gold standard of constitutional advising, International IDEA.⁵⁵ Many countries, including the United States, have little or no public

⁵⁰ Allan R. Brewer-Carías, *The 1999 Venezuelan Constitution-Making Process as an Instrument for Framing the Development of an Authoritarian Political Regime* in FRAMING THE STATE IN TIMES OF POLITICAL TRANSITION 505, 212 (Laurel Miller with Louis Aucoin (eds)). US Institute for Peace, 2010, at http://www.usip.org/sites/default/files/Framing%20the%20State/Chapter19_Framing.pdf

⁵¹ David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 940-941 (2013).

⁵² Javier Corrales, *Autocratic Legalism in Venezuela*, 26(2) JOURNAL OF DEMOCRACY 37-51, 38 (2015).

⁵³ CONSTITUTION UNIT, CHECKS AND BALANCES IN SINGLE-CHAMBER PARLIAMENTS: A COMPARATIVE ANALYSIS (1998), at <https://www.ucl.ac.uk/spp/publications/unit-publications/24.pdf>.

⁵⁴ Mario Renzi’s constitutional reforms in Italy include a radical weakening of the Italian Senate, a move that has been praised in TLO circles for making Italy more governable. Francesco Clementi, *Italian Constitutional Reforms: Toward Stable and Efficient Government*. CONSTITUTION.NET, 23 June 2016, at <http://www.constitutionnet.org/news/italian-constitutional-reforms-towards-stable-and-efficient-government> <http://www.constitutionnet.org/news/italian-constitutional-reforms-towards-stable-and-efficient-government>. (Constitution.NET is the official website of International IDEA, a multilateral institution that supports constitution drafting around the world. It is one of the organizations at the center of the web of TLO institutions.)

⁵⁵ INTERNATIONAL IDEA, DIRECT DEMOCRACY HANDBOOK, Chapter 5, at http://www.idea.int/publications/direct_democracy/upload/direct_democracy_handbook_c

funding for political parties, so this cannot be a core normative principle of constitutionalism.⁵⁶ In addition, many countries require presidential approval (if not always initiation) of constitutional amendments.⁵⁷ What could be wrong with the new Venezuelan constitution? Take these major changes one by one, and they may not represent constitutional best practices, but they are not disqualifying ones. Most of the criticism of the Chávez experiment in transforming the Venezuelan democratic project has been ideological instead of constitutional.⁵⁸

International criticism was far more pronounced when Chávez proposed constitutional amendments in 2007 that would have extended the presidential term from six to seven years and would have removed term limits so that he could run for president indefinitely.⁵⁹ The amendments would also have given the president direction of the central bank and more control over regional governors as well as banning foreign funding of NGOs.⁶⁰ The amendments were narrowly defeated and Chávez accepted the defeat – for a while. In 2009, he brought back the abolition of presidential term limits in another constitutional amendment package, this time combined with the abolition of term limits for members of the parliament, regional governors and local officials.⁶¹ That set of amendments passed.

Blowing past term limits is a TLO no-no. In fact, removing term limits is one of those few points of consensus about specific constitutional structures in the

[hapter5.pdf](#) . The chapter notes that, in addition to Venezuela, the constitutions of Ecuador, Ethiopia, Peru, Taiwan also contain such mechanisms.

⁵⁶ International IDEA has a handbook on financing of parties and elections that shows the massive variation in funding schemes: FUNDING POLITICAL PARTIES AND ELECTION CAMPAIGNS, at <http://www.idea.int/publications/funding-of-political-parties-and-election-campaigns/index.cfm> . This means that, while some approaches can count as best practices, others are worst practices and yet cannot be fully condemned.

⁵⁷ INTERNATIONAL IDEA, CONSTITUTIONAL AMENDMENT PROCEDURES, September 2014, at <http://www.idea.int/cbp/loader.cfm?csModule=security/getfile&pageid=65937> . The document notes that presidents often can initiate constitutional amendments at 5 and 7, though notes that this is more typical of presidential or hyper-presidential systems.

⁵⁸ Roberto Gargarella, *Neo-Constitutionalism in Twenty-First Century Venezuela : Participatory Democracy, Deconcentrated Decentralization or Centralized Populism?* in NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES 163-182. (Detlef Nolte and Almut Schilling-Vacaflor, eds.). Ashgate, 2012.

⁵⁹ “In a statement from the White House, the US State Department said the Venezuelan people had delivered a clear message that they did “not want any further erosion in their democracy and their democratic institutions.” BBC, *US hails Chavez Referendum Defeat*. BBC NEWS. 3 December 2007, at <http://news.bbc.co.uk/2/hi/americas/7125689.stm>.

⁶⁰ Roberto Gargarella, *Neo-Constitutionalism in Twenty-First Century Venezuela : Participatory Democracy, Deconcentrated Decentralization or Centralized Populism?* in NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES 163-182, 173-174. (Detlef Nolte and Almut Schilling-Vacaflor, eds., 2012).

⁶¹ Id.

TLO.⁶² It is virtually always taken as a sign that a current national executive intends to abuse his power when the abolition of term limits comes up. While the practice is generally condemned, it is also widely practiced.⁶³ By the time that Chavez got constitutional permission to keep running for office, however, he was to be cut down by cancer instead.

Modeling himself explicitly on Chávez in tailoring a constitution to a new democratorship, Rafael Correa “came to office with the view that winning the presidency was, at best, a prelude to a more profound struggle for political power one that would involve confronting rivals both within the state and in society at large.”⁶⁴ He called for a new constitution in Ecuador as soon as he was elected president in 2006 with a 73% approval rating.⁶⁵

Emphasizing his democratic mandate Correa proclaimed that he was leading a “citizens’ revolution”:

During the campaign we were clearly aware that what we were proposing was a revolution, understood as a radical and rapid change in the existing structures of Ecuadorean society, in order to change the bourgeois state into a truly popular one. Faced with the delegitimization of the political class, which no longer represented anyone except itself, we said to ourselves that it was we citizens who had to reveal its inadequacies. So we decided to call it a citizens’ revolution, a revolt of indignant citizens.⁶⁶

Correa governed as a plebiscitary president, using “direct, unmediated appeals to public opinion in order to govern ‘over the heads’ of other institutions, especially legislatures. . . . With the public’s overwhelming approval, he rendered Congress totally irrelevant.”⁶⁷

Against this background, Correa’s new constitution was approved in a referendum in 2008 with 64% public support. It mixed ‘hyperpresidentialism

⁶² International IDEA has guidelines: *To Go or Not To Go? Debates about Constitutional Term Limits*, Chapter VI of the ANNUAL REVIEW OF CONSTITUTION-BUILDING PROCESSES 2014 (2015), at <http://www.idea.int/publications/annual-review-of-cbp-2014/upload/annual-review-of-cbp-2014-c6.pdf>.

⁶³ Tom Ginsburg, James Melton, Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WILLIAM AND MARY LAW REVIEW 1807 (2011), at <http://www.law.uchicago.edu/files/file/328-tg-evasion.pdf>.

⁶⁴ Catherine Conaghan, *Ecuador: Correa’s Plebiscitary Presidency*, 19(2) JOURNAL OF DEMOCRACY 46, 46-47 (2008).

⁶⁵ *Id.* at 50.

⁶⁶ Rafael Correa, *Ecuador’s Path*, 77 NEW LEFT REVIEW 90 (September-October 2012).

⁶⁷ *Id.* at 47.

with an expanded list of rights.”⁶⁸ The 1998 constitution that the Correa constitution replaced already had expansive presidential powers, which were maintained. The Correa constitution, like the Chávez constitution, put the power to call national referenda into the president’s hands, which enabled him to continue his plebiscitary presidency.⁶⁹ In addition, Correa was given the power to veto not just whole laws, but also parts of laws, which gave him the power to hand-pick just which parts of the legislature’s work he would endorse.⁷⁰ The 2008 constitution allowed Correa to run for reelection once, something that the 1998 constitution did not permit.

Did the new Ecuadorian constitution run afoul of international norms? As an International IDEA publication noted in a formula that showed how well Correa skirted the edge of the transnational constitutional consensus: “It is important to note that while President Correa may not be a political tyrant, he is not exactly a liberal democrat either.”⁷¹ Strong presidents had been the norm in Latin America; it would be hard for the “international community” to condemn the practice when strong presidencies did not automatically turn all Latin American presidents into dictators, and where the US model constantly acted as a counter-example.⁷²

Gaining the power to bypass the legislature by calling national referenda is also not an unusual practice, so it hard to condemn in general.⁷³ The line-item

⁶⁸ Carlos de la Torre, *Technocratic Populism in Ecuador*. 24(3) JOURNAL OF DEMOCRACY 33-46, 36 (213).

⁶⁹ Catherine Conaghan, *Ecuador: Correa’s Plebiscitary Presidency*. 19(2) JOURNAL OF DEMOCRACY 46, 46-47 (2008).

⁷⁰ Catherine M. Conaghan, *Ecuador Under Correa*. 27(3) JOURNAL OF DEMOCRACY 109, 111-112 (2016).

⁷¹ David Landau, *Term Limit Manipulation across Latin America and What Constitutional Design Should Do About It*, CONSTITUTION.NET, 21 July 2015, at <http://www.constitutionnet.org/news/term-limits-manipulation-across-latin-america-and-what-constitutional-design-could-do-about-it>; International IDEA, *To Go or Not To Go? Debates about Constitutional Term Limits*, Chapter VI of the ANNUAL REVIEW OF CONSTITUTION-BUILDING PROCESSES 2014, 6 (2015), at <http://www.idea.int/publications/annual-review-of-cbp-2014/upload/annual-review-of-cbp-2014-c6.pdf>.

⁷² Scott Mainwaring and Matthew S. Shugart, *Juan Linz, Presidentialism, and Democracy: A Critical Appraisal*, 29 COMPARATIVE POLITICS 449-471 (1997).

⁷³ But International IDEA has been skeptical of executives calling referenda especially in Latin America:

Executives have also initiated referendums in order to demonstrate popular support for a specific political decision. Governments often claim that this is their main or only reason for organizing a referendum, whereas the true motivation may be (and often is) provided by political and tactical considerations. Such political and tactical reasons for initiating referendums have been criticized from a democratic point of view because here the referendum instrument has been used not in order to

veto, which was crucial in Ecuador in moving power from the parliament to the president, is something that has been sought for years by the US President and is not unheard of elsewhere.⁷⁴ How could that key tool be criticized?

Through Correa was not attacked in the TLO for his new constitution, when Correa approached the end of his second term in office under this new constitution, he sought to amend it to allow himself to run again in 2017. The National Assembly agreed but 80% of the public told pollsters that they did not approve of the change. The National Assembly then modified the constitutional amendment to make reelection indefinite only starting after the next election, to which the amendment would not apply⁷⁵ and, conceding the point, Correa said he would not run for the presidency again. It seemed that the constitutional limits held. But his loyal Constitutional Court, ruling on a petition from Correa supporters who wanted him to be able to continue in office, allowed the whole question to go to a referendum. As I write, a Correa candidacy is now possible if a majority approves the referendum question.⁷⁶

As we have seen, the extension of term limits has raised international concern. For example, the International IDEA blog has recently expressed concern about the Latin American trend toward throwing out term limits to benefit current incumbents, calling out Chávez and Correa in particular.⁷⁷ The *Journal of Democracy* published an article analyzing the effects of the removal of

strengthen popular sovereignty and increase political equality but rather to bypass popular control and maintain or even extend the authority of the executive. Both democratic and authoritarian governments can initiate referendums, which may contribute to the stability and efficiency of the regime. Thus, a large number of referendums held in Latin America have been called by the executive branch. . . . Some referendums called by the executive in Latin America were attempts to legitimize authoritarian regimes, but such attempts have not always been successful.

INTERNATIONAL IDEA, DIRECT DEMOCRACY HANDBOOK 49, at http://www.idea.int/publications/direct_democracy/index.cfm .

⁷⁴ “[T]he line-item veto has become common in US states (about 90 per cent of US states allow governors to exercise a line-item veto) and at the national level in Latin America (e.g. Argentina, art. 83; Brazil, art. 66; Paraguay, art. 208).” INTERNATIONAL IDEA, PRESIDENTIAL VETO POWERS, May 2015, at <http://www.idea.int/cbp/loader.cfm?csModule=security/getfile&pageid=69562> .

⁷⁵ Conaghan, *supra* note ___ at 116-117.

⁷⁶ *Ecuador Court Paves the Way for Referendum on Correa’s Reelection*, TELESUR ONLINE, 25 April 2016, at <http://www.telesurvtv.net/english/news/Ecuador-Court-Paves-Way-for-Referendum-on-Correas-Re-Election-20160425-0044.html> .

⁷⁷ David Landau, *Term Limit Manipulation across Latin America and What Constitutional Design Should Do About It*, CONSTITUTION.NET, 21 July 2015, at <http://www.constitutionnet.org/news/term-limits-manipulation-across-latin-america-and-what-constitutional-design-could-do-about-it> .

presidential term limits, showing that it was often a tool of autocrats in training.⁷⁸ One wonders whether the abolition of term limits in both Venezuela and Ecuador was saved for a constitutional amendment after the original constitution was drafted to make it less visible to international audiences and to make the autocratic tendencies of the new constitutions less clear. Both Chávez and Correa saw little criticism of their constitutional overhauls, until they touched the question of presidential terms.

Viktor Orbán, Hungary's prime minister, also opted for constitutional revolution, having won 53% of the vote in 2010 which, under Hungary's disproportionate election law, awarded his Fidesz party 67% of the seats in the parliament. Under the constitution Orbán inherited, a single two-thirds vote of the Parliament could change anything in the constitution, so his party won the possibility of changing the constitution at will. Even though constitutional reform was not mentioned during the election campaign, Orbán's Fidesz government quickly embarked on an ambitious and immediate program of constitutional change for which it needed – and for which it accepted – no input from other parties. It first promulgated a “Statement of National Cooperation” that was to be compulsorily displayed in public buildings. Following the usual script of constitutional revolutions in the name of a plebiscitary mandate, the statement announced that the election had produced a “constitutional revolution”:

[A]fter 46 years of occupation, and 20 confused years of transition, Hungary has regained the right and power of self-determination In spring 2010, the Hungarian nation gathered its strength once again, and brought about a successful revolution in the polling booth. Parliament declares that it recognizes and will respect this constitutional revolution. . . .⁷⁹

The new Fidesz government then amended the constitution it inherited 12 times before pushing through the Parliament a new constitution (the “Fundamental Law”) one year into its term. The amendments of the old constitution facilitated the concentration of power in the hands of the party by changing the way constitutional judges were nominated to give the Fidesz government complete control over appointments and by cutting the size of the Parliament in half so that electoral reform could begin immediately. These amendments also removed the obstacles to drafting a new constitution by removing from the constitution the clause that required a 4/5th majority, which the government did not have, to agree to procedures for writing a new

⁷⁸ Javier Corrales and Michael Penfold, *Manipulating Term Limits in Latin America*, 25(4) JOURNAL OF DEMOCRACY 157 (2014).

⁷⁹ Government Resolution. 1/2010. (VI. 16.) Proclamation of the Parliament, 1140/2010. (VII. 2.)

constitution. Both the amendments to the old constitution and the new constitution were adopted with the votes of only the governing party.

Once the new Fundamental Law was enacted in 2011, dozens of new “cardinal laws” were required to supplement the constitution. These laws required a two-thirds vote of the Parliament and were therefore nearly as entrenched as the constitution.⁸⁰ Both the new constitution and most of the cardinal laws were adopted in expedited legislative processes, almost always without the input or votes of opposition parties and very often using the streamlined parliamentary procedure available to those introducing private members’ bills. After its adoption, the Fundamental Law was then amended five times in its first three years, often substantially. The overall effect of the constitutional revolution was to change the whole system of governance in Hungary.

The new constitutional order reorganized many of the state’s standing bodies, including the Constitutional Court, Supreme Court, ordinary judiciary, National Council of Judges, Media Council, Budget Council, National Bank, Election Commission and Ombudsmen’s Offices.⁸¹ These reorganizations were frequently accompanied by the removal of incumbent officials in the predecessor institutions before the completion of their terms and by the extension of the terms of office for the new Fidesz-backed officials who replaced them in the new institutions. The educational and healthcare systems, previously decentralized, were transferred to the national government as part of a general shift of power away from local governments. While the constitution retained unicameral parliamentarism, at least on paper, the new constitutional order shifted power strongly toward the prime minister.

Given the plasticity of constitutional norms in the TLO about state structures, the general reorganization of the structural constitution was not generally criticized by international bodies. Instead, international critics focused on the procedure used to enact the constitution which had been non-transparent, excluded the political opposition, and was done in a mad rush.

The new Fundamental Law was reviewed by the European Commission for Democracy through Law (the Venice Commission)⁸² which opined: “It is regrettable that the constitution-making process, including the drafting and the final adoption of the new Constitution, has been affected by a lack of transparency, shortcomings in the dialogue between the majority and the

⁸⁰ A constitutional amendment requires an *absolute* two-thirds majority – or a majority of all MPs. An amendment to a cardinal law requires a *relative* two-thirds majority – or a majority of the MPs present and voting.

⁸¹ Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppelle, *Hungary’s Illiberal Turn: Dismantling the Constitution*. 21(3) JOURNAL OF DEMOCRACY 138-145 (2012).

⁸² The Venice Commission might be considered a core institution of the constitutional TLO as it provides expertise in drafting new constitutions, evaluations of major new laws and assessments of the compliance of national constitutions and legislation with international norms.

opposition, the insufficient opportunities for an adequate public debate, and a very tight timeframe.”⁸³

The US State Department also noted with concern in its 2012 Human Rights Report that “[t]he government [of Hungary] used its two-thirds parliamentary majority to implement constitutional reform, the speed and extent of which raised concerns that checks and balances were eroding” and called attention to “little or no minority consultation in many cases.”⁸⁴

The European Parliament also condemned the one-sided and strictly majoritarian nature of the Hungarian constitutional drafting process: “The Constitution has been widely criticized by national, European, and international NGOs and organizations, the Venice Commission and representatives of Member States’ governments, and was adopted exclusively with the votes of the MPs from the governing parties, so that no political or social consensus was achieved.”⁸⁵ The European Parliament also expressed concern about the “scale of the comprehensive and systematic constitutional and institutional reforms which the new Hungarian Government and Parliament have carried out in an exceptionally short time frame.”⁸⁶

But almost no one criticized most of the substance of the new constitution. They could not; Hungary had violated few existing international norms. The Venice Commission’s opinion on the new constitution made a few gentle suggestions; the constitution should be less detailed on economic policy and more detailed on the structure of the judiciary, for example.⁸⁷ Had the government chosen to leave out a bill of rights or to overtly deny the independence of the judiciary, then that would have been an issue. De facto independence of the judiciary and the actual realization of rights was another matter, beyond the reach of constitutional consultant. But since the constitution gave lip service to all the right values, except in the bombastic nationalist preamble, which the Venice

⁸³ VENICE COMMISSION, OPINION ON THE NEW CONSTITUTION OF HUNGARY, Adopted by the Venice Commission at its 87th Plenary Session, 17-18 June 2011, Opinion no. 621/2011, CDL-AD(2011)016 at para. 144. This Venice Commission report was not produced upon request of the Hungarian government, as would be usual, but instead at the request of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE).

⁸⁴ US DEPARTMENT OF STATE, HUMAN RIGHTS REPORT: HUNGARY 2012, EXECUTIVE SUMMARY.

⁸⁵ EUROPEAN PARLIAMENT, RESOLUTION OF 5 JULY 2011 ON THE REVISED HUNGARIAN CONSTITUTION, P7_TA(2011)0315 at para. E.

⁸⁶ EUROPEAN PARLIAMENT, RESOLUTION OF 3 JULY 2013 ON THE SITUATION OF FUNDAMENTAL RIGHTS: STANDARDS AND PRACTICES IN HUNGARY (pursuant to the European Parliament Resolution of 16 February 2012) (2012/2130(INI)), P7_TA(2013)0315, A7-0229/2013 at para. Y, AC and AD.

⁸⁷ VENICE COMMISSION, OPINION ON THE NEW CONSTITUTION OF HUNGARY, Adopted by the Venice Commission at its 87th Plenary Session, 17-18 June 2011, Opinion no. 621/2011, CDL-AD(2011)016

Commission was inclined to downplay,⁸⁸ Hungary passed its new-constitution check-up with (almost) flying colors. Simply rearranging familiar institutional forms so that they concentrated power in the hands of the prime minister was harder to challenge because it was harder to demonstrate.

Constitutional democracies in good standing come in all kinds of shapes and flavors. It would be hard to pick out a feature of any well-drafted constitution that did not have some close relatives elsewhere. And Hungary had a well-drafted constitution, which the government defended by pointing to all of the other countries that had this form of judicial review, or that form of parliamentary system, or some distinctive form of appointments process to independent agencies. Was unicameral government a problem? No, because even within the EU there are many unicameral parliaments. Was removing the *actio popularis* petition from the Constitutional Court's jurisdiction a problem? No because Hungary was the only country in Europe that ever had such an option in the first place.⁸⁹ Was having the President of the Republic elected by the parliament a problem? No because that was the system Hungary had when it was admitted with no objections to the EU. The government's experts who drafted the constitution had done their homework in comparative law and knew that there were always unobjectionable examples of each individual point in the constitution to be used against critics who challenged it. Despite international criticism of the process, the government of Hungary emerged relatively unscathed in international perspective on the content of the constitution itself, albeit with strongly consolidated power.

With Putin's and Erdoğan's proposals for constitutional change – neither of which were so far enacted – we see strategic choices of political system to match the particular configuration of support on the ground. Putin entertained the idea of moving from presidentialism to parliamentarism and Erdoğan has proposed a switch the other way around. Each was designed to ensure its respective leader a long time in power. In principle, nothing is wrong with either presidentialism or parliamentarism so it is hard for the international community to criticize either

⁸⁸ “The relevance of the Preamble for the Constitution's interpretation and some potentially problematic statements and terms contained therein . . . gave reason to question and would call for adequate clarification by the Hungarian authorities.” *Id.* at para. 149.

⁸⁹ That said, the Venice Commission noted that the *actio popularis* petition had served an important function in Hungarian democracy and they regretted its demise. But they could not insist that Hungary retain it: “The Venice Commission would like to stress that the availability of an *actio popularis* in matters of constitutionality cannot be regarded as a European standard.” VENICE COMMISSION, OPINION ON THREE LEGAL QUESTIONS ARISING IN THE PROCESS OF DRAFTING THE NEW CONSTITUTION OF HUNGARY, Adopted by the Venice Commission at its 86th Plenary Session, Venice 25-26 March 2011, Opinion no. 614/2011, CDL-AD(2011)001, at para. 57, at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2011\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2011)016-e)

system, or even the switch from one to another.⁹⁰ It is the motivation for switching that raises eyebrows but motivation is hard to prove. But it also a testament to the strength of the TLO's norms that the apparently easier option – simply abolishing term limits in Russia, for example, or rigging elections in Turkey – was considered more costly as it would make these leaders' ambitions completely clear.

In 2003, Vladimir Putin (or perhaps more accurately, people in the close circle of his presidential administration) contemplated switching from a presidential to a parliamentary system in order to evade the term limits that would bite in 2008. In a parliamentary system, prime ministers do not typically have term limits because it is assumed that they are accountable to parliaments that will hold them in check. Putin's advisors thought that the move to a parliamentary system would allow him to escape from term limits under cover of being accountable to parliament but that the weak parliament would not really offer any constraint. In the political context of Russia at the time, there was really only one well-organized political party, United Russia, and that party would invariably support Putin given that he controlled the fates of all individual party members. Critics also darkly guessed that Putin would never allow another party to gain that level of support,⁹¹ but those criticisms almost always came from political analysts who were critical of Putin's challenges to a unipolar world and not from institutions that were part of the TLO. Parliamentarism seemed a safe system for keeping Putin in power for the foreseeable future because it was inconceivable at the time that Putin would ever lose his parliamentary majority. But parliamentarism would have appeared to be restricting rather than enhancing presidential power.

In the end, Putin declined the constitutional reform and opted to swap places with his prime minister for one term, during which time the constitution was amended to increase the length of the presidency from four to six years.⁹² The move to lengthen presidential terms was immediately seen by foreign critics as

⁹⁰ For a long time, presidentialism was condemned for its dictatorial tendencies. Juan Linz, *The Perils of Presidentialism*, 1 JOURNAL OF DEMOCRACY 51-69 (1990), at <http://scholar.harvard.edu/levitsky/files/1.1linz.pdf>. But that criticism has since softened with new evidence from Latin America. Scott Mainwaring and Matthew S. Shugart, Juan Linz, *Presidentialism, and Democracy: A Critical Appraisal*, 29 COMPARATIVE POLITICS 449-471 (1997).

⁹¹ "Since ascending to power, Putin has sought to eliminate independent media, civil society organizations and opposition political parties." Stephen Nix, *Yes, Mr. Putin, There is an Opposition in Russia*, DEMOCRACY SPEAKS, the blog of the International Republican Institute, 28 December 2015, at <http://www.democracyspeaks.org/blog/yes-mr-putin-there-political-opposition-russia> .

⁹² Peter P. Pan, *Russia's Medvedev Signs Constitutional Amendment to Lengthen Presidential Terms*, WASHINGTON POST, 30 December 2008, at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/30/AR2008123000839.html> .

guaranteeing Putin the opportunity to be czar for life.⁹³ When Putin ran for president again after his one-term time-out, he became eligible to stay in office for 12 years with only one reelection.

The increased length of the term of the Russian president was taken as a sign of constitutional dictatorship by Putin's political critics. But what could be wrong with lengthening the term of office, a Russian constitutional expert might ask? France had an independently elected president with a seven-year term for nearly a half century without falling into dictatorship!⁹⁴ Indeed France's super-long super-presidency had been criticized for a long time, which did not prevent France from being considered a constitutional democracy in good standing.⁹⁵ Surely, Russia's six-year presidency was within international legal leeway. International criticism was directed at Putin and what observers thought he was up to, not to the constitutional system as such.

We see the opposite move being contemplated – and partially enacted – today in Turkey, where Recep Tayyip Erdoğan has been steadily consolidating power over the last half-dozen years. He originally rode an electoral wave to victory, as his AKP party won the parliamentary elections in 2003, the first overtly Islamist party to do so.⁹⁶ For his first six years in office, he supported legal reforms that enabled Turkey to comply with Council of Europe human rights norms for the first time as he steered his country toward joining the EU.⁹⁷ But when the European door slammed in his face, he took his country in a different direction: toward more centralized control. As he began to worry that his electoral support might not last forever, he opted for presidentialism over parliamentarism.

Toward that end, Erdoğan was able to amend the constitution to make the presidency a directly elected office, replacing the then-existing system in which the Parliament elected the president. Since presidentialism is a widely accepted

⁹³ For example, *On Putin's Terms*, THE ECONOMIST, 8 November 2008, <http://www.economist.com/node/12622987> .

⁹⁴ The 1958 constitution established the seven-year presidency, which was amended in 2000 to shorten the term to five years. Olivier Duhamel, *France's new Five-Year Presidential Term*, Brookings Institute, 1 March 2000, at <https://www.brookings.edu/articles/frances-new-five-year-presidential-term/> .

⁹⁵ Louise Knight, *Presidentialism in Contemporary France : De Gaulle and Mitterrand*. PhD thesis, University of Warwick. (2001), unpublished manuscript, on file at <http://wrap.warwick.ac.uk/66773/> .

⁹⁶ I should say that it was the first Islamist party to be *allowed* to do so. All of the previous religious parties had been dissolved by party bans. Dicle Kogacioglu, *Progress, Unity, and Democracy: Dissolving Political Parties in Turkey*, 38 LAW AND SOCIETY REVIEW 433–462 (2004).

⁹⁷ “Rafts of constitutional amendments were passed in 1999, 2002, and 2004 in order to bring Turkish law in line with European norms.” Patrick Scharfe, *Erdoğan's Presidential Dreams, Turkey's Constitutional Politics*, 8(5) ORIGINS (February 2015), at <http://origins.osu.edu/article/erdo-s-presidential-dreams-turkey-s-constitutional-politics> .

political system and direct election of presidents seems even more democratic than parliamentary election, it was hard for the “international community” to challenge the proposal as such.

But international criticism started when Erdoğan pushed through a package of constitutional amendments in 2010, strengthening the power of the presidency by hobbling the Constitutional Court. The AKP President Abdullah Gül referred the constitutional package to the people – where the AKP Prime Minister Erdoğan was able to win 58% support for the 30 new provisions, affecting 23 articles of the constitution.⁹⁸ While some provisions strengthened rights – notably the rights of families, children, workers and women who wear the headscarf -- and also removed the special privileges of the military, other provisions gutted the judicial checks on the executive branch. Under the constitutional amendments, the Constitutional Court was enlarged from 11 to 18 judges and the president was given the power to name 14 of the 18 judges.⁹⁹ The Supreme Board of Judges and Prosecutors, which handles judicial and prosecutorial appointments, promotions, disciplinary procedures and dismissals, was expanded as well, giving the president more control over those who would select the ordinary judges and prosecutors.

Reaction to these constitutional changes from the international community was mixed. The EU welcomed the new rights provisions and abstained from comment on the rest.¹⁰⁰ While some constitutional experts attacked Erdoğan for packing the Constitutional Court,¹⁰¹ others contextualized the changes in the local political context by noting that the Constitutional Court had repeatedly struck down AKP legislation on the basis of constitutional secularism that the public no longer supported.¹⁰² Those opposed to court-packing worried about executive infringement on judicial independence while those in favor of the changes argued that the court had blocked democratic change for decades and needed to be reformed. In short, the debate was joined over how to balance constitutionalism and democracy, both staples of intra-TLO debate.

After the constitutional amendments, Erdoğan’s AKP party won a huge electoral victory in 2011, so a multi-party constitutional drafting committee was formed to write a new constitution, something all parties had agreed was desirable given that the 1982 constitution still in effect had been written under military supervision after the last coup. But even though there was agreement

⁹⁸ Sinan Ciddi, *Turkey’s September 12, 2010 Referendum*, 15(4) MERIA JOURNAL (December 2011), at <http://www.rubincenter.org/2011/12/turkey%E2%80%99s-september-12-2010-referendum/> .

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?* 19 CONSTELLATIONS 182 (2012).

¹⁰² Asli Bâli, *Courts and Constitutional Transition: Lessons from the Turkish Case*. 11 I-CON (INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW) 666-701 (2013).

across the political spectrum on many aspects of the change, the process foundered over the issue of presidentialism:

AKP proposals for a stronger presidency or even a full presidential system were viewed as unacceptable by the opposition as a whole. The opposition parties knew that a powerful presidency would suit Erdoğan's personal political ambitions perfectly, and it is largely for this reason that the constitutional reform process slowed to a halt and finally collapsed at the end of 2013.¹⁰³

Erdoğan was so confident that he would eventually be able to remake the presidency into the strongest position in the constitutional order that he ran for president and won in 2014 before all of his desired powers had been transferred to that office. In anticipation of the enlarged presidency, he even built an enlarged presidential palace (with 1,100 rooms), but he was blocked in gaining the power he sought in the constitution itself because he lacked a constitutional majority in the parliament. Worse yet for him, he lost his simple parliamentary majority with the June 2015 election, but he quickly found a way around that temporary setback. He called a snap election for November 2015 and won back his parliamentary majority though with not quite enough seats to pass a new constitution.¹⁰⁴ He again tried to push constitutional reform again in a multi-party process, but failed.¹⁰⁵

With the attempted coup in July 2016 and Erdoğan's subsequent announcement that he would push constitutional reform again, his critics are worried that he will finally be able to succeed in his presidential ambitions and govern like a dictator.¹⁰⁶ With a state of emergency in place, some claim that he is doing so already.¹⁰⁷

The criticism being piled on Erdoğan since the coup attempt and his wide-ranging purge of many public institutions does not react specifically to his constitutional plans, or even to his stated goal to convert Turkey from a

¹⁰³ Patrick Scharfe, *Erdoğan's Presidential Dreams, Turkey's Constitutional Politics*, 8(5) ORIGINS (February 2015), at <http://origins.osu.edu/article/erdo-s-presidential-dreams-turkey-s-constitutional-politics>.

¹⁰⁴ Ziya Önis, *Turkey's Two Elections: The AKP Comes Back*. 27(2) JOURNAL OF DEMOCRACY 141 (2016).

¹⁰⁵ Şule Özsoy, *Erdoğan's Long-Standing Struggle for a Turkish Type of Presidential System*, PRESIDENTIAL POWER BLOG, 23 February 2016, at <http://presidential-power.com/?p=4495>

¹⁰⁶ For the reasons Erdoğan had given before the coup attempt given for preferring a presidential model, see Şule Özsoy, *Erdoğan's Long-Standing Struggle for a Turkish Type of Presidential System*, PRESIDENTIAL POWER BLOG, 23 February 2016, at <http://presidential-power.com/?p=4495>.

¹⁰⁷ Alon Ben Meir, *Turkey's Elected Dictator*, WORLD POST, 20 July 2016, at http://www.huffingtonpost.com/alon-benmeir/turkeys-elected-dictator_b_11093160.html

parliamentary to a presidential system. The criticism of Turkey as I write focuses on the fact that he is using emergency powers, violating the laws of his own country and infringing on rights that are part of the TLO consensus.¹⁰⁸ In short, he is attacked precisely because he is not using the constitution to shield himself but using emergency powers to go around it.

Like Erdoğan who came out from behind the constitutional shield to seize new powers after an attempted coup, Jarosław Kaczyński of Poland's Law and Justice (PiS) party has also been having a hard time with the TLO community because they too have come out from behind the constitutional shield to act without its protection. Since the 2015 election of PiS candidates first to the presidency of Poland (Andrzej Duda) and then to a majority of seats in its parliament (which enabled the election of Prime Minister Beata Szydło), a constitutional revolution has begun there as well. The leader of the revolution is Kaczyński, the head of PiS and formally an MP in the parliament, but he has no formal state position that reflects his influence. Both President Duda and Prime Minister Szydło openly defer to him but he operates from the shadows of the constitutional order without having an official role.

PiS had put a new draft constitution on the political agenda in 2010 when they were out of power, but they then withdrew it.¹⁰⁹ As Polish constitutional expert Wojciech Sadurski explained in July 2016, however, constitutional change has simply taken a different form since PiS came to power in late 2015 because "what they have been doing over the past months was already a de facto change of the constitution. That is why I think that the way of describing what is going on in Poland is basically a constitutional coup d'état."¹¹⁰ As Sadurski pointed out, statutes in blatant violation of the existing constitution were being passed by the PiS majority in the parliament. Then, when the Constitutional Tribunal struck them down, the government refused to publish the decisions of the Court and claimed that therefore the decisions had no legal effect. Poland represents a classic case of the do-badder who is operating without the benefit of constitutional cover. And not surprisingly, the international community has come down on Poland hard.

The Venice Commission issued a highly critical opinion backing the Constitutional Tribunal's efforts to restore constitutionalism.¹¹¹ The European

¹⁰⁸ BBC, *Recep Tayyip Erdogan: Turkey's Ruthless President*, BBC NEWS, 21 July 2016, at <http://www.bbc.com/news/world-europe-13746679> .

¹⁰⁹ *What is Going on in Poland is an Attack Against Democracy*. Interview with Wojciech Sadurski and Maximilian Steinbeis, VERFASSUNGSBLOG, 15 July 2016, at <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/> .

¹¹⁰ Id.

¹¹¹ VENICE COMMISSION, OPINION ON AMENDMENTS TO THE ACT OF 25 JUNE 2015 ON THE CONSTITUTIONAL TRIBUNAL OF POLAND, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD(2016)001-e, at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e) .

Commission, which had been rather muted in response to the Hungarian constitutional revolution,¹¹² suddenly sprang into action, invoking its “rule of law framework” in January,¹¹³ pressuring Poland through the spring, moving to an “opinion” in June (that formally joined the debate with the country),¹¹⁴ and issuing a “recommendation” (a public list of actions that Poland would have to take to avoid a move toward sanctions) in July.¹¹⁵ The Commission demanded that the Polish government honor the decisions of the Constitutional Court. For good measure, the Council of Europe Human Rights Commissioner chimed in too.¹¹⁶ While the stand-off between Poland and its international critics (and its domestic opposition), is still ongoing, it is hard to see how Poland can get through this unless it adopts a more constitutionalist approach. It clearly violates the TLO consensus to refuse to honor the rulings of a court and to attempt to shut down a court when it issues rulings the government does not appreciate.

From these examples – Venezuela under Chávez, Ecuador under Correa, Hungary under Orbán, Russia under Putin, Turkey under Erdoğan and Poland under Kaczyński – we can see that there is a TLO in place that generally approves when change occurs pursuant to democratic elections and in constitutional form, almost no matter what the content. But we can also see that changing the structural provisions of constitutions so as to consolidate power in the hands of an all-powerful executive is not generally outside the consensus that the TLO has built. Apart from disapproving of removing term limits or extending presidential terms or overtly engaging in court-packing, no other methods of concentrating power generates sustained criticism because some other constitutional-democratic state in good standing can always be found to demonstrate that this particular institutional form can be used without danger.

¹¹² Kim Lane Scheppelle, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)*. 23 JOURNAL OF TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 51-117 (2014).

¹¹³ European Commission Fact Sheet, *College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers*, 13 January 2016, at [http://europa.eu/rapid/press-release MEMO-16-62_en.htm](http://europa.eu/rapid/press-release_MEMO-16-62_en.htm).

¹¹⁴ European Commission Press Release, *Commission adopts Rule of Law Opinion on the situation in Poland*, 1 June 2016, at [http://europa.eu/rapid/press-release IP-16-2015_en.htm](http://europa.eu/rapid/press-release_IP-16-2015_en.htm).

¹¹⁵ European Commission Press Release, *Rule of Law: Commission Issues Recommendation to Poland*, 27 July 2016, at [http://europa.eu/rapid/press-release IP-16-2643_en.htm](http://europa.eu/rapid/press-release_IP-16-2643_en.htm).

¹¹⁶ REPORT BY NILS MUIŽNIEKS, COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, FOLLOWING HIS VISIT TO POLAND, FROM 9 TO 12 FEBRUARY 2016, CommDH(2016)23, 15 June 2016, at [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH\(2016\)23&Language=lanEnglish&Ver=original&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH(2016)23&Language=lanEnglish&Ver=original&direct=true)

The TLO may have a consensus over rights and how they must be observed, but the new democrators are not usually engaged in massive rights violations as their first move. Instead, they are seeking to gain unlimited power by removing checks and balances. Given that these democrators have to go on winning elections, they are not eager to annoy most of their citizens. But given that these democrators want to go on governing without constraint for the foreseeable future also, they want to control the constitutional distribution of power and not let any competitors gain a toehold in their space. But hollowing liberal constitutions out from the inside through concentrating power and preventing its rotation is outside the field of vision in the TLO except in extreme cases, and only then after the damage has been done.

When democrators step out from behind their constitutional cover, however, we see the transnational institutions of the TLO start to attack. With Erdoğan using emergency powers in Turkey and Kaczyński overtly violating the constitution in Poland, international criticism has been fast, sharp and overwhelming. No wonder the others have tried to stay under constitutional cover!

In this section, we have established that democrators generally try to change the constitutional systems they inherit so that they can consolidate power, and that the “international community” (that is, the constitutionalism TLO) does not really know what to say about any of this, except to frown on a few obvious things. Otherwise, there is no consensus on what a good liberal democratic constitutional system looks like because there is such huge variation among the “do-gooders” in how their own political institutions are designed. The TLO has therefore concentrated on encouraging best practices rather than on isolating and condemning worst practices. But the TLO’s inability to settle on normative standards has not only allowed democratorships to spread, but it has also encouraged them to hide behind constitutional shields.

IV. TOWARD SELF-SUSTAINING DEMOCRACY

What’s a TLO to do? On one hand, the very existence of a TLO means that there is substantial transnational normative consensus about the shape of a particular legal field. But on the other hand, the consensus may not be very sharp as it applies to concrete examples on the ground. The vague positive ideas that float around a TLO may have attracted consensus only because they are vague. This would not be the only time that law has had an attraction in theory that it was unable to cash out in practice. As Karl Llewellyn famously said to the first-year law students at Columbia Law School in 2013 when he gave the lectures that turned into *The Bramble Bush*:

You have come here to embark upon the study of the law. . . [A]round [the law] I take it, there floats a pleasant haze. If it were not pleasant, you would not be here. Perhaps you would not, if there were no haze.¹¹⁷

The transnational legal order around constitutions is also full of pleasant haze as it attempts to encourage liberal and democratic constitutions with all of the good things they promise. There is clear international agreement that a government that breaks its own constitution deserves criticism; the (relatively) swift reaction to the Polish government's activity when it passed unconstitutional laws and then tried to muzzle the Constitutional Tribunal when it said so or the criticism of the Turkish government for calling a state of emergency and engaging in a massive purge of all critics even those not involved in planning or staging the coup attempt, shows as much. It is also clear that certain particular tactics, in particular removing presidential term limits from a constitution or enlarging a court's membership in order to pack it, also generate some push back from the TLO.

But democrats these days are more clever than their judges. They recognize that the world's constitutions are full of worst practices just as they are full of best practices. Very long terms of presidential office have graced constitutions that have passed TLO muster. So have other executive-enhancing practices like authorizing executive line-item vetoes, allowing presidents to call referenda to bypass legislative proposals, and assigning the president the ability to appoint judges to a peak court. In each case, there are other perfectly reasonable democracies that have those constitutional arrangements, which makes it hard for the TLO community to criticize these practices when they see them. Thus, the consensus seems to be that unless all – or even most – uses of a particular constitutional practice lead to dictatorship, then it escapes with only mild condemnation at most. It may not be a best practice; it can even be a worst practice. Democrats can amass a set of worst practices that are each acceptable somewhere, bundle them together and use these tactics to consolidate power without check.

If the TLO around constitutionalism is to have any traction at stopping the decline of liberal, democratic, constitutional systems, it will need better diagnostics to tell when a constitutional system is in trouble and more consensus over what norms are to be enforced. Of course, if such a consensus were easy, it would have been reached already. Making progress requires changing the frame.

We might start by changing the method that institutions within the TLO use. The constitutionalist TLO community loves checklists. If we browse through the main activities of some of the key institutions at the core of the TLO, we find that they have divided up good governance through constitutionalism into a number of manageable pieces, each of which gets separate treatment. Go to the

¹¹⁷ KARL LLEWELLYN, *THE BRAMBLE BUSH* 3 (1930).

International Idea website and one must immediately choose whether to focus on one branch of government or another, and within each branch, one must further concentrate on specific issues to get advice.¹¹⁸ The chapters review things one should think about to design a sensible legislature, build an independent judiciary, work out whether decentralized government is a good thing in the particular location. Within those institution pigeon-holes, there are further classifications into forms of institutional design. But nothing puts the pieces together into a coherent whole. Go to the National Democratic Institute website, in the democratic governance section, and one is immediately directed to various specific issues. For example, under legislatures, one can get advice on legislative committee structures, the role of the speaker and so on.¹¹⁹ The United Nations Development Program's Guidance Note on Constitutional Drafting Processes deals primarily with the getting the right process in place for drafting constitutions and says little about substance.¹²⁰ One has to look up advice for each particular issue one by one – how to draw election districts, how to include more women in legislatures, how to set up the internal management of the judiciary or how to write a constitution – without in the end going back to some coherent vision of what a constitution should do once all of the parts are in place and interacting.

Even the gold standard institution providing constitutional advice, the Venice Commission, deals with one issue at a time. When the Hungarian constitutional consolidation was proceeding apace, for example, the Venice Commission sent separate teams to assess the draft constitution, then the new constitution as a whole, then particular constitutional amendments. While that made a certain amount of sense since they constituted a sequence, other more specialized evaluations were being organized along the way as one-off assessments. So there were separate teams to review the media law (twice), the reorganization of the judiciary (twice), the reorganization of the Constitutional Court, the new election law, the new law on ethnic minorities, the new law on religious organizations, the new law reorganizing the prosecutor's office, the new

¹¹⁸ INTERNATIONAL IDEA, A PRACTICAL GUIDE TO CONSTITUTION BUILDING <http://www.constitutionnet.org/book/handbook> . As the publicity for the guide explains, one can download the whole book or one can download each chapter separately. Chapters focus on human rights, executive branch, legislative branch, judiciary, and decentralization (federalism). One chapter deals with “cross-cutting issues” and references political principles (like the role of religion in the state). Each chapter is written by a different team of authors and, while they are not flat-out contradictory, they also do not work together to create a systemic picture of constitutionalism as such.

¹¹⁹ NATIONAL DEMOCRATIC INSTITUTION, DEMOCRATIC GOVERNANCE at <https://www.ndi.org/governance> .

¹²⁰ UNITED NATIONS DEVELOPMENT PROGRAM, UNDP GUIDANCE NOTE ON CONSTITUTION-MAKING SUPPORT, 2014, at <http://www.onu.cl/onu/wp-content/uploads/2016/06/Constitution-Making-Support-Guidance-Note.pdf>

freedom of information act, and so on.¹²¹ While each team of Venice Commission experts did an excellent job on their particular topic. Also, the Venice Commission itself assigned one particular team of experts to all of the broad assessments of the constitution and its amendments so there was continuity within a single subject matter and it did the same for repeat analyses of a particular area where the job had to be done twice because of amendments that were alleged not to have met the first set of criticisms (with regard to the media and judiciary, in particular). That said, the Venice Commission teams were clearly limited by their mandate (and the translations available to them) to review one law at a time. Because different experts worked on different aspects of the constitutional consolidation of power, no particular team got to see everything. Each individual assessment swam in its own lane, so to speak, unable to take account of everything else happening in the pool.

Constitutional governance is a huge area with many different specialized nooks and crannies. But the structure of normative assessment of constitutional government – parceled out across experts in election law, experts on media laws, experts on the judiciary or on legislatures or on human rights – allows important things to fall between the cracks. This can lead to disasters because constitutional provisions have important interaction effects. Whether rule A works well will depend on what rule B is. But if rule A is assessed by one team and rule B is assessed by another, no one has responsibility for spotting the fatal the interaction between the two.

Take one of most famously consequential interaction effects in the history of constitutional drafting. In the Weimar Constitution of inter-war Germany, Article 25 permitted the President of the Republic to dissolve the Parliament, though only one time for one reason. Elections had to be held within 60 days after a parliamentary dissolution.¹²² This was a perfectly reasonable rule, especially in Weimar Germany where it was hard to form stable parliaments. Unworkable parliaments could be put to an end and the electorate would be asked to create a new mandate. That made good democratic sense. So, a constitutional consultant with a checklist should say: Check! Good rule!

But then in that same constitution, Article 48 gave the President the power to declare a state of emergency “in case public safety is seriously threatened or disturbed.”¹²³ Such an awesome power should have a check, according to best practices, and Article 48 had one. The President had to inform the Parliament immediately about the state of emergency and the Parliament could order a halt to the emergency if it did not agree that the emergency was warranted. The constitutional consultant with the checklist would again say: Check! Good rule!

¹²¹ For a list of reports that the Venice Commission has written about Hungary since 2010, see <http://www.venice.coe.int/webforms/documents/?country=17&year=all>.

¹²² Weimar Constitution, Article 25, at https://www.zum.de/psm/weimar/weimar_vve.php .

¹²³ WEIMAR CONSTITUTION, Article 48.

As history now tells us, there was a problem when the two rules were used together. President Hindenburg first dissolved the Parliament under Article 25 at his Chancellor's urging. And then, before elections could be held, he once again took his Chancellor's advice and invoked Article 48. (The Chancellor at the time was one Adolf Hitler.) Both actions were completely constitutional on the surface, but once the Parliament was dissolved legally under Article 25 it was no longer around to object to the emergency measures taken under Article 48. While each article taken alone could pass constitutional muster since those powers exist in many constitutions and the Weimar Constitution possessed the requisite checks on their exercise, the interaction between the two was fatal to the republic and to the constitutional order. And more.

A checklist approach to constitutions cannot spot these interaction effects. I think that this is the main reason why the key institutions of the TLO have been slow to react to the rise of democratorships. Democrators are, after all, elected. That satisfies the basic premise that governments are democratic. The democrator will often follow the rules laid down in achieving constitutional change by using the existing amendment procedure (Orbán and Erdogan) or by calling a new constitutional convention according to the established rules (Chávez and Correa). That seems to satisfy the good governance checklist that the methods of constitutional change used are themselves constitutional. The constitutional changes will generally consist of a package of new rules and institutional design elements in which each one individually can be found somewhere in a perfectly reasonable constitution, as we have seen. Abolition of presidential term limits and expanding the number of judges on a peak court in order to be able to pack it seem to be the only exceptions. But the interaction effects that result from combining reasonable individual rules can be fatal.

Take one example from the new Hungarian constitution. The Fidesz constitution created a trap that can be snapped in case any other party wins an election over the next several election cycles. The constitution created a three-person National Budget Council with the power to veto any future budget that adds to the national debt,¹²⁴ which any foreseeable budget will do. Two members of the budget council were chosen by the Fidesz two-thirds parliamentary majority from among their own loyalists for terms of six and twelve years and one member was chosen by the President of the Republic, who, since he was also elected by the Parliament, is affiliated with the governing party as well. (The President of the Republic is a former Fidesz MP.) Council members can be replaced only if two-thirds of the Parliament can agree on their successors when their terms are over. Absent a future two-thirds majority (which would mean that as long as Fidesz holds one third of the seats in a future Parliament), a Fidesz majority on the budget council could stay in place indefinitely. As a result, any future government must follow an economic course agreed on by a council whose

¹²⁴ FUNDAMENTAL LAW OF HUNGARY, Article 44.

members were all elected by a particular government. That is a way to entrench a particular economic policy for a long time.

But the budget council has an even more awesome – and structurally more worrisome – power than that. The constitution requires the Parliament to pass a budget by 31 March of each year. If the Parliament fails to do so, the President of the Republic can dissolve the Parliament and call new elections.¹²⁵

When the provision on parliamentary dissolution is put together with the composition and terms of the budgetary council, the constraints within which any future government must work are clear. If a new non-Fidesz government tries to adopt a budget that adds to the debt, that budget can be vetoed by the all-Fidesz budgetary council at any time, including on the eve of the budget deadline given in the constitution. The Parliament would then miss the deadline and the President – also named by Fidesz and serving through 2022 – could call new elections. And this process could be repeated with annual elections until an acceptable (to Fidesz) government is voted back into power.

The Fidesz government may have created this unfortunate interaction effect inadvertently in an earnest attempt to create a binding mechanism to achieve budget discipline. But when one sees a government that refuses to share power with the political opposition and has weeded all opposition members out of civil service positions, public media, and independent agencies, then one doesn't have a great deal of hope that this government would allow another party to govern for long.

Bad interaction effects in otherwise reasonable constitutions can sneak in accidentally, but they are also the hallmark of clever democratorships. I have called this the Frankenstate problem:

Victor Frankenstein's monster—nameless in Mary Shelley's novel—was assembled from various component parts of once recognizably reasonable bodies. However, he went on to look and act a monster. The Frankenstate, too, is composed from various perfectly reasonable pieces, and its monstrous quality comes from the horrible way that those pieces interact when stitched together.¹²⁶

One can think of other bad interaction effects, including the one that brought down Hungary's 1989-1990 constitution in the face of the 2010 election results. Fearing that many small parties would make it impossible to form stable parliamentary majorities, the drafters of Hungary's 1990 election law gave the winning plurality party extra seats to boost their chances of getting a stable majority. At the same time, knowing that the 1989-1990 constitution had been written quickly, the constitutional framers did not want to entrench it too deeply.

¹²⁵ FUNDAMENTAL LAW OF HUNGARY, Article 3(3)(b).

¹²⁶ Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*. 26 GOVERNANCE 559-562, 560 (2013).

As a result, they kept the constitutional amendment rule, left over from the communist constitution, that any provision could be changed by a single two-thirds votes of the Parliament. Both fears proved unfounded: Hungary quickly settled on a stable party structure that, by 2010, meant that there were two dominant parties and the 1989-1990 constitution came to be taken for granted as a functioning document that worked well. When the disproportionate election law therefore brought a democrat to power in 2010 with a two-thirds parliamentary majority, the stage was set for nonconsensual constitutional change that destroyed Hungary's "end of history" constitution.

These examples should counsel the TLO community to rethink its normative constitutional standards. It is impossible to imagine agreeing on detailed one-size-fits-all constitutional institutions across the board (a model election code, a precisely constructed legislature) given the diversity of reasonably well-functioning democratic and constitutional governments in the world, but it may be possible to develop holistic standards that look at what happens when various constitutional provisions interaction. Such standards would not rely on getting into the weeds on every single aspect of constitutional design. A holistic standard should focus the TLO community's attention on what really matters about liberal, democratic constitutionalism: that it is not self-destructive.

I would argue, then, for a new normative standard by which to assess constitutional systems of government: a liberal, constitutional democracy must be self-sustaining. Both constitutions and democracies are open-ended experiences in self-governance. If the principles underlying both constitutionalism and democracy are to be honored, one political generation should not be able remove the possibility of self-governance from future generations. The openness to having one's successors govern themselves also goes a long way toward realizing the liberal promise of democratic constitutionalism.

The Weimar Constitution was not self-sustaining – because emergency powers that were invoked when the Parliament was dissolved led to dictatorship. The present Hungarian constitution is not self-sustaining – because an unbalanced budget proposed by a future government could be used as an excuse to bring down elected governments repeatedly until a particular political party regains control of the levers of power. The weaknesses of the Venezuelan constitution are becoming clear at President Chávez's successor, Nicolás Maduro, has refused to accept the results of last year's election – in which his party lost as it grappled with an economic crisis. Maduro's state of emergency declaration, rejected by the Parliament, has been upheld by the very court his predecessor packed.¹²⁷ Constitutional experts see few ways to require Maduro to govern with a

¹²⁷ BBC, *Venezuela crisis: Maduro's State of Emergency 'Constitutional'*, BBC NEWS, 20 May 2016, at <http://www.bbc.com/news/world-latin-america-36339721> .

Parliament dominated by his opponents.¹²⁸ The Chávez constitution ultimately concentrated so many powers in the hands of the President that no parliamentary election can dislodge him. The last possibility – using the referendum process to generate a recall vote – may yet work, but it relies on the hand-picked members of the Election Commission to certify the question and recognize when the signature requirements are met.¹²⁹

Of course, it is not always so clear whether constitutions have built-in harmful interaction effects until a weakness reveals itself. All the more reason to develop expertise about these democratorships and the tricks they have learned already while thinking through how to train experts to spot interaction effects. We are seeing the rise of Frankenstates because right now the democrators are more clever than the TLO assessors.

If we start from the principle that liberal constitutional democracies should be self-sustaining, at least we know what to look for. If the TLO community is in the business of assessing the normative bona fides of constitutions around the world, it would be better off having constitutional generalists look at whole systems and how the parts function together rather than simply sending election specialists off for one mission and experts in legislative committee structures or judicial selections processes off on another. Specific advice like that is useful, of course, if one already has a functioning liberal, constitutional-democratic system or leaders who sincerely want to create one. But ultimately the experts who look at one isolated area – election law or the structure of the cabinet – cannot really tell much about self-sustainability of the liberal, democratic constitutional order. Until experts learn to see a constitution as a system and ask whether the system can last to allow the next generation (or the next electorate) to make its own choices about how it wants to be governed,

¹²⁸

Political analysts say all the constitutional options to force Maduro from power face likely rejection by the Supreme Court or the National Electoral Council, both of which the opposition accuses the president of packing with allies. The Supreme Court has struck down the opposition's powerful two-thirds majority in the National Assembly and dealt it a series of other blows. "All these paths can be torpedoed by the constitutional chamber (of the Supreme Court), in an abusive exercise of its authority," said constitutional law expert Jose Ignacio Hernandez.

Maria Isabel Sanchez, *Venezuela: Opposition Vows All Means, Including Constitutional Amendment, to Oust Maduro*, CONSTITUTION.NET, 9 March 2016, at <http://www.constitutionnet.org/news/venezuela-opposition-vows-all-means-including-constitutional-amendment-oust-maduro>

¹²⁹ Guardian Staff with Reuters, *Nicolás Maduro Dismissal Threat Grows as Enough Venezuelans Sign Petitions*, THE GUARDIAN, 2 August 2016, at <https://www.theguardian.com/world/2016/aug/02/nicolas-maduro-dismissal-threat-grows-as-enough-venezuelans-sign-petitions> .

we will see the number of liberal, constitutional democracies shrink as the end of history comes to a crashing end.