

## THE IMPORTANCE OF CONSTITUTION-MAKING

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*In this short invited contribution, I argue that scholars and policy-makers need to shift focus from the moment at which the break with the old regime occurs towards the moment at which new constitutional orders are constructed. The constitution-making process in countries like Tunisia, Egypt, and Libya, for example, is likely to determine in large measure what these new regimes are likely to look like. In particular, I draw off of a case study of the 2009 military coup in Honduras, which was provoked by ex-President Zelaya's attempt to call a constituent assembly, to make two points. First, both constitutional theory and international law and politics have allowed constitution-making processes to occur in a vacuum—neither provides any real restraints on these processes. Second, the main risk of constitution-making is that powerful individuals or political parties use either real or manufactured majorities to impose constitutions on the rest of their societies. An urgent task in constitutional design and theory is therefore to construct models that will constrain this kind of constitution-making, and to find ways to enforce those constraints.*

Recent events in the Middle East and elsewhere, as well as recent scholarly contributions, have again pushed to the forefront questions of revolutionary change and democratic transition. The events in Egypt and elsewhere open up possibilities for democratization and for peaceful change in parts of the world where this was previously thought unlikely. But we must avoid idealizing these moments. Revolutions and constitution-making processes are often traumatic experiences, and transitions from authoritarian regimes can often prove to be false ones, replacing these regimes with new authoritarian or semi-authoritarian governments.<sup>1</sup>

The key question is thus the following: what determines the end state of revolutions? What factors cause a revolution to end up in an ultimately democratic or nondemocratic outcome? Here, I think it is important to recognize that revolutions and other types of regime change<sup>2</sup>

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1. See generally STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR (2010); Andreas Schedler, *The Logic of Electoral Authoritarianism*, in ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION 1, 1 (Andreas Schedler ed., 2006) (arguing, among other things, that “[a] large number of political regimes in the contemporary world . . . have established the institutional facades of democracy”).

2. Note that I do not in this essay carefully distinguish revolutions from other types of regime changes, such as coups, because my point does not depend on how the event is categorized.

are sequential events, with at least two major stages. In the first stage, new power holders replace existing power holders in control of the government. For the kinds of events being considered here, this replacement is usually done by extralegal means. From the standpoint of the existing legal regime, the shift to a new government is done illegally and generally in flagrant violation of the existing legal order. In the second stage, the new regime seeks to establish the rules under which it itself will be governed. This is the stage in which constitutions are written and new institutions created. In Egypt, for example, the first phase occurred when the people took to the streets and forced the removal of Mubarak. The second stage is ongoing—the interim military government is still at work planning the new constitution and preparing to hold the first set of elections.

We must pay more attention, both in scholarship and in international politics, to the second stage. In particular, we must be much more attuned to the process by which new institutions are constructed. Observers, diplomats, and international organizations often pay great attention to the dramatic moment at which an existing regime falls; these actors pay far less attention to the aftermath, when new institutions are constructed.

Similarly, international law has traditionally had nothing to say about these situations, and scholarship in both comparative politics and comparative constitutional law have both deemphasized the constitution-making process itself as an object of study. Traditional legal theory compounds the problem by viewing constitution-making as a kind of legal black hole. Hans Kelsen's theory of revolution, for example, holds that revolution occurs precisely when there is a decisive legal break with the old constitutional or legal order.<sup>3</sup> Once such a break has occurred, the state is in a kind of legal no-man's land until the new constitutional order has been constructed—there is no legal standard for evaluating the propriety of acts by the interim regime.

The manner in which the old regime collapses generally does not determine how the process of constructing the new regime will turn out. Instead, a revolution or coup generally leaves a chaotic jumble of emerging parties and civil society groups in its wake. The shape of the new regime will be determined by how these groups interact and participate to construct the basic institutions of the new regime. And thus it is the second stage that is likely to govern the normative desirability of revolutions and other overthrows of existing regime—the key question is not

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The broad point is that regardless of how a regime change occurs, we should be paying much more attention to the attempt to construct a new regime.

3. See generally HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 117 (Anders Wedberg trans., 1945).

how the old regime was overthrown, but rather what the new regime looks like. This process, then, is exactly where we should focus our energies as scholars. Yet, despite an outpouring of high quality recent work, it is still undertheorized.<sup>4</sup>

Constitution-making holds great promise. Constitutional politics has the potential to establish the legitimacy of a new democracy across a broad spectrum of social groups. This sort of legitimacy is the foundation of a vibrant democracy. But constitution-making is also dangerous and commonly abused; constitution-making is often seized to impose the agendas of particular social groups or, even worse, of particular actors who are trying to consolidate power. Such processes are likely to lead to poorly functioning and unstable states. Thus, an important but very difficult task is to devise ways to prevent this kind of abuse from occurring. Rather than designing constitution-making in an attempt to reach some idealized end state, we may be better served by developing a “risk averse” model of constitutionalism, where the major goal is to prevent democratic breakdown.

The rest of this response is organized as follows: In Part I, I lay out the importance of my object of study, explaining why we should focus on the constitution-making moment as the key to understanding the effects of revolutions, coups, and other methods of fundamental regime change. In Part II, I explain the ways in which this area is a traditional legal and constitutional theory, as well as international law, even when fortified by some pro-democratic norms, pays no real attention to questions regarding the quality of democracy in existing regimes or to the constitution-making processes. Part III gives an example of these problems in practice, drawing off of my own recent work as part of a team analyzing the 2009 coup in Honduras. While the international community was fixated on the coup itself, it offered almost no responses to the dangerous abuses of constitution-making that both preceded and followed it. The Honduran example is cautionary—it shows that constitution-making processes are often dangerous exercises.

Part IV jumps off from another observation based on the Honduran case: the chief risk of constitution-making may be the risk that it will be abused by powerful political actors or social groups for their own ends. Put another way, the main risk of constitution-making seems to be that it may be excessively majoritarian: politicians and social groups may manufacture momentary majorities, either real or invented, to remake the state in their image. This kind of constitution-making does lasting dam-

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4. For some examples of recent scholarship, see FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING (Laurel E. Miller, ed., 2010); Ozan Varol, *The Democratic Coup d'Etat*, 53 HARV. INT'L L.J. (forthcoming 2012); William Partlett, *Making Constitutions Matter: The Dangers of Constitutional Politics in Current Post-Authoritarian Constitution Making*, 38 BROOK. J. INT'L L. (forthcoming 2012).

age to democratic institutions. Finally, Part V concludes by suggesting that there is an urgent need to develop guidelines that will help to stop this kind of constitution-making, and that will incorporate these ideas into domestic and international politics. I do not here develop a complete theory of constrained or risk-averse constitution-making; that is a task I and other scholars have worked towards in other work.<sup>5</sup> My goals here are more modest: I point out the difficulty in achieving constraint in these moments, and the urgent need to do so.

#### I. THE IMPORTANCE OF THE CONSTITUTION-MAKING MOMENT

No account of a regime's upheaval is complete without considering what happens next, as coups and revolutions do not and cannot end at the moment in which the old regime dies. The new regime needs to organize itself in some fashion, by establishing fundamental rules. This is going to be true regardless of which political and social groups hold power after the coup or revolution. In the past, new authoritarian regimes might have settled for organizing power with some form of provisional statutes or other document short of a constitution. This would have permitted the regime to establish working rules for dealing with intra-elite disputes, while also giving flexibility.<sup>6</sup> Recently, though, virtually all new governments have moved relatively quickly towards the establishment of new constitutions. And even authoritarian regimes have generally clothed these constitutions in democratic garb. As Levitsky and Way have recently shown, there is now enough international pressure towards democracy that even basically authoritarian regimes like Iran and the more authoritarian post-Soviet states create some democratic institutions, such as elections, within otherwise non-democratic states.<sup>7</sup>

Egypt poses a classic variant on the problem—opposition protests resulted in the overthrow of the authoritarian regime headed by Mubarak in February 2011. But this left the state with essentially no framework for governance; the military therefore established a temporary regime, quickly establishing a provisional constitution (based on amendments to the old constitution) in March 2011 and promising to hold elections by late 2011. The provisional constitution, which was drafted by the military and approved via wide margins in a referendum, was never intended to

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5. See David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. (forthcoming 2012).

6. Even classical, personalized authoritarian regimes like Pinochet's Chile in the 1970s sought to impose some form of organizing principles, initially in the form of a Statute of the Junta, and later a full-fledged Constitution. As Barros argued, these documents meant something—they served to act as checks on Pinochet's power by other members of the junta. However, even this authoritarian regime eventually moved towards adopting a permanent constitution, which came into effect in 1980. See generally ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 167–254 (2002).

7. These regimes they refer to as “competitive authoritarian” states. See LEVITSKY & WAY, *supra* note 1, at 1.

be a permanent document.<sup>8</sup> Instead, the interim regime established vague plans for the creation of a new text sometime after the first set of elections were held.

Both the timing of elections and the process for writing the new constitution have created tension among the various social groups in Egypt. Islamist groups, led by the Muslim Brotherhood, have dominated the initial elections for Parliament, and—after initially promising not to run a candidate—captured the presidency.<sup>9</sup> The military and its allies (particularly the judiciary) have in various ways—some clumsy, others more sophisticated—tried to limit the electoral power of Islamist groups. The military's initial attempts to impose a set of principles on the constitution-making process were met with widespread derision and renewed protests,<sup>10</sup> but the courts have subsequently had considerable success in limiting the power of the Muslim Brotherhood. After the supreme administrative court suspended the constituent assembly appointed by the Parliament, the supreme constitutional court dissolved the Parliament itself, holding that the electoral rules used to elect part of the legislature were unconstitutional.<sup>11</sup> What has emerged is a complex negotiation process between forces, the outcome of which will determine the future of the Egyptian state.

These conflicts show that the revolution did not in any sense end with the overthrow of Mubarak. Nor will it be over when the first set of elections are held, because the new Parliament will still lack a constitutional text or other principles to guide its work and to establish the basic institutional framework for the country. Moreover, the fights staged amongst the various political groups and between those groups and the government are critical because they will shape the new constitution and thus the basic character of the new regime. A constitution written by Islamist groups like the Muslim Brotherhood working alone, or by the military working alone, would look very different from the constitution written by secular political groups or by all of the new groups working in cooperation. This first set of parliamentary elections and the new constitution will define what the Egyptian revolution means.

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8. Turnout at the referendum was 41.2%, and 77% of voters approved the constitutional changes. *Egypt Referendum Strongly Backs Constitution Changes*, BBC NEWS, <http://www.bbc.co.uk/news/world-middle-east-12801125> (last updated Mar. 20, 2011, 6:05 PM).

9. See Leila Fadel, *Final Results Confirm Islamists Winners in Egypt's Elections*, WASH. POST (Jan. 21, 2012), [www.washingtonpost.com/world/.../gIQAXpwbGQ\\_story.html](http://www.washingtonpost.com/world/.../gIQAXpwbGQ_story.html) (stating that the Freedom and Justice Party won 47% of seats in the lower house, and the conservative Islamist Salafist Nour party won 25%).

10. These principles offered some guarantees of the liberal nature of the new democracy, but also gave the military considerable autonomy and power over the new state. See *Declaration of the Fundamental Principles for the New Egyptian State, Draft Dated November 1, 2011: A Commentary* 4 (International Institute for Democracy and Electoral Assistance, 2011).

11. See INTERNATIONAL FOUNDATION FOR ELECTORAL SYSTEMS, ELECTIONS IN EGYPT: IMPLICATIONS OF RECENT COURT DECISIONS ON THE ELECTORAL FRAMEWORK 9–10 (2012), available at [http://www.ifes.org/~media/Files/Publications/White%20PaperReport/2012/Egypt\\_SCC\\_Decisions\\_August9.pdf](http://www.ifes.org/~media/Files/Publications/White%20PaperReport/2012/Egypt_SCC_Decisions_August9.pdf).

And this is the normal course of affairs. There may be some cases where one political and social group (i.e., the military) has so much power that it will make no difference what the electoral and constitutional processes look like: the outcome is foreordained by the dominance of that group.<sup>12</sup> But this situation is highly unusual—in most recent situations involving regime change (for example, Venezuela after Chavez came to power, Egypt, and now Libya) the situation is highly fluid, with new social groups and political parties organizing and a variety of new groups vying for control. No one faction has clear control in the new regime. In these cases, the constitution-making process will indeed be one of the key moments in shaping the character of the new regime. Yet, as I show in Part II, these processes fall through important gaps in both legal theory and in international law and politics.

## II. THE SILENCE OF LEGAL THEORY AND INTERNATIONAL LAW

In this section, I explain why constitution-making moments constitute a kind of “wild-west” both in domestic constitutional theory and in international law. Kelsenian theories of revolutionary break emphasize that revolutions occur, legally, when the new regime makes a decisive legal break with the old one. In other words, they occur when the old constitution is expressly abrogated; its procedures and substantive constraints are thrown out. In practice, virtually all new constitution-making occurs this way, because it is rare for an existing constitution to have a provision allowing its own replacement by an entirely new text. But this leaves a vacuum, because new constitutions are then written outside of any set of domestic legal constraints. International norms do not fill that vacuum; international law, even when concerned with the promotion and maintenance of democracy, has not developed any clear rules about what constitution-making must look like.

### A. *Domestic Constitutional Theory*

Kelsen defines a revolution as an event that replaces the “entire legal order.”<sup>13</sup> In other words, the constitution is altered or replaced by some process other than the one contemplated in the text, and as result, the old constitution and laws lose their efficacy. In practice, almost all constitution-making follows this route. Very few constitutions allow for the calling of a constituent assembly within their text, and thorough replacement of a constitutional text by means found within an existing constitutional order is, ordinarily, likely to prove difficult or impossible.

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12. Some classic authoritarian regimes, like Chile post-1973, might fit this model: the post-authoritarian regime was dominated by a small clique of military officials. But it is notable that even in Chile, the military regime eventually moved towards writing a new constitution, which came into effect in 1980. And as Barros shows, the final product was heavily influenced by the negotiations between different factions of the military and by the involvement of commission’s composed of both right-wing and centrist lawyers. See BARROS *supra* note 6, at 168.

13. See KELSEN, *supra* note 3, at 118.

Constitutions, in other words, contemplate their amendment but almost never their replacement. To take examples from recent Latin American history, the Colombian Constitution of 1991, the Venezuelan Constitution of 1999, the Ecuadorian Constitution of 2008, and the Bolivian Constitution of 2009 all utilized constituent assemblies to replace their constitutional texts, and the use of a constituent assembly to replace the old constitution was not mentioned in any of the old constitutions.

How, then, did these events occur? In some instances they are basically extralegal—courts simply refrain from passing on their legality *ex ante*, or the assembly proceeds even in the face of a negative judicial decision.<sup>14</sup> In other cases, the court upholds the assembly, generally on the grounds that there is a residual power in the people to make or unmake their constitutional order. In 1990, for example, the Colombian Supreme Court held that the president could proceed with elections to call a constituent assembly, essentially on the grounds that “the people . . . is the primary constituency from which all constituted and derivative powers emanate.”<sup>15</sup> Thus, despite a constitution which stated only one method of constitutional amendment (approval by an subabsolute majority of congress in two separate congressional sessions), the public always has a residual power to call a constituent assembly to replace the existing political order.

The consequences of both courses of events are the same—the constitution-making process is subject to no clear rules or constraints under domestic law. In the Colombian case, for example, the court held that because “the Nation [is] is the primary constituency which takes on a sovereign character, . . . it cannot have any limits other than those it imposes on itself, nor can the constituted powers revise its acts.”<sup>16</sup> In other words, the constituent power acts outside of all existing legal principles or restraints.<sup>17</sup> The Venezuelan court took on the same view in 1999, when it held that the constituent assembly convoked by Chavez was a supraconstitutional body that had the power to dissolve or reorganize all of the existing branches of government while it worked to write a new

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14. The Honduran example, discussed below in Part III, is an example of this route—Zelaya attempted to move forward with a non-binding vote on whether to hold a constituent assembly despite judicial decisions to the contrary.

15. RAFAEL BALLÉN M., *CONSTITUYENTE Y CONSTITUCIÓN DEL 91*, at 169 (1991) (giving the full text of the decision).

16. *See id.* at 170–71.

17. The Pakistan Supreme Court, in the case *Syed Zafar Ali Shah v. General Pervez Musharraf, Chief Executive of Pakistan*, (2000) 52 PLD (SC) 869, attempted an *ex post* halfway house between legitimating the coup of President Musharraf and restraining it. It thus legitimated the coup on grounds of public necessity while stating that the regime had to follow the existing constitution and was barred from altering its fundamental principles. Such approaches, however, are rare in constitutional theory, and even rarer when dealing with bodies like constituent assemblies.

constitution.<sup>18</sup> As often conceived, domestic law has nothing to say about these moments.

### B. *International Law*

International law has traditionally held a state's form of government to be irrelevant. Historically, this was because international law was concerned with relations between states rather than with the relationship between a state and its own citizens.<sup>19</sup> But even as international law has built up a formidable body of law governing human rights, which prevents a state from taking certain kinds of actions against its own citizens, the rule that international law is unconcerned with the internal governance of a state has persisted. For example, in *Nicaragua v. United States*, the International Court of Justice held that the United States' claim that the Nicaraguan government was attempting to impose a "totalitarian" form of government was irrelevant: "Every State possesses a fundamental right to choose and implement its own political, economic and social systems."<sup>20</sup>

Changes in international law have been slow and subtle. Some scholars have argued that there is an emerging customary international law norm of democracy.<sup>21</sup> But this requires consistent state practice coupled with an opinion by states that they are following that practice because it constitutes binding international law (*opinio juris*). Given the variation in types of governance that still exists around the world, and pronouncements like the statement by the *Nicaragua* court, such a customary norm seems doubtful.<sup>22</sup>

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18. See 77–80 REVISTA DEL DERECHO PUBLICO 111 (1999); see also ALLAN R. BREWER-CARÍAS, DISMANTLING DEMOCRACY IN VENEZUELA: THE CHÁVEZ AUTHORITARIAN EXPERIMENT 58–60 (2010) (discussing this case and its implications); Joel I. Colón-Ríos, *Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia*, 18 CONSTELLATIONS 365, 369–72 (2011) (discussing the Venezuelan case as a way to use the idea of "constituent power" to get around legal constraints).

19. See, e.g., J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE I (4th ed. 1949) (defining international law as "the body of rules and principles of action which are binding upon civilized nations in their relations with one another").

20. *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, \*131 (1986); see also Fernando R. Teson, *Le Peuple, C'est Moi!: The World Court and Human Rights*, 81 AM. J. INT'L L. 173, 177–78 (1987) (criticizing ruling on grounds that the form of government, at least in extreme cases, is deeply relevant to the enjoyment of human rights in a given country and stating that "if the political system described as 'totalitarian dictatorship' results in a consistent pattern of gross violations of internationally recognized human rights, then that system cannot validly be 'chosen' by a state").

21. See, e.g., Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992).

22. I recognize that there are resolutions by both the U.N. Human Rights Commission and the U.N. General Assembly affirming or suggesting that democracy is a human right. See, e.g., Commission on Human Rights Res. 1999/57, Commission on Human Rights, 57th Sess., Apr. 27, 1999, U.N. CHR E/CN.4/RES/1999/57; G.A. Res. 55/2, pt. 5, U.N. Doc. A/55/L.2 (Sept. 8, 2000). However, as with most of the other instruments studied in this section, the Human Rights Commission and General Assembly Resolutions do not constitute a form of binding international law.

At most, there are now some norms within regional treaties that bear on or protect the existence of international democracy; there appear to be no norms at the global level. And most of these norms are non-binding forms of soft law. For example, the Commonwealth nations associated with the British crown have signed multiple declarations expressing a commitment to democratic governance.<sup>23</sup> The Treaty on European Union in its current incarnation states democracy as a basic principle of the Union and states that adherence to the essential principles should be a core criterion for admission.<sup>24</sup> Finally, the Inter-American Democratic Charter (which does not enjoy the formal status of a treaty) explicitly states a “right to democracy,” and the preamble states that “cooperation between American states requires the political organization of those states based on the effective exercise of representative democracy.”<sup>25</sup> The agreement also creates certain instruments that would aid the Organization of American States (OAS) in assessing and responding to breakdowns in democracy.<sup>26</sup> These are all important regional pronouncements, but none of them really represent binding international norms—they are all effectively forms of international soft law.<sup>27</sup>

Perhaps more interesting are those few instances where guarantees of democratic governance, along with enforcement mechanisms, have been incorporated into regional treaty regimes. In both the Latin American and African cases, the emphasis is on avoiding coups or other interruptions of democratic governments. Little attention is paid to other problems, such as reconstituting states after interruptions or avoiding erosions in democracy from overreaching presidents or other figures. They therefore preserve international law’s traditional focus on order within the international community, without expanding the focus to look more broadly at democratic governance. The Charter of the OAS states that “[a] member of the Organization whose democratically constituted government has been overthrown by force may be suspended” by the

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23. See, e.g., Heads of Gov’t in Harare, Zim., *Harare Commonwealth Declaration*, THE COMMONWEALTH (Oct. 20, 1991), [http://www.thecommonwealth.org/shared\\_asp\\_files/GFSR.asp?NodeID=141095](http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=141095) (reaffirming a commitment to “democracy, democratic processes and institutions”).

24. See Consolidated Version of the Treaty on European Union art. 2, Sept. 5, 2008, 2008 O.J. (C 115) 13 (stating democracy as a basic value); *id.* art. 49 (requiring that states “respect[] the values” referred to in article 2 to become members of the Union), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF>.

25. *Inter-American Democratic Charter*, ORG. OF AM. STATES (Sept. 11, 2001) pmbl., art. 1, [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm).

26. The Charter allows a state to request the support of the Secretary General of the OAS whenever the democratic institutional order may be at risk. See *id.*, arts. 17–18. It also provides that the OAS should immediately use diplomatic means to repair an “unconstitutional interruption” of democracy or a “unconstitutional alteration of the constitutional regime” that significantly impairs democracy in a country. See *id.*, arts. 20–21. If these efforts fail, the OAS is empowered to suspend the violating state by a two-thirds vote. See *id.*, art. 21.

27. International soft law is not binding on states or individuals, although it often has considerable persuasive or other significance. See, e.g., Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L L. 499, 499 (1999).

OAS.<sup>28</sup> Somewhat similarly, the Constitutive Act of the African Union provides that “[g]overnments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.”<sup>29</sup> Both of these are essentially anti-coup clauses; they prohibit the unconstitutional replacement of one democratic regime by another, but they say nothing about post-revolutionary circumstances where a new democracy is being constituted, or about situations where an incumbent leader is taking steps to weaken democracy.

This kind of a focus—on dramatic interruptions like coups rather than on other types of events that threaten democratic governance in subtle but important ways—is confirmed by looking at the way in which these instruments have been carried out, and more broadly on how the international community responds to different kinds of threats to democracy. The suspension mechanisms in the OAS and African Union are sometimes invoked in response to unconstitutional overthrows of democratic governance, as occurred in Honduras after President Zelaya was removed in 2009,<sup>30</sup> and in Cote d’Ivoire, where President Bedie was overthrown by a military coup in 1999.<sup>31</sup> But where Hugo Chavez in Venezuela used his lawfully elected position to undermine other democratic institutions by, for example, closing and intimidating hostile media and weakening and packing the country’s Congress, Supreme Court, and control institutions like the Ombudsman, the response of the OAS was much more tepid. The organization has done virtually nothing, because in the absence of an unconstitutional interruption in democracy that might trigger the suspension clause, it is able to monitor and facilitate dialogue only at the invitation of the Venezuelan state.<sup>32</sup>

Even if international organizations wanted to intervene, it is unclear whether and how they could do so. As noted by Franck and Thiruvengadam, there is “no firm evidence of rules applicable to the process of constitution making” within international law.<sup>33</sup> While the authors try to leverage both the International Covenant on Civil and Political Rights and recent practice as a source for emerging legal norms, the most that can be found is a general set of principles about public partici-

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28. *Protocol of Amendments to the Charter of the Organization of American States (A-56)*, ORGANIZATION OF AMERICAN STATES, WASHINGTON D.C. (Dec. 14, 1992), [http://www.oas.org/dil/treaties\\_A-56\\_Protocol\\_of\\_Washington.htm](http://www.oas.org/dil/treaties_A-56_Protocol_of_Washington.htm).

29. CONSTITUTIVE ACT OF THE AFRICAN UNION July 11, 2000, art. 30, *available at* [http://www.africa-union.org/root/au/aboutau/constitutive\\_act\\_en.htm](http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm).

30. *See* discussion *infra* Part III.

31. *See* Theodore J. Piccone, *International Mechanisms for Protecting Democracy*, in PROTECTING DEMOCRACY: INTERNATIONAL RESPONSES 101, 119 (Morton H. Halperin & Mira Galic eds., 2005) (discussing the Bedie case).

32. *See id.* at 107 (discussing the ineffectiveness of the OAS’s attempted responses to Chavez); *see also supra* note 26 (explaining the mechanisms created by the Inter-American Democratic Charter to protect democracy).

33. Thomas M. Franck & Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 3, 14 (Laurel E. Miller ed., 2010).

pation in constitution-making processes.<sup>34</sup> This is probably too vague a principle to be much good at restraining the risks posed by constitution-making that are outlined in Parts III and IV below.<sup>35</sup>

More broadly, the international community often responds far more forcefully and readily to regime changes than it does to the complex but more important series of events occurring after the regime change. Egypt and Libya offer recent examples: the attention of world media and world governments was fixated in winter and early spring 2011 on the fall of the Mubarak regime, and again in late spring and summer of 2011 on the attempts of the rebels to dislodge Quaddafi with NATO support. But the questions surrounding the subsequent construction of democratic governance in Egypt have received far less attention. There is little doubt that the new Libyan leaders will be in a similar position. The example of Honduras leading up to and following the 2009 removal of President Zelaya, which I lay out in the next section, offers similar examples.

### III. HONDURAS AS AN EXAMPLE OF THE SILENCE IN ACTION

In this section, I explain how Honduras offers an example of the gaps in domestic and international law that I laid out in Part II. The point is no longer that international law is wholly unresponsive to questions of form of government. The point is that that response was focused only on a narrow swath of issues. The OAS and other international actors responded vigorously to the illegal overthrow of President Zelaya in 2009.<sup>36</sup> However, there was virtually no international reaction to the various illegal actions taken by President Zelaya before the overthrow, which could have damaged the institutional framework of Honduran democracy. Nor is there currently any attention paid to the new government's movement towards rewriting the entire Honduran Constitution.

Moreover, this section supports my argument that changes in government are complex, multi-stage events, and that it is critical to expand the focus beyond the moment in which an old regime is brought down. The Honduran example is much closer to a coup than a revolution; but

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34. The authors use article 1 of the ICCPR, which creates a right to "self-determination," and article 25, which gives a right "to take part in the conduct of public affairs." *See id.* at 5–6.

35. I do not mean to imply that the international community is always uninvolved in constitution-making processes. Various post-conflict constitutions have been drafted with a high degree of United Nations involvement—one can think of East Timor, Afghanistan, and Kosovo, for example. *See, e.g.,* Vijayashri Sripati, *The United Nation's Role in Post-Conflict Constitution-Making Processes: TWAIL Insights*, 10 INT'L COMMUNITY L. REV. 411, 415 (2008). But these tend to occur in situations where the domestic state has been destroyed and domestic institutions and social groups gravely weakened. In such instances, the international community essentially substitutes for domestic institutions in constructing the new constitutional order, and it acts according to sets of best practices that it has developed rather than according to clear legal rules.

36. Most importantly, they quickly suspended Honduras from the Organization. *See, e.g.,* Ginger Thompson & Marc Lacey, *O.A.S. Votes to Suspend Honduras Over Coup*, N.Y. TIMES, July 5, 2009, at A6, available at <http://www.nytimes.com/2009/07/05/world/americas/05honduras.html?pagewanted=all>.

even though the events simply changed the identity of the ruler rather than thoroughly altering politics and society, the most important events may be occurring after the coup rather than during the coup itself. The actual change in regime in 2009—the irregular overthrow of President Zelaya—was an important event in Honduran politics and society, but it occurred in the middle of a much longer chain of events. Prior to the removal, Zelaya himself engaged in a series of events that were calculated to weaken Honduran democracy.<sup>37</sup> And the new regime has strongly suggested that it will seek to engage in either a significant constitutional reform or the writing of a new constitution.<sup>38</sup> How this constitutional reform process is carried out will go a long way towards determining whether Honduran democracy will be strengthened or gravely weakened in the longer run.

The analysis in this section is based heavily on work that I undertook, as part of a team including Noah Feldman, Brian Sheppard, and Leonidas Rosa-Suazo, to analyze constitutional issues surrounding the removal of Zelaya for the Commission on Truth and Reconciliation of Honduras. Our task was both to analyze the constitutionality of the actions of both Zelaya and those removing him, and to make prospective suggestions for constitutional reforms in order to prevent a recurrence and to strengthen Honduran democracy.<sup>39</sup>

Our essential finding was that both sides acted unconstitutionally at various key points. Zelaya won election in a political environment that is notoriously closed and exclusionary.<sup>40</sup> The political system is controlled by the two traditional parties, the Liberal and National parties. Moreover, these parties themselves are controlled by a small collection of largely homogenous elites that also control most of the economic power in the country.<sup>41</sup> Zelaya, who himself is part of this group, won election as an orthodox liberal, but began taking positions of a more “populist” variety that were at variance with the leadership of his own party. From a foreign policy perspective, he began aligning himself with Hugo Chavez, signing several agreements, for example, to receive subsidized petroleum and other kinds of aid.<sup>42</sup> From a domestic perspective, he adopted a vague

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37. See *infra* text accompanying notes 40–49.

38. See *infra* text accompanying notes 78–80.

39. The full text of this report is available in both English and Spanish. See Noah Feldman, David Landau, Brian Sheppard & Leonidas Rosa Suazo, *Report to the Commission on Truth and Reconciliation of Honduras: Constitutional Issues* (Fla. State Coll. of Law, Pub. Law, Research Paper No. 536, 2011), available at <http://ssrn.com/abstract=1915214>.

40. See Michelle M. Taylor, *When Electoral and Party Institutions Interact to Produce Caudillo Politics: The Case of Honduras*, 15 ELECTORAL STUD. 327, 328–29 (1996) (providing a useful overview of the basic nature and history of Honduran politics).

41. See *id.* at 331–32.

42. See, e.g., *Central America: Zelaya Plays the Chávez Card*, ECONOMIST, Oct. 30, 2008, available at [http://www.economist.com/node/12522958?story\\_id=12522958](http://www.economist.com/node/12522958?story_id=12522958).

discourse and policy in favor of participation by a broader set of actors.<sup>43</sup> He also began issuing increasingly strident attacks against the other institutions of the Honduran government, including the Congress and the Supreme Court.<sup>44</sup>

Zelaya's rhetoric aimed to delegitimize traditional political actors and to gain political support from a broader range of traditionally marginalized political groups. His root goal appeared to be the strengthening of his personal political power. He began signaling in late 2008 that he would seek to call a constitutional convention to write an entirely new constitutional text, replacing the current constitution of 1982.<sup>45</sup> While Zelaya never stated that he intended to reform the constitutional article prohibiting presidential reelection, and indeed stated that he intended to hold only one term in power, the widely held assumption was that he would use the convention to extend his own term.<sup>46</sup>

This effort was complicated by two features of the Honduran Constitution. First, Article 373 establishes only one method for constitutional reform: approval by two-thirds of Congress in two different congressional sessions.<sup>47</sup> It says nothing about the legality of a constituent assembly. Second, Article 374 establishes that certain provisions, including the prohibition on presidential reelection, cannot be reformed under any circumstances.<sup>48</sup> Article 239 enforces the prohibition on reelection by mandating that anyone who "breaks the prohibition or proposes its reform, along with those who support [that effort] directly or indirectly" will

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43. For example, one of President Zelaya's first acts as president was to sign a new "Law of Citizen's Participation." See Ley No. 30,917, 27 Jan. 2006, Ley de Participacion Ciudadana [Law of Citizen's Participation] Decreto 3-2006, LA GACETA, DIARIO OFICIAL [L.G.], 1 Feb. 2006 (Hond.), <http://pdba.georgetown.edu/Parties/Honduras/Leyes/LeyParticipacion.pdf> (stating that "sovereignty belongs to the people, from which emanates the powers of the State," and therefore that the government is based on "the principle of participatory democracy").

44. For example, Zelaya failed to present a 2009 budget to Congress by the constitutional deadline of September 15, 2008, and thus no budget was passed for that year. The Congress and Supreme Court both claimed that they received no budgetary allocations in 2009, up until the point when Zelaya was removed from power. See *Presupuesto 2009 no llega al Congreso Nacional [2009 Budget Does Not Come to Congress]*, LA PRENSA (Hond.) (Feb. 5, 2009, 11:02PM), <http://archivo.laprensa.hn/Pa%c3%ads/Ediciones/2009/02/06/Noticias/Presupuesto-2009-no-llega-al-Congreso-Nacional>.

45. See *Manuel Zelaya propone asamblea constituyente [Manuel Zelaya Proposed Constituent Assembly]*, EL HERALDO (Hond.) (Nov. 22, 2008, 11:15AM), <http://www.heraldo.hn/index.php/content/view/full/46876>.

46. See *id.*; see also *Buscan crear vacío de poder en Honduras [Seek to Create a Power Vacuum in Honduras]*, EL HERALDO (Hond.) (Jan. 16, 2009, 10:20PM), <http://eng.elheraldo.hn/content/view/full/69737> (describing the view of other political actors who believed Zelaya would attempt to perpetuate himself in power).

47. See CONSTITUCION POLITICA DE LA REPUBLICA DE HONDURAS [CN.] tit. VII, ch. I, art. 373, 11 Jan. 1982, as interpreted by Decreto No. 169/1986.

48. See *id.* art. 374 (rendering unamendable, inter alia, provisions dealing with the form of government, the national territory, the length of the presidential term, and the prohibition on being reelected president).

cease immediately in her office and be ineligible to serve any public function for ten years.<sup>49</sup>

At any rate, Zelaya pressed forward with his plans for the constituent assembly, issuing several decrees ordering the carrying out of a nationwide “consultation” or “poll” on June 28, 2009, to see whether the public supported the effort.<sup>50</sup> The decrees stated that the consultation would be non-binding and would be used as political support for Zelaya’s project.<sup>51</sup> An administrative court in May 2009 blocked the first decree, and the court’s order was not successfully appealed. Zelaya then essentially issued the same order under a slightly different name, and the court issued a “clarification” to its order to cover the new decree.<sup>52</sup> Nonetheless, Zelaya pressed forward with his plans. Allegedly, the Supreme Court opened a criminal investigation of the president on various grounds (including treason and abuse of authority) on June 26, 2009, and issued an arrest warrant, to be carried out by military officials, on June 27. The military arrived at Zelaya’s house on the morning of June 28 and, instead of taking him to the country’s Supreme Court as allegedly specified in the warrant, took him on a plane and carried him to Costa Rica.<sup>53</sup> Later that day, the Congress purported to “separate” Zelaya from the office of president and to appoint the president of the Congress (Roberto Micheleti) as interim president. The Congress took this action even though it lacked any explicit presidential impeachment or removal power.<sup>54</sup>

The public debate in Honduras about the legality of Zelaya’s actions centered largely on whether it was legally possible to hold a constituent assembly to write an entirely new constitution, including the prohibition on presidential reelection.<sup>55</sup> Those are very difficult questions to answer

49. See *id.* ch. VI, art. 239, 11 Jan. 1982, as amended by Decreto No. 374/2002 and ratified by Decreto No. 153/2003. (“[W]hosoever breaks this disposition or proposes its reform, as well as those who directly or indirectly support him, shall immediately cease in the exercise of their office and will be disqualified from the exercise of any public function for ten (10) years.”)

50. See Decreto No. PCM-005-2009 (Hond.) (ordering a “public consultation” managed by the National Institute of Statistics); Decreto No. 31,945, PCM-020-2009, LA GACETA DIARIO OFICIAL [L.G.], 25 June 2008 (Hond.) (changing the name of the “public consultation” to a poll); Acuerdo Ejecutivo No. 027-2009 (Hond.) (ordering the armed forces to provide “support” for the “poll”).

51. See Decreto PCM-005-2009, art. 3 (Hond.) (“The positive result of this popular consultation will serve as a legitimate basis for the Executive to send to the National Congress a special legal project to place the [issue] on the ballot in the general elections of November 2009.”)

52. See Decreto No. 31,945, PCM-020-2009, L.G., 25 June 2008 (Hond.) (changing the name of the “consultation” to a “poll”).

53. See, e.g., *Micheletti Sucede a “Mel”* [*Micheletti Happens to “Mel”*], LA TRIBUNA (Hond.) (June 29, 2009), <http://www.latribuna.hn/2009/06/29/micheletti-sucede-a-%E2%80%9Cmel%E2%80%9D/>.

54. See, e.g., *id.*

55. See, e.g., Edmundo Orellana, *Golpe de Estado en Honduras* [*Coup in Honduras*], VOSELOBERANO.COM (Sept. 27, 2009), available at [http://voseloberano.com/v1/index.php?option=com\\_content&view=article&id=856:golpe-de-estado-en-honduras-un-analisis-juridico-por-edmundo-orellana&catid=17:debate-juridico](http://voseloberano.com/v1/index.php?option=com_content&view=article&id=856:golpe-de-estado-en-honduras-un-analisis-juridico-por-edmundo-orellana&catid=17:debate-juridico) (arguing that a constituent assembly would be possible in the existing framework).

from within an existing constitutional framework. Most constitutions are silent about their own replacement by new texts. And even if a constitution had an explicit prohibition on constituent assemblies or on the writing of new texts, arguably the public retains an inherent and inalienable power to rewrite their constitution.

Our analysis focused much more on serious problems in the constitution-making process. Regardless of whether Zelaya somehow could have moved towards convoking a constituent assembly, he did not follow procedures that were mandated by Honduran law and would have been necessary to ensure the fairness of the process. First, Zelaya had no legal authority to call for the vote, and he did not seek the Congress's assent to the passage of a new law that would have given him that authority.<sup>56</sup> Even the consideration of the convoking of a constituent assembly is a serious event better processed on the basis of consensus or near consensus. Zelaya instead set up his project in opposition to both the Congress and the judiciary, as part of a general pattern of attacks against those institutions.<sup>57</sup>

Moreover, while the constitution sets up a fairly well-functioning Supreme Electoral Tribunal as the institution charged with supervising elections,<sup>58</sup> Zelaya instead placed his "consultation" or "poll" under the charge of a National Institute of Statistics, which is basically the Honduran equivalent of the census bureau.<sup>59</sup> The Electoral Tribunal has the capacity and experience to monitor polling places and ensure the overall fairness of an election; the National Institute of Statistics had none of these capabilities. Finally, and even more troublingly, Zelaya ordered the military to "support" the "poll," basically using the specter of military force as a cudgel against those groups who opposed the effort.<sup>60</sup> The military ordinarily provides logistical support during elections, but under the authority and orders of the Supreme Electoral Tribunal; Zelaya instead invoked his direct authority as chief of the armed forces.<sup>61</sup>

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56. Zelaya attempted to use the Law of Citizen Participation as support for his action, *see supra* note 46, but it was clear that that law did not give him the power to carry out a nationwide vote, even if non-binding.

57. *See supra* note 44.

58. *See* CONSTITUCION POLITICA DE LA REPUBLICA DE HONDURAS [CN.] ch. V, art. 51, 11 Jan. 1982, as amended by Decreto No. 154/2003 (creating a Supreme Electoral Tribunal charged with "everything related with electoral acts and procedures").

59. *See* Decreto No. PCM-005-2009 (Hond.); Decreto No. 31,945, PCM-020-2009, L.G., 25 June 2009 (Hond.) (both providing that the National Institute of Statistics would "supervise the effective execution" of the consultation or poll).

60. *See* Acuerdo Ejecutivo No. 027-2009 (Hond.).

61. *See* CONSTITUCION POLITICA DE LA REPUBLICA DE HONDURAS [CN.] ch. X, art. 272, 11 Jan. 1982, as amended by Decreto No. 245/1998 and ratified by Decreto No. 2/1999 (ordering the president to place the military at the disposition of the Supreme Electoral Tribunal one month before all elections).

In short, we regarded the question of whether Zelaya could legally have moved towards a constituent assembly as relatively unimportant.<sup>62</sup> It was far more relevant that the particular process he had chosen lacked legitimacy. He moved forward without ensuring that any sort of consensus or near consensus existed. And his choice of institutions—the National Institute of Statistics and military—to support the vote would not have provided any guarantee of fairness in outcome.

We were also struck by the nature of the international reaction surrounding the incident. The condemnation by almost all countries and by the OAS of the illegal removal of President Zelaya by the military and congress was proper. For example, the OAS condemned the incident as a “*coup d’etat*” and suspended Honduras under its democracy clauses,<sup>63</sup> while the Obama Administration also sharply condemned the removal as “illegal” and demanded the restoration of Zelaya.<sup>64</sup> There was a constitutional procedure to remove Zelaya—trial before the Supreme Court—but the actors opposed to Zelaya did not follow that process. In so doing, they raised the specter, which had long plagued democratic governance in the region, of military intervention in politics. International organizations and other states rightly condemned the actions of those opposed to Zelaya.

But there was little condemnation of Zelaya’s actions prior to his removal. And it is critical to see that these actions too raised the specter of a serious threat to democratic governance: the threat that a strong-man president will use his power to undermine other institutions of government and essentially erode democracy from within. This is no mere fantasy, and in fact has been far more common in recent times in Latin America than direct military intervention in politics.<sup>65</sup> Following Levitsky and Way’s argument, pro-democracy norms have now become sufficiently entrenched that obviously anti-democratic action like mili-

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62. There are plenty of examples of new constitutions being written outside of the structure of existing constitutional law, but in ways that clearly produce highly legitimate texts. Colombia in 1991, for example, convoked a constituent assembly and wrote an entirely new constitution to replace the Constitution of 1886, even though the Constitution (as in Honduras) only gave the Congress the power to amend the constitutional text. Yet the constitution-making process has produced a highly legitimate text. *See supra* text accompanying notes 59–62.

63. *See OAS Suspends Membership of Honduras*, ORG. OF AM. STATES (July 5, 2009), [http://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-219/09](http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-219/09).

64. *See, e.g.*, PETER J. MEYER, CONG. RESEARCH SERV., RL34027, HONDURAN-U.S. RELATIONS 14 (2009), available at <http://fpc.state.gov/documents/organization/128853.pdf>; *see also* Noah Feldman, David Landau & Brian Sheppard, Op-Ed., *Fixing Honduras*, L.A. TIMES, June 7, 2011, at 11, available at <http://articles.latimes.com/print/2011/jun/07/opinion/la-oe-landau-honduras-20110607> (noting the significant “real-world effects,” like loss of foreign aid, of the international steps taken against Honduras).

65. Aside from the Honduran case, Hugo Chavez in Venezuela, Alberto Fujimori in Peru, Evo Morales in Bolivia, Rafael Correa in Ecuador, and Alvaro Uribe in Colombia have all arguably attempted similar erosions of democratic governance. *See, e.g.*, Scott Mainwaring, *The Crisis of Representation in the Andes*, in *LATIN AMERICA’S STRUGGLE FOR DEMOCRACY* 18, 18–19 (Larry Diamond, Marc F. Plattner & Diego Abente Brun eds., 2008).

tary coups has become disfavored.<sup>66</sup> But subtler attacks on the democratic institutions that provide “horizontal accountability” to presidents, like congresses and courts, may be more acceptable.<sup>67</sup> At the very least, the president can use the mantle of “popular legitimacy,” arguing that he is carrying out the people’s will while other institutions are frustrating it. Zelaya repeatedly relied on that sort of rhetoric.<sup>68</sup> Chavez in Venezuela and Fujimori in Peru provide clear examples of this threat—each undertook serious manipulation of legislatures and courts to attain maximal power.<sup>69</sup> Correa in Ecuador, Morales in Bolivia, and Uribe in Colombia have all provided more but still troubling cases of the same trend.<sup>70</sup> Internal erosion of democracy, rather than the military coup, is now the major threat to democracy in Latin America and perhaps in most of the world.

Yet the United States merely observed blandly that Zelaya’s referendum was an internal matter and requested that the relevant parties come to a “consensual democratic resolution.”<sup>71</sup> The OAS, however, played a more pernicious role. The OAS Secretary-General agreed, at Zelaya’s request, to send a mission to observe Zelaya’s “poll” or “consultation.”<sup>72</sup> The Secretary-General stated that due to the “nature” of the vote, this mission would be a “mission of accompaniment,” rather than the standard “electoral mission” that would observe an election and that is explicitly mentioned in the Inter-American Democratic Charter.<sup>73</sup> Regardless of the formal name for the mission, the Secretary-General’s action served as a form of legitimization for Zelaya’s “consultation.” Some commentators have suggested that politics played a role in the Secretary-General actions, noting his closeness to Chavez and other Latin America leaders within his sphere of influence.<sup>74</sup> But the ideological structure of international law and politics also played an important role:

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66. See LEVITSKY & WAY, *supra* note 1, at 43–54.

67. In Guillermo O’Donnell’s model of delegative democracy, popular presidents use their link to the public in order to weaken other institutions that might serve as checks on their power. See Guillermo O’Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55, 59–62 (1994); see also Guillermo O’Donnell, *Horizontal Accountability in New Democracies*, in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 29, 29 (Andreas Schedler et al. eds., 1999) (arguing that many developing countries in Latin America and elsewhere are plagued by the “absence” of horizontal accountability).

68. See *supra* text accompanying note 47.

69. See Mainwaring, *supra* note 65, at 22–24.

70. See, e.g., Mitchell A. Seligson, *The Rise of Populism and the Left*, in LATIN AMERICA’S STRUGGLE FOR DEMOCRACY, *supra* note 65, at 77, 77.

71. See MEYER, *supra* note 66, at 14.

72. See OEA *Analiza Enviar Misión a Honduras: El Organismo Internacional Tendrá un Enviado Especial para Mediar en el Problema*, EL HERALDO (Hond.), June 26, 2009, <http://www.elheraldo.hn/A1%20Frente/Ediciones/2009/06/26/Noticias/OEA-analiza-enviar-mision-a-Honduras>.

73. See *id.*; see also *Inter-American Democratic Charter*, ORG. OF AM. STATES (Sept. 11, 2001) arts. 23–25, [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm).

74. See generally *The Facts and the Law Behind the Democratic Crisis in Honduras, 2009: A Constitutional and International Democracy Law Analysis*, HUMAN RIGHTS FOUND. (Mar. 8, 2010), [http://thehrf.org/HRF\\_TheFactsAndTheLaw\\_Honduras2009.pdf](http://thehrf.org/HRF_TheFactsAndTheLaw_Honduras2009.pdf).

the ire of the OAS and the international community was properly and forcefully invoked against the removal of Zelaya. And the OAS's clear provisions against "interruptions" of democratic governments were used to suspend the new Honduran regime. But the international community lacked a set of conceptual or legal tools to respond to Zelaya's attempts to undermine the other institutions in his own democracy.

The aftermath of the removal offers similar lessons. After new elections were held in November 2009, and the interim president, Micheletti, was replaced by a new permanent president from the National Party, Porfirio Lobo, the reaction of the international community began to soften. The State Department in the United States "noted that it recognized the complicated nature of events" in Honduras.<sup>75</sup> Moreover, Zelaya and the regime reached a set of agreements that granted him legal immunity for actions taken during the crisis and allowed him to return to the country. And in June 2011, the OAS lifted the suspension of Honduras from the organization by an overwhelming vote of thirty-two in favor and only one (Ecuador) against.<sup>76</sup> The message of the international community was that the intervening events in the country—both electoral politics and the accord between Zelaya and the regime—had cleansed the damage done by the removal of Zelaya. Thus, normalcy had been restored, and Honduran politics once again became a wholly domestic affair.

The problem is that politics in the country had not really been restored to normal. There were documented human rights abuses against Zelaya's supporters in the aftermath of his removal, and the election of Lobo in November 2009, while untainted by fraud, was also not conducted in a fully open environment.<sup>77</sup> Moreover, the Honduran state had suffered a deep crisis of legitimacy; such a crisis cannot be healed in a short period of time. In this social and political context, there have been recurring calls for a new overhaul of the Constitution. Some constitutional articles have already been reformed—for example Article 5, which regulates plebiscites and referenda, has been broadened to make these devices easier to use and to possibly allow for sweeping constitutional reforms via some sort of direct democracy.<sup>78</sup> The current presidential administration has suggested that it favors these reforms, and the common understanding is that its emphasis is on doing exactly what Zelaya

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75. See Feldman, Landau & Sheppard, *supra* note 64 (internal quotation marks omitted).

76. See *OAS Lifts Honduras Suspension After Zelaya Agreement*, BBC NEWS, June 1, 2011, <http://www.bbc.co.uk/news/world-latin-america-13622939>.

77. See, e.g., INTER-AM. COMM'N HUMAN RIGHTS, ORG. OF AM. STATES, HONDURAS: HUMAN RIGHTS AND THE COUP D'ETAT 59–62 (2009), available at <http://www.cidh.org/pdf%20files/HONDURAS2009ENG.pdf> (documenting both human rights abuses and problems in November 2009 election).

78. See *CN Aprobó Reformas a la Constitución de Honduras*, EL HERALDO (Hond.), Jan. 12, 2011, <http://www.elheraldo.hn/Ediciones/2011/01/12/Noticias/CN-aprobo-reformas-a-Constitucion-de-Honduras>.

was trying to do: change the constitution to allow for presidential reelection.<sup>79</sup>

This overhaul is not particularly popular with the public: a recent poll showed that just less than half of the population favored significant reforms.<sup>80</sup> In the wake of the serious trauma faced by the Honduran democracy, such a result is, at first blush, surprising. But I think it is explained by the way in which these reforms have been framed: it is obvious to citizens that the push for constitutional reforms has occurred because of specific, short-term political agendas. As with Zelaya, it appears that the discourse about popular legitimacy, increased participation, and constitutional politics is a cover for the continuation of the power games that have always been played between the small Honduran elite.

#### IV. THE PROMISE AND PERIL OF CONSTITUTIONAL POLITICS

The Honduran example highlights the main risk of constitution-making: that momentarily powerful actors or groups will use the constitution-making process to remake the state in order to serve their own interests. Typically, they use claims to majoritarian support (whether true or false), and tools such as plebiscites and referenda, in order to make an end-run around existing democratic institutions.

Recent work by Partlett demonstrates this risk in Eastern Europe. Partlett draws heavily on the example of Russia, where Yeltsin withdrew the constitution-making process from Parliament and moved it to an appointed constituent assembly in order to take more control over the process. In other words, in Russia the invocation of a constitutional moment was a ruse used by the president, and the resulting constitution has lacked legitimacy and has failed to constrain strong-man Russian executives.<sup>81</sup>

In Latin America, constitution-making in Venezuela, Ecuador, and Bolivia, along with the Honduran example explored above, demonstrates the same risk to varying degrees.<sup>82</sup> Venezuela is perhaps the classic example. Hugo Chavez, who had formerly led a failed coup attempt against the political system in 1992,<sup>83</sup> won the presidential election in 1998 with

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79. See, e.g., *Lobo Consultará a Sectores Sobre Posible Reforma Constitucional en Honduras*, LA NACIÓN (Costa Rica), June 29, 2011, <http://www.nacion.com/2011-06-29/Mundo/Lobo-consultara-a-sectores-sobre-posible-reforma-constitucional-en-Honduras.aspx>.

80. See *id.*

81. See William Partlett, *Making Constitutions Matter: The Dangers of Constitutional Politics in Current Post-Authoritarian Constitution Making*, 38 BROOK. J. INT'L L. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1924958](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924958) (looking also at examples in Belarus and Kazakhstan).

82. For a fuller exploration of the Venezuelan and Bolivian examples, see Landau, *supra* note 5.

83. See Felipe Agüero, *Crisis and Decay of Democracy in Venezuela: The Civil-Military Dimension*, in VENEZUELAN DEMOCRACY UNDER STRESS 215, 215–16 (Jennifer McCoy et al. eds., 1995) (recounting the coup attempt).

56% of the vote. Chavez arrived at a perilous moment for the democracy—the country’s once very-strong two traditional parties had lost legitimacy because of successive corruption scandals and because they seemed out of touch with citizens.<sup>84</sup> Chavez thus won election as an anti-system outsider. Chavez campaigned on a promise to hold a constituent assembly, and once elected moved forward with plans to call a constituent assembly and remake the democracy. He promised to abolish Venezuela’s traditional system, which was dominated by two traditional parties, and to create a more inclusive, socially transformative democracy.<sup>85</sup>

While Chavez was fairly popular in Venezuela, the rules for composing the constituent assembly manufactured total dominance by pro-Chavez forces and marginalized all of the opposition.<sup>86</sup> Rather than using pure proportional representation as in Colombia, Venezuela used an electoral system based on either single-member districts or small regional districts electing a small number of delegates.<sup>87</sup> This resulted in the massive overrepresentation of pro-Chavez forces. While Chavez had won election in 1998 with only 56% of the vote, and while his forces only won 65% of the vote in the Assembly, he won 93% of the seats in the Assembly and was able to achieve exactly the constitution he envisioned. The tiny opposition had no power to block or alter any of Chavez’s proposals.<sup>88</sup>

The resulting process strengthened Chavez’s powers and wiped away many of the existing checks on the president. First, the constituent assembly replaced the members of most of the other institutions of state (including the Supreme Court, National Electoral Council, Congress, and state legislative assemblies).<sup>89</sup> It used its “constituent powers” to take these actions, which were upheld by the supreme court on the grounds that the constituent assembly was not bound by the legal constraints of either the existing or new constitutional order.<sup>90</sup> The Assembly also drafted a constitution that suited Chavez by allowing for a very strong chief executive. Indeed, the 1999 Venezuelan Constitution has been

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84. See Michael Coppedge, *Partidocracia and Reform in Comparative Perspective*, in *VENEZUELAN DEMOCRACY UNDER STRESS*, *supra* note 83, at 173, 174, 187–90 (explaining the decline of the party system).

85. See Renata Segura & Ana María Bejarano, ¡Ni una Asamblea Más sin Nosotros! *Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes*, 11 *CONSTELLATIONS* 217, 224–25 (2004).

86. The traditional parties also helped to marginalize themselves by boycotting the constituent assembly. See *id.* at 225–28.

87. See *id.* at 230 (noting that the opposition received more than 34% of the vote but grabbed only 4.6% of the seats).

88. For the view of one of the members of the opposition during the Assembly, see generally BREWER-CARIAS, *supra* note 18, at 35–68.

89. See 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 TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 505, 507 (Laurel E. Miller ed., 2010).

90. See *supra* text accompanying note 18 (explaining this decision and its logic).

called “[h]yperpresidential.”<sup>91</sup> For example, it allowed presidential reelection for the first time in many decades and lengthened the presidential term from five to six years.<sup>92</sup> It also weakened other institutions, for example by abolishing the Senate and by making the judiciary much more dependent on the Congress than it had been previously.<sup>93</sup> There can be little doubt in the Venezuelan case that the constitution-making process is linked to the constitutional outcome, and it is not difficult to argue that the Constitution undermined existing institutions and caused long-run harm to the quality of Venezuelan democracy.

If I am correct about the main peril of constitution-making, then this suggests that the existing literature on the topic needs to be reframed. The existing literature on constitution-making is dominated by Elster, who argues that probably the core task of the constitution-making process is avoiding deliberation based on short-term interest.<sup>94</sup> Delegates must be forced to consider the long-term interest of the country rather than their immediate short-term political goals. Thus, for example, constitutions should be drafted in special chambers like constitutional assemblies rather than in ordinary legislatures, and delegates should be ineligible to run for office immediately after serving in the assembly.<sup>95</sup>

Yet if the main risk of constitution-making is instead the risk of abuse by temporarily popular figures seeking to enhance their power, then we will need a different set of design recommendations. Presentation of a model keyed to this risk is the topic of my current work and is beyond the scope of the current project.<sup>96</sup> But the main need is to find rules and principles that will restrain the ability of powerful individual figures, minorities, or temporary majorities from imposing their own desired constitution.<sup>97</sup> Given the current state of domestic constitutional theory and international law, this will not be an easy task, but it is urgent.

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91. See JAVIER CORRALES & MICHAEL PENFOLD, *DRAGON IN THE TROPICS: HUGO CHÁVEZ AND THE POLITICAL ECONOMY OF REVOLUTION IN VENEZUELA* 16 (2011).

92. See *id.* at 19.

93. See *id.*

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

95. See *id.* at 395 (“The most important [implication] is perhaps that to reduce the scope for institutional interest, constitutions ought to be written by specially convened assemblies and not by bodies that also serve as ordinary legislatures.”).

96. A more complete theorization is developed in David Landau, *Constitution-Making Gone Wrong*, 64 *ALA. L. REV.* (forthcoming 2012).

97. Andrew Arato produces a very helpful analysis of constitution-making in Iraq; he argues that the effort was hamstrung because the Occupation did not take seriously the need to allow participation from all affected groups. See ANDREW ARATO, *CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ* 122–23, 255–56 (2009). In a provocative recent article, Partlett emphasizes the advantages of drafting constitutions in ordinary political bodies like congresses rather than constituent assemblies or other extralegal processes like extraordinary referenda. See PARTLETT, *supra* note 81, at 27–29. Whether drafting constitutions using ordinary political institutions rather than extraordinary ones is an adequate check is a more difficult issue. For example, both Congresses and Constituent Assemblies can be abused if they can

In Egypt and in other countries with a swirl of emerging political parties and civil society groups, this likely means that electoral rules should be structured to try and deny any one faction (say the Islamicist parties) a clear majority. In Honduras, Colombia, and other countries with historically exclusionist political systems, it means that electoral rules and other devices should be used to give representation to groups that have historically been excluded from the political process. The exact tools to achieve these goals will be highly context-specific. Proportional representation rather than a majoritarian electoral system, for example, should generally help to achieve greater representativeness and avoid the overrepresentation of the most popular parties and groups.<sup>98</sup> But while the exclusion of current or even past politicians may be desirable in contexts where the main problem has been the closed nature of the existing political system (as in Honduras and Colombia), it may be highly undesirable in new democracies like Egypt, where there is a pressing need for political expertise and technical skill in the assembly.

The basic analysis—that processes must be structured so as to minimize the ability of individual groups to dominate—has other important implications. In Egypt and in other situations experiencing a democratic transition, civil society and political parties remain inchoate. Some movements, in this case the Muslim Brotherhood and other Islamist groups, were much more organized than other elements during the Mubarak regime. The domination of these movements in early elections may reflect in part their organizational advantages rather than genuine popularity. In this context, the role of the military and judiciary in restraining these forces becomes highly difficult to evaluate. As noted in Part II, the military-backed judiciary has taken extreme measures, including dissolving the Parliament, in order to slow the electoral power of the Muslim Brotherhood. Most domestic and international commentators have viewed these measures as a “judicial coup” or as otherwise fundamentally undemocratic. But the reality may be more complex—as Ozan Varol has recently argued, the military can actually play pro-democratic roles during many democratic transitions.<sup>99</sup> Further, as Sam Issacharoff suggests, fragile or unstable democracies may need illiberal institutions in order to stave off implosion from within.<sup>100</sup>

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be controlled by a single political group. Perhaps more important than the chamber where a constitution is written is the composition of that chamber and the rules under which it will make decisions.

98. See, e.g., AREND LIJPHART, *ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES 1945–1990*, at 54–77 (1994) (showing how pure proportional representation tends to translate votes exactly into seats, while majoritarian systems overrepresent the largest parties, sometimes massively).

99. Varol, *supra* note 4.

100. Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007) (arguing that weak democracies may need to use party-banning and other techniques to ensure that anti-democratic elements cannot come to power through lawful means).

## V. CONCLUSIONS

Old regimes fall and new regimes rise in situations of great uncertainty. In these situations, constitution-making is likely to be a key event in shaping the character of the new regime. The character of the Egyptian and Libyan regimes, for example, is likely to be worked out largely as a result of the battles fought and compromises struck as new constitutions are written in each country. Yet constitution-making is a dangerous and often socially-traumatic event. In a broad range of situations, we should be most worried about constructing a robust model of constitution-making that seeks to avoid a breakdown of democracy.

But constructing such a model of constitution-making is quite difficult. As noted in Part III, domestic constitutional rules are often no help, because ideologically there is a long tradition of seeing constitution-making as an event outside of the existing constitutional order. In the classical view popularized by Sieyes, Schmitt, and Kelsen, revolutionary legal change cannot, logically, be constrained by existing institutions. Moreover, international law does nothing to fill this gap—it continues to struggle to reach into the “black box” of domestic political change. Finally, there is a critical practical problem: those institutions capable of restraining undemocratic elements during transitions have often been weakened by the transition process, and may be viewed as illegitimate. Like the military in Egypt, they may have lost much of their capacity to command respect, and may themselves have questionable pro-democratic credentials.

In this context, the search for constraint on the constitution-making process is a kind of triage. Even damaged and distrusted domestic institutions like the Egyptian military and judiciary may be useful in stabilizing new regimes and in acting as a counterbalance to would-be hegemonic political forces. A restricted democracy, with the military hemming in electoral politics, may be a reasonable tradeoff against the possibility of a democratic breakdown. International institutions could also play a stronger role in backing up domestic institutions. As noted in Part II, international law says little about democracy and even less about situations that are not coups or other ruptures in the institutional order. But at the least, we can develop a set of principles to be used by the international community when evaluating the proposed constitutional assemblies in Egypt and in other new or reconstituted democracies. In so doing, the international community can help ensure the emergence of vibrant democracies.