

# Shifting Constitutional Designs in Latin America: A Two-Level Explanation

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*Latin American countries have been riding a massive wave of constitutional change since 1978. One aspect of the political institutions selected as a result of this process seems particularly puzzling. Reforms that promote party pluralism and consensual decision making coexist, often within the same design, with other reforms that restrict party competition and foster concentration of power in the executive branch. This Article argues that constitutional choice is endogenous to the performance of preexisting constitutional structures and to the partisan interests and relative power of reformers. According to this theory, the seemingly contradictory trends of design that we observe in Latin America reflect (i) the diverse governance problems faced by new democracies and (ii) the heterogeneous interests of the actors who had influence over institutional selection. The Article provides evidence in support of this theory from the recent experience of constitution making in Latin America.*

Let us remember, then, in the first place, that political institutions (however the proposition may be at times ignored) are the work of men; owe their origin and their whole existence to human will. Men did not wake on a summer morning and find them sprung up . . . . Like all things, therefore, which are made by men, they may be either well or ill made; judgment and skill may have been exercised in their production, or the reverse of these.

—John Stuart Mill, 1861<sup>1</sup>

Latin American countries have been riding a massive wave of constitutional change since 1978. One aspect of the institutions selected as a result of this process seems particularly puzzling from the point of view of an external observer. Reforms that promote party pluralism and consensual decision making coexist, often within the same design, with other reforms that restrict party competition and foster concentration of power in the executive branch. I propose that this seemingly contradictory design is endogenous to the performance of preexisting constitutional structures and to the partisan interests and relative power of reformers.

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1. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 4 (Henry Regnery Co. 1962) (1861).

Recent constitutional changes in Latin America have introduced more inclusive rules for electing presidents and legislators, congressional controls over cabinets, new oversight institutions, mechanisms to strengthen judicial independence, and diverse degrees of political decentralization.<sup>2</sup> These are reforms that are intended to diffuse power and place limits on the partisan or government powers of presidents. Paradoxically, however, other recent reforms go in the opposite direction. From 1978 to 1993, most constitutions maintained relatively restrictive rules on presidential reelection. Since that time, however, there has been a slight but steady increase in the number of constitutions and amendments that have made the rules of presidential reelection more permissive.<sup>3</sup> During the last three decades, constitutional designers in Latin America have also increased the legislative powers of presidents, particularly their powers to promote legislative change.<sup>4</sup>

The contrasting orientations of many of these reforms reflect the diverse performance problems faced by new democracies in Latin America as they adapt to the dynamics of multiparty competition and respond to citizens' demands for better representation and public goods. Inherited majoritarian electoral rules for both presidential and legislative elections often failed to produce acceptable results in multiparty competitions.<sup>5</sup> The traditional concentration of power in the executive failed to provide effective protection for individual rights, and it restricted political participation and weakened the independence and power of the judiciary and oversight institutions.<sup>6</sup> The classic checks-and-balances model of an executive with strong reactive legislative powers but weak proactive powers proved ineffective to enable swift decisions in a context of recurrent economic instability.<sup>7</sup> All of these governance problems have justified the need to reform constitutions in somewhat opposite directions, such as making electoral rules more inclusive and strengthening the oversight powers of congress and the judiciary while increasing the legislative powers of presidents.

Governance problems, however, admit different possible solutions, and there is always some degree of ambiguity surrounding the question of

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2. See generally Gabriel L. Negretto, *Paradojas de la reforma constitucional en América Latina* [*Paradoxes of Constitutional Reform in Latin America*], 1 J. DEMOCRACY EN ESPAÑOL 38, 41–51 (2009) (Chile) (discussing recent constitutional reforms in Latin America).

3. See *id.* at 50–51 (observing the increasing permissiveness of presidential reelection rules).

4. See Gabriel Negretto, *Political Parties and Institutional Design: Explaining Constitutional Choice in Latin America*, 39 BRIT. J. POL. SCI. 117, 120–21 (2009) (demonstrating the general increase of the legislative powers of presidents both before and after 1978).

5. See Gabriel Negretto, *Propuesta para una reforma electoral en México* [*Proposal for an Electoral Reform in Mexico*], 14 POLÍTICA Y GOBIERNO [POL. & GOV'T] 215, 215–19 (2007) (Mex.) (explaining how plurality rules of presidential election produce undesirable results when electoral competition becomes fragmented).

6. See Negretto, *supra* note 2, at 38–39, 42, 46–47 (explaining how past failures of presidential democracies led to proposals of reform aimed at reducing the governmental power of presidents).

7. See *id.* at 50 (observing that recurrent economic crises in Latin America have provided presidents with an incentive to request proactive legislative powers).

precisely what design will best improve institutional performance. Albeit in varying degrees, this indeterminacy provides strategic politicians with room to propose or support those alternatives that best suit their interests or are the least damaging to them. This leads to competition and partisan conflict, which makes the relative power of reformers crucial to explaining comparative variations in constitutional choice.<sup>8</sup> A few constitutional reforms since 1978 have been enacted by dominant parties, which explains the occasional adoption of power-concentrating institutions.<sup>9</sup> But most reforms have been passed by coalitions that include at least two parties with conflicting interests.<sup>10</sup> Although the exact outcome would vary depending on the relative bargaining power of the actors, multiparty coalitions are likely to adopt a hybrid design that combines power-sharing and power-concentrating rules, as we can observe in many reforms adopted in Latin America during the most recent decades.

This Article starts by analyzing the scope of constitutional change in Latin America in election and decision-making rules. This is followed by a theory of constitutional choice that accounts for the potentially conflicting goals of political actors, both cooperative and distributive, in constitutional design. The third Part provides evidence in support of this theory from the recent experience of constitution making in Latin America. The Article concludes by discussing the tension between the normative goals of an optimal democratic-constitutional design and the constraints imposed by the governance problems of Latin American democracies in an unstable partisan context.

## I. Constitutional Transformations in Latin America

The content of new constitutions and important amendments enacted in Latin America since 1978 reveals substantial cross-national variation in design. Variation is even greater if one considers institutional reforms implemented at the level of ordinary laws that also affect the performance of the constitutional regime. Within this diversity, however, several trends are discernible in the general orientation of reforms.

I will review the trends of design that have taken place in the area of election and decision-making rules from 1978 to 2008.<sup>11</sup> These rules are not the only constitutional features relevant to understanding the workings of a representative democracy. They are, however, the basic aspects of constitutional design that students of political institutions have traditionally identified

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8. Gabriel L. Negretto, *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America* 13 (2010) (unpublished manuscript) (on file with author).

9. *Id.* at 15.

10. *Id.*

11. For analyses of historical models of constitutional design in Latin America, see José Cheibub, Zachary Elkins & Tom Ginsburg, *Latin American Presidentialism in Comparative and Historical Perspective*, 89 *TEXAS L. REV.* 1707 (2011).

when comparing the nature, performance, and quality of political regimes across the world.<sup>12</sup>

A. *Election Rules*

In contrast to a parliamentary regime, where the election of members of parliament determines both the composition of the assembly and the formation of government, in a presidential regime, these results depend on the separate election of the president and members of congress. The rules governing presidential and congressional elections thus affect the legislative support for the president's agenda, the incentives for coalition formation, and the degree of participation and representation of voters in elections. I will focus here on some central aspects of these rules.

1. *Pluralist Rules for the Election of Deputies and Presidents.*—The most widely accepted hypothesis about the effect of electoral rules on party systems is that, while plurality rule in single-member districts induces the creation and maintenance of two-party systems, majority runoff and proportional representation (PR) formulas impose fewer constraints on the number of parties that are able to compete and win office in elections.<sup>13</sup> From this perspective, it seems clear that electoral reform in Latin America since 1978 represents a shift from more to less restrictive rules on party competition.

Since the early decades of the twentieth century, there has been a clear trend toward replacing majority or plurality formulas with PR formulas for legislative elections in Latin America. The trend started with Costa Rica in 1913, followed by Uruguay in 1917, the Dominican Republic in 1924, and Chile in 1925.<sup>14</sup> By 1978, just before the expansion of electoral democracy in the region, fifteen out of eighteen countries had adopted variants of PR formulas.<sup>15</sup> The few countries that had not adopted PR formulas previously did so more recently. Between 1977 and 1986, Mexico replaced plurality elections with a mixed system that combines single-member plurality with multimember-district proportional elections.<sup>16</sup> Meanwhile, Nicaragua in

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12. See AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 2–6 (1999) (comparing constitutional regimes according to whether they concentrate or diffuse power in the electoral and decision-making dimensions); G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY 4–17 (2000) (introducing an analysis similar to Lijphart's, but with more emphasis on the impact of constitutional design on the congruence between the preferences of voters and policy makers).

13. GARY W. COX, MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS 13–14 (1997) (citing MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE 239 (Barbara North & Robert North trans., 1954)).

14. Negretto, *supra* note 8, at 36.

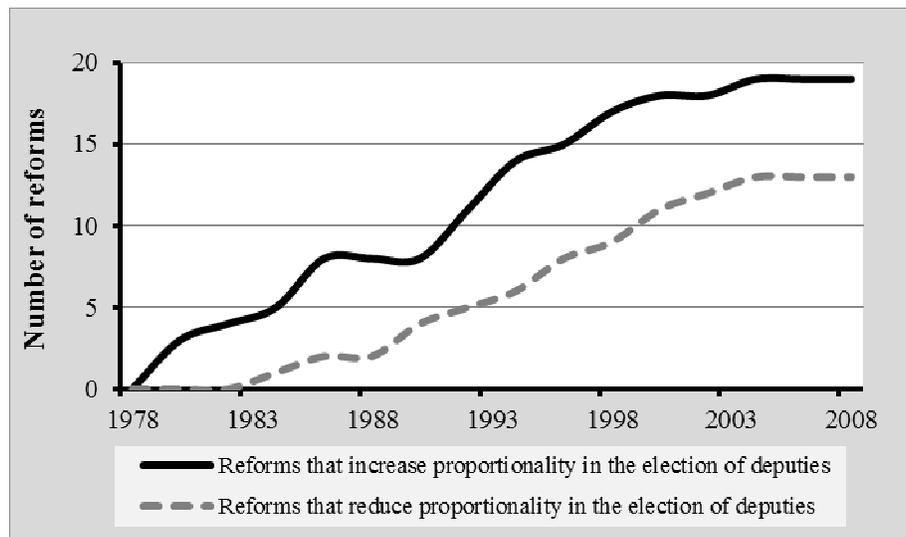
15. Negretto, *supra* note 4, at 118.

16. Gabriel L. Negretto, *La reforma electoral en América Latina: Entre el interés partidario y las demandas ciudadanas* [*The Electoral Reform in Latin America: Between Partisan Interests and*

1984 and Paraguay in 1992 adopted PR formulas for the first time.<sup>17</sup> As a result of these reforms, no country in Latin America currently elects legislators by a purely majoritarian system.<sup>18</sup>

Proportionality, of course, varies depending on the method of seat allocation, district magnitude, assembly size, and legal thresholds.<sup>19</sup> Mixed systems can also be more or less proportional depending on the percentage of total seats allocated by plurality and on whether PR seats are used to compensate for the concentrating effect of single-member district elections.<sup>20</sup> Even taking these elements into account, however, one can also observe that the election of deputies has become more proportional over time. Figure 1 illustrates the number of reforms that made the electoral system more and less proportional from 1978 to 2008.

Figure 1. Reforms to the System for Electing Deputies by Year, 1978–2008



Counting both constitutional reforms and reforms to ordinary election laws, there have been thirty-two important electoral reforms in the system for

*Citizen Demands*], in REFORMA DEL SISTEMA ELECTORAL CHILENO [REFORM OF THE CHILEAN ELECTORAL SYSTEM] 63, 88 & tbl.6, 89 (Arturo Fontaine et al. eds., 2009).

17. *Id.* at 85 tbl.4.

18. *See id.* at 84, 85 tbl.4 (identifying the proportional formulas for legislative elections in Latin American countries).

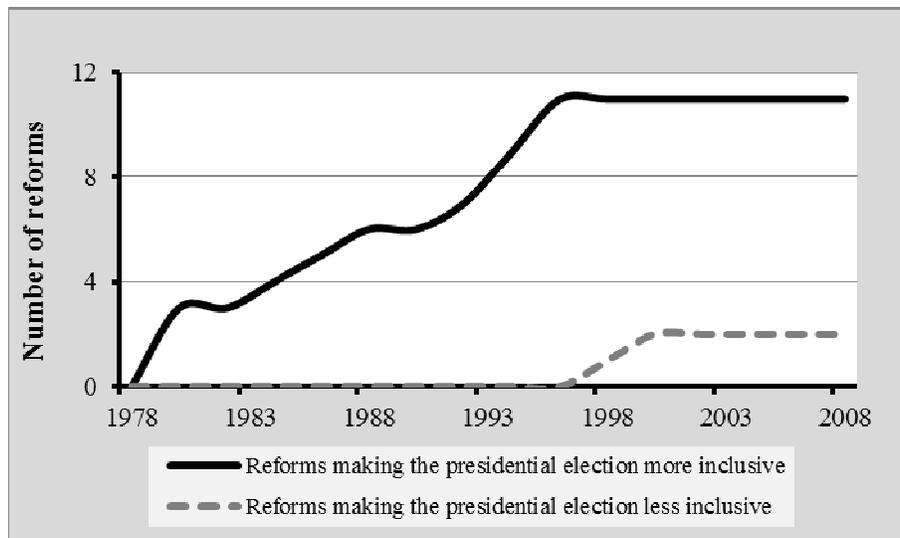
19. AREND LIJPHART, ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES, 1945–1990, at 10–13 (1994).

20. For an overview of the concept and variations of mixed electoral systems, see MIXED-MEMBER ELECTORAL SYSTEMS: THE BEST OF BOTH WORLDS? (Matthew Soberg Shugart & Martin P. Wattenberg eds., 2003).

electing deputies in Latin America from 1978 to 2008.<sup>21</sup> Most (nineteen) of these reforms increase proportionality due to the adoption of a more inclusive electoral formula, an increase in average district magnitude, or the elimination of a preexisting legal threshold.<sup>22</sup> The rest of the reforms (thirteen) have moved in the opposite direction, either because they adopted formulas that benefited larger parties, reduced the average magnitude of districts, or created a legal threshold for obtaining seats.<sup>23</sup>

The trend toward electoral inclusiveness is even more pronounced in the reforms that have affected the rules for electing presidents during recent decades. While countries experimented with various formulas for choosing executives during the twentieth century, the democratization process initiated in 1978 has brought a gradual abandoning of direct elections by simple plurality and the adoption of alternative rules, such as qualified plurality—with a minimum threshold to win in the first round—and majority-runoff formulas.<sup>24</sup> Figure 2 compares the number of reforms that have increased and decreased the inclusiveness of presidential-election formulas.

Figure 2. Reforms to the Formula for Electing the President by Year, 1978–2008



21. These reforms include only changes in the electoral formula to elect deputies, changes of at least 25% in the average magnitude of the districts or in the size of the lower or single chamber of congress, and changes in the legal threshold. Negretto, *supra* note 2, at 44 & 54 n.4.

22. *Id.* at 44.

23. *Id.* Electoral formulas have been ordered from least to most proportional as follows: Imperiali highest average, Imperiali largest remainders, d'Hondt highest average, Droop largest remainders, modified Saint Laguë highest average, and Hare largest remainders. THE POLITICS OF ELECTORAL SYSTEMS 589 app. (Michael Gallagher & Paul Mitchell eds., 2005).

24. Gabriel L. Negretto, *Choosing How to Choose Presidents: Parties, Military Rulers, and Presidential Elections in Latin America*, 68 J. POL. 421, 422 (2006).

Taking the last formula used in a competitive presidential election before 1978 as a reference point, there have been thirteen changes in the formulas to elect presidents from 1978 to 2008.<sup>25</sup> Eight of these reforms replaced simple-plurality elections with runoff elections, either with a majority or a qualified-plurality threshold.<sup>26</sup> In three cases, direct presidential elections by majority already existed, but the involvement of congress to determine outcomes was replaced by a second round of voting in the runoff.<sup>27</sup> Only two cases have shifted from less to more restrictive electoral rules: Ecuador in 1998, which adopted qualified-plurality presidential elections after having used majority runoff since 1979, and Nicaragua in 2000, which lowered the threshold of votes for winning the presidential election from 45% to 40%.<sup>28</sup> As a result of these reforms, by 2008, only five countries—Honduras, Mexico, Panama, Paraguay, and Venezuela—used plurality rule for electing their president.<sup>29</sup>

To recapitulate, electoral reforms during the last thirty years have aimed to make electoral competition and representation more inclusive, whether we analyze the different components of the system to elect deputies or presidential election formulas. This conclusion holds if we take into account electoral cycles. As of 2008, most countries (twelve) have concurrent presidential and congressional elections.<sup>30</sup> Concurrent elections, however, only put downward pressure on the number of parties that compete in legislative elections when presidents are elected by plurality.<sup>31</sup> Only three countries—Honduras, Panama, and Paraguay—have this combination, meaning that in most cases, the proportionality of the system to elect deputies is not neutralized by the “coattails effect” of the presidential election.<sup>32</sup>

2. *Personalized Voting Systems.*—Another important set of electoral rules, a set that has been subject to revision in recent years, determines the personal or partisan nature of voting in legislative elections.<sup>33</sup> Partisan

25. Negretto, *supra* note 2, at 43.

26. Before 1994, Argentina had an electoral-college system which, in practice, worked like a plurality system. Gabriel L. Negretto, *Argentina: Compromising on a Qualified Plurality System*, in *HANDBOOK OF ELECTORAL SYSTEM CHOICE* 110, 110–11 (Josep M. Colomer ed., 2004).

27. Negretto, *supra* note 2, at 44.

28. Negretto, *supra* note 16, at 81 tbl.2.

29. Negretto, *supra* note 2, at 43.

30. Of the ten reforms in this area between 1978 and 2007, five have increased and five have decreased the proximity of presidential and congressional elections. Negretto, *supra* note 16, at 82 tbl.3.

31. Matt Golder, *Presidential Coattails and Legislative Fragmentation*, 50 *AM. J. POL. SCI.* 34, 46 (2006).

32. *Cf. id.* at 35–36 (describing the coattails effect of presidential elections, whereby voters’ preferences in legislative elections are linked to their presidential preferences); Negretto, *supra* note 16, at 83 (identifying the three countries with concurrent elections).

33. See Matthew Søberg Shugart, *Comparative Electoral Systems Research: The Maturation of a Field and New Challenges Ahead*, in *THE POLITICS OF ELECTORAL SYSTEMS*, *supra* note 23, at

voting is strong when all legislators are selected from single closed-party lists in multimember districts.<sup>34</sup> Personalization increases when party candidates compete under multiple closed lists, flexible lists, and open lists.<sup>35</sup> Personalization also increases when a proportion of legislators is elected from single-member districts.<sup>36</sup> Personalization of voting is important because it may foster more voter participation in candidate selection as well as increased intraparty competition and local orientation of policies.<sup>37</sup>

Over time, significant reforms have altered the influence of voters over candidates elected in congressional elections. By 1977, just before the beginning of the “third wave” of democratization in Latin America, most countries in the region (fourteen) used single closed lists to elect all members of the single or lower chamber of congress.<sup>38</sup> Only two countries (Colombia and Uruguay) used multiple closed lists, and two (Chile and Brazil) used open lists.<sup>39</sup> As shown in Figure 3, this trend has recently been reversed.

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25, 36 (discussing the increased scholarship analyzing the effect of electoral rules on how parties are organized and how legislators interact with their constituents). The partisan or personal nature of voting also depends on internal mechanisms of candidate selection, which affect candidates for both presidential and legislative elections. See generally Flavia Freidenberg, *Mucho ruido y pocas nueces: Organizaciones partidistas y democracia interna en América Latina* [*Much Ado About Nothing: Party Organizations and Internal Democracy in Latin America*], 1 POLIS 91, 91–129 (2005) (Mex.) (discussing the different mechanisms of candidate selection in Latin America and how they vary across parties). Reforms in these areas, however, vary from party to party and thus do not lend themselves to cross-national comparative analysis.

34. See John M. Carey & Matthew Soberg Shugart, *Incentives to Cultivate a Personal Vote: A Rank Ordering of Electoral Formulas*, 14 ELECTORAL STUD. 417, 424–26 (1995) (ranking closed lists as providing the least value for personal reputation as opposed to party reputation).

35. Multiple closed lists (traditionally used in Uruguay and in Colombia until 2003) allow party factions to compete against each other under the same party label. Negretto, *supra* note 8, at 40 n.19; see also Shugart, *supra* note 33, at 38 (describing such a system as requiring parties to submit lists of candidates to fill the seats to which the party is entitled based on election results). Flexible lists provide voters with a list and rank of candidates but voters have the option of altering the order using a preferential vote. *Id.* at 42. Open lists provide voters with only the names of candidates so that who gets elected is entirely determined by voters. *Id.* For an application of this terminology to party lists in Latin America, see DIETER NOHLEN, SISTEMAS ELECTORALES Y PARTIDOS POLÍTICOS [ELECTORAL SYSTEMS AND POL. PARTIES] 138–43, 47 (1994).

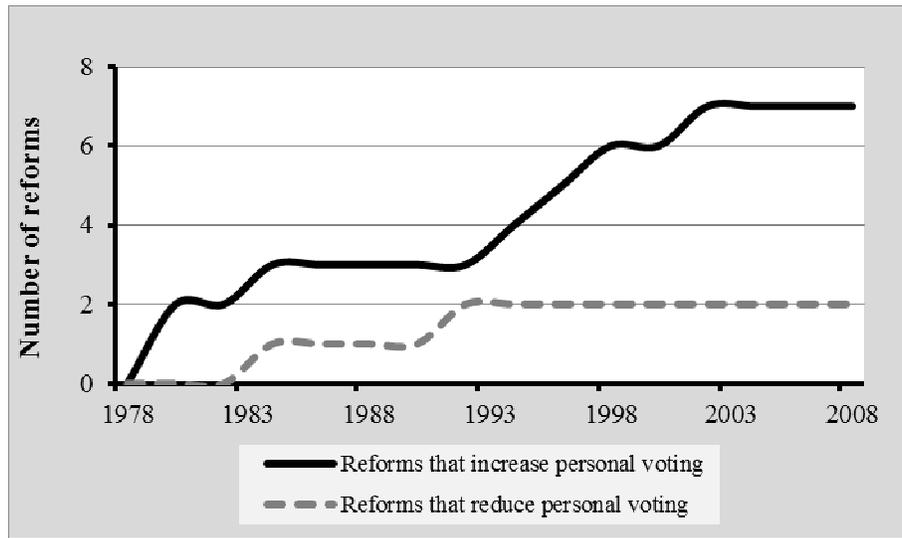
36. Negretto, *supra* note 2, at 45–46.

37. See Carey & Shugart, *supra* note 34, at 421–22, 430–31 (describing how, as a result of personalization, voters have a greater role in candidate selection, a party’s candidates compete amongst themselves, and leaders may enact pork barrel legislation to win favor with constituents).

38. Negretto, *supra* note 8, at 41.

39. *Id.*

Figure 3. Reforms to the Partisan Nature of Voting by Year, 1978–2008



From 1978 to 2008, there have been nine reforms in this area, most of which (seven) introduced a degree of personal voting that was absent before.<sup>40</sup> In some cases, personalization was increased by combining single-member districts with party-list voting, in others by adopting open or flexible lists.<sup>41</sup> As a result of these reforms, by 2008, only six countries—Argentina, Costa Rica, El Salvador, Guatemala, Paraguay, and Nicaragua—elected all members of the single or lower chamber of congress by single closed lists.<sup>42</sup>

The only cases of reform that can be counted as increasing partisan voting are Colombia in 2003 and Mexico in 1986. As to Colombia, this is because single-party lists replaced multiple lists without vote pooling.<sup>43</sup> In Mexico, the 1986 reform expanded the number of deputies who could be elected via party lists from 100 to 200.<sup>44</sup> Since those deputies were previously elected in single-member districts, the reform could be considered a step toward greater partisan voting.

*3. More Permissive Rules of Presidential Reelection.*—The combination of inclusive electoral rules, which foster multiparty systems, with personalized voting systems, which encourage intraparty competition, suggests the emergence of more pluralistic and competitive electoral

40. Negretto, *supra* note 2, at 46.

41. *Id.* at 45–46.

42. Negretto, *supra* note 16, at 86.

43. *Id.* at 88. In spite of this, the 2003 reform maintains an important degree of personalization in that it allows parties to opt for open or closed lists, and in fact, most parties have opted for open lists since 2006. *Id.* at 88–89.

44. *Id.* at 87 tbl.5.

systems. These rules also support consensual forms of decision making by inducing negotiation both across and within parties. Other electoral reforms, however, do not move in the same direction, at least not consistently. Such is the case with the presidential reelection rule, which has recently become more permissive. Permissive rules of presidential reelection limit the rotation of individuals in the executive office and may also increase—as in consecutive reelection—the bargaining power of the president vis-à-vis legislators.<sup>45</sup>

In increasing order of permissiveness, reelection rules may vary from the absolute proscription of reelection to reelection after one or two terms to consecutive reelection, with or without limits. Reelection rules (perhaps along with the rules regulating presidential terms) have traditionally been among the most unstable constitutional provisions in Latin America.<sup>46</sup> For instance, the number of countries whose constitutions allowed consecutive reelection—one or unlimited—has successively increased and decreased between 1900 and 1960 as a result of cycles in which more permissive rules were followed by less permissive ones and vice versa.<sup>47</sup>

A similar instability has been visible since 1978. From 1978 to 1993, most new constitutions and amendments maintained or restored relatively restrictive presidential reelection rules, such as reelection after one term. In several cases, as in Ecuador in 1978, Guatemala in 1985, Honduras in 1982, Colombia in 1991, and Paraguay in 1992, presidential reelection was proscribed.<sup>48</sup> Since 1993, however, this trend has been reversed. Figure 4 illustrates the number of reforms that made presidential reelection more, and less, permissive from 1978 to 2008.

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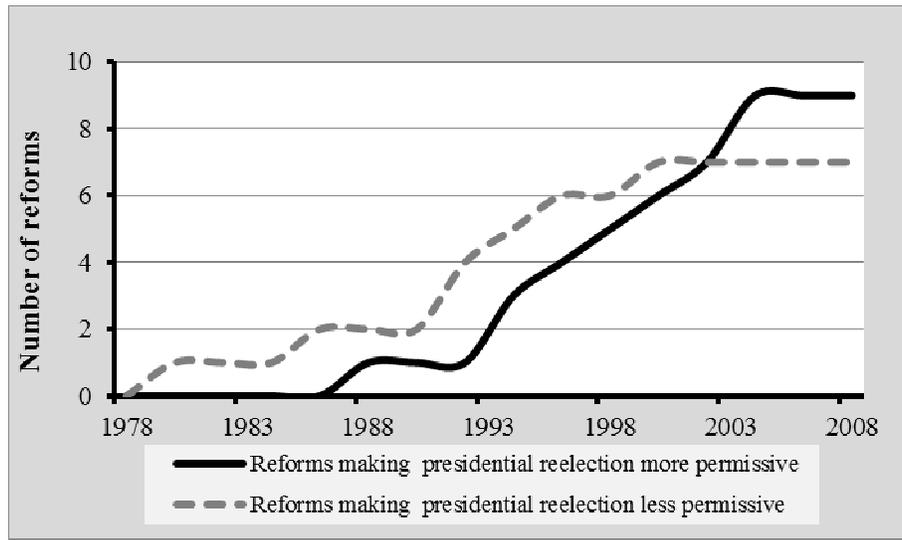
45. See generally John M. Carey, *The Reelection Debate in Latin America*, LATIN AM. POL. & SOC'Y, Spring 2003, at 119 (discussing the constitutional restrictions on reelection and the lifting of those restrictions in Latin America in the nineteenth and twentieth centuries).

46. Negretto, *supra* note 8, at 43.

47. *Id.*

48. *Id.*

Figure 4. Reforms to Presidential Reelection Rules by Year, 1978–2008



From a total of sixteen reforms to the rules of presidential reelection, nine have made it more permissive and seven less.<sup>49</sup> Although the shift toward more permissive rules of presidential reelection is recent and not pronounced, it is important to note the frequency with which pressures emerge in different countries for reforms to extend the term of the president in office, usually to replace a proscription of reelection or the rule of reelection after one term with the rule of reelection for one consecutive term.<sup>50</sup> These pressures suggest that the trend toward more permissive reelection rules may continue in the near future.

As the previous analysis shows, electoral rules have been anything but stable in Latin America. Yet patterns emerge within this general instability. Reforms in the formulas to elect presidents, the system to elect deputies, and the partisan nature of voting all seem to follow a pattern that goes from less to more inclusiveness, pluralism, and competition. Other areas of electoral

49. *Id.* These reforms do not include the case of Costa Rica. In 2003, Costa Rica shifted from an absolute proscription on presidential reelection to the rule of presidential reelection after two terms. *Id.* at 44 n.23. This reform, however, resulted from an interpretation by the Constitutional Court rather than from a formal amendment. *Id.*

50. In the last two years, the presidential reelection rule became more permissive in Venezuela and Bolivia. Cf. *Chavez Wins Chance of Fresh Term*, BBC NEWS (Feb. 16, 2009), <http://news.bbc.co.uk/2/hi/7891856.stm> (discussing results of vote to abolish presidential term limits in Venezuela); *Profile: Bolivia's President Evo Morales*, BBC NEWS (Jan. 12, 2011), <http://www.bbc.co.uk/news/world-latin-america-12166905> (reporting on President Morales's victory in a referendum to extend his term). More recently, a ruling by the supreme court of Nicaragua may enable the president of the country to serve consecutive terms in spite of being prohibited since the 1995 reform. *Nicaragua Court Backs Re-Election*, BBC NEWS (Oct. 20, 2009), <http://news.bbc.co.uk/2/hi/8316167.stm>.

reform, however, do not move consistently in the same direction, as is the case with presidential reelection rules.

*B. Decision-Making Rules*

Presidential power is a multidimensional concept because it alludes to the authority of the president in her different roles as chief of party, chief of state, chief of government, and co-legislator. The two main dimensions of presidential power that constitutions regulate relate to the capacity of presidents to appoint and remove cabinet ministers and other high officials in the administration and the judiciary, and their capacity to participate and to have influence over policy making.<sup>51</sup> The first dimension refers to government powers; the second refers to legislative powers.

*1. Greater Restrictions on the Government Powers of Presidents.—* Presidents in Latin America have traditionally enjoyed a high degree of independence from congress in the formation, coordination, and change of cabinets. Since the 1850s, no constitution in the region has required the intervention of congress or one of its chambers to confirm the appointment of cabinet ministers.<sup>52</sup> A procedure called “parliamentary interpellation” has been part of most Latin American constitutions since the early nineteenth century.<sup>53</sup> This procedure, however, did not normally imply the possibility of forcing the resignation of ministers; it only provided legislators with the capacity to summon cabinet ministers to a congressional session for information about a particular policy area under their responsibility.<sup>54</sup>

Over time, however, several constitutions in Latin America imposed greater restrictions on the governmental powers of presidents, and this trend has grown since 1978. During recent decades, important debates took place in Brazil, Argentina, and Bolivia about the merits of shifting from a presidential to a mixed regime which would combine presidential and parliamentary principles of design.<sup>55</sup> No country passed such a reform, but several recent constitutional changes in Latin American countries have strengthened congressional controls over cabinets, often with the intention of introducing features of a parliamentary system within the structure of a presidential regime.<sup>56</sup> Figure 5 illustrates the number of reforms that have

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51. Negretto, *supra* note 8, at 44–45.

52. *Id.* at 45.

53. *Id.*

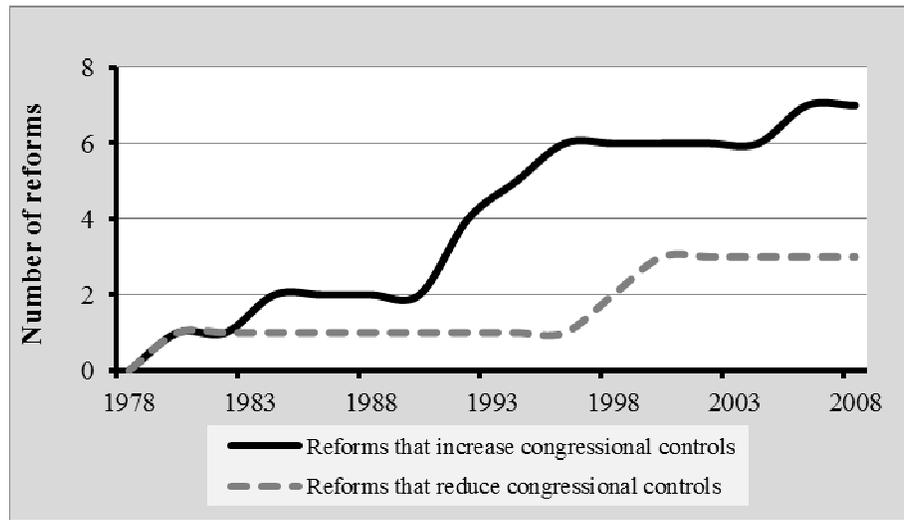
54. *Id.*

55. See Negretto, *supra* note 2, at 47 (summarizing debates about the adoption of semi-presidential regimes in Brazil and Argentina); René Antonio Mayorga, *Bolivia: Electoral Reform in Latin America*, in THE INTERNATIONAL IDEA HANDBOOK OF ELECTORAL SYSTEM DESIGN 79, 79 (Andrew Reynolds & Ben Reilly eds., 2d ed. 1997) (characterizing the Bolivian system as “parliamentari[z]ed presidentialism”).

56. Negretto, *supra* note 2, at 46–48.

increased or decreased congressional controls over cabinets from 1978 to 2008.

Figure 5. Reforms to the Government Powers of the President by Year, 1978–2008



Of a total of ten reforms in this area, in seven cases the formal power of congress over cabinets has increased.<sup>57</sup> It was only in three cases—Ecuador in 1998, Peru in 1993, and Venezuela in 1999—that congressional power over cabinets decreased.<sup>58</sup> As a consequence of these reforms and the constitutions that maintained similar mechanisms inherited from previous constitutions, as of 2008, there were thirteen countries in Latin America in which the constitution provides some form of political control of cabinets by congress.<sup>59</sup>

The same trend can be observed in other areas of the government power of presidents. Presidents in Latin America have traditionally had the power to appoint, or at least be influential in the appointment of, local authorities, judges of constitutional courts, attorney generals, and members of oversight institutions.<sup>60</sup> The most important changes in these powers have been introduced since 1978, both strengthening congressional controls over

57. *Id.* at 47. I have considered as an increase in congressional power (and thus a decrease of presidential power) adopting a censure mechanism when this did not exist, making requirements for the initiation of a motion of censure less stringent, and making the censure binding when it was not previously so. Negretto, *supra* note 8, at 46 n.27. I have included the traditional interpellation mechanism only when it did not exist before the reform, as in Chile. *Id.*

58. Negretto, *supra* note 2, at 47.

59. Negretto, *supra* note 8, at 47.

60. *Cf. supra* note 2 and accompanying text.

executive appointments and removing the influence of the president altogether.

Measures of political decentralization introduced in several centralist states have deprived presidents of an important source of power and patronage.<sup>61</sup> Such was the case in the introduction of the popular election of all city mayors in Bolivia in 1994 and the popular election of governors in Venezuela in 1989 and Colombia in 1991.<sup>62</sup> The appointment powers of presidents have also been reduced as a result of reforms aimed at strengthening judicial independence. Since the 1994 reforms in Argentina and Mexico, for instance, presidents in these countries have needed the support of a qualified majority of the senate—rather than the simple majority required in the past—to appoint supreme court justices.<sup>63</sup> Since enactment of the 1991 Colombian constitution, the president has lacked the exclusive power to nominate candidates to the Constitutional Court.<sup>64</sup> Similar reforms have occurred in several countries, reducing the power of the president to appoint the attorney general, prosecutor general, and heads of oversight institutions.<sup>65</sup>

2. *Stronger Legislative Powers for the President.*—The classic checks-and-balances model of presidents with strong reactive legislative powers but weak proactive powers, inspired by the United States Constitution, prevailed in most Latin American constitutions until the early decades of the twentieth century.<sup>66</sup> Since then, however, a persistent trend of reforms has strengthened the powers of presidents to promote legislative change, thus moving design in an opposite direction from the reforms in the area of government powers discussed above.

Although some reforms have altered the veto powers of presidents, the most important and frequent changes introduced in the allocation of policy-making powers have occurred in the area of agenda-setting powers. These powers allow presidents to constrain the set of policy alternatives from which the assembly may choose, or the timetable according to which these choices must be made, or both. Throughout the twentieth century, the agenda-setting powers of presidents have consistently increased in five areas. Presidents have acquired exclusive authority to (1) introduce bills concerning important

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61. See MERILEE S. GRINDLE, *AUDACIOUS REFORMS: INSTITUTIONAL INVENTION AND DEMOCRACY IN LATIN AMERICA* 3–4 (2000) (explaining that reforms to decentralize power had the effect of increasing political competition); KATHLEEN O'NEILL, *DECENTRALIZING THE STATE: ELECTIONS, PARTIES, AND LOCAL POWER IN THE ANDES* 4 (2005) (summarizing the shifting of power from national to local governments in certain Latin American countries).

62. O'NEILL, *supra* note 61, at 107 (Colombia), 125 (Bolivia), 175–76 (Venezuela).

63. Negretto, *supra* note 2, at 48.

64. *Id.*

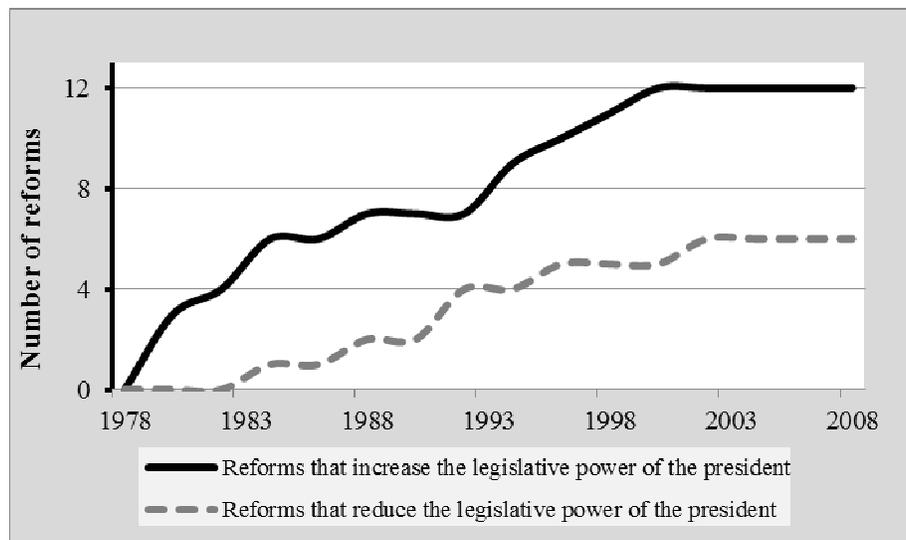
65. *Id.*

66. See Negretto, *supra* note 4, at 120 (noting that most presidential regimes in Latin America maintained the United States model of separation of powers at the beginning of the twentieth century).

economic and financial issues, and authority to (2) set the budget, (3) introduce bills that must be voted on in Congress within a time limit, (4) issue decrees of legislative content, and (5) submit the approval of bills to popular referenda.<sup>67</sup>

In 1930, only the constitutions of Chile, Colombia, and Uruguay authorized presidents to use any of these powers.<sup>68</sup> The number of constitutions providing for agenda-setting powers, however, increased to seven in 1940 and to ten by 1960.<sup>69</sup> This trend has continued throughout subsequent decades. Figure 6 illustrates the number of reforms that have increased or reduced the legislative powers of presidents between 1978 and 2008.

Figure 6. Reforms to the Legislative Powers of the President by Year, 1978–2008



Of a total of eighteen reforms during this period that altered the distribution of legislative powers between presidents and assemblies, twelve strengthened the powers of the president and only six weakened them.<sup>70</sup> The relative increase in the legislative powers of the president was due exclusively to the strengthening of his veto powers in only two cases: El Salvador

67. Negretto, *supra* note 8, at 48–49.

68. *Id.* at 49.

69. *Id.*

70. Negretto, *supra* note 2, at 49 tbl.5. Except for the 1995 reform in Nicaragua, however, all of the reforms that reduced the previous legislative powers of presidents (Brazil in 1988 and 2001, Colombia in 1991, Nicaragua in 1987, and Paraguay in 1992) left presidents with legislative powers that are still quite strong in the Latin American context. Negretto, *supra* note 8, at 50 n.28.

in 1983 and Uruguay in 1996.<sup>71</sup> All of the other cases involved strengthening at least some of his agenda-setting powers. As a result of these reforms, as of 2008, only four countries in Latin America—Costa Rica, the Dominican Republic, Mexico, and Nicaragua (after its 1995 reform)—had constitutions that did not provide presidents with any significant agenda-setting power.<sup>72</sup>

Just as in the case of electoral rules, then, the allocation of powers between presidents and assemblies reveals both instability and patterns of design that are not always mutually consistent. Reforms aimed at redistributing power away from the presidency and toward congress and the judiciary have coexisted—even within the same design—with reforms aimed at concentrating power in the hands of the president.

## II. A Two-Level Theory of Constitutional Choice

How do we explain this amalgam of seemingly inconsistent institutions? From the perspective of an external observer, reforms that promote plural representation and consensual decision making may appear incompatible with reforms that restrict party competition and concentrate power in the executive branch. For an analysis of constitutional politics, however, the most important question is why those who participate in constitution making would have selected these institutions.

Prevailing theories of institutional choice and design do not provide clear guidance to answering this question. Cooperative theories, most of them from economics, presume that institutional designers pursue cooperative outcomes and that the distribution of resources among them is relatively unimportant for explaining institutional selection.<sup>73</sup> Distributional theories, usually preferred by political scientists, assume that institutional designers are exclusively concerned with the effect of institutions on their capacity to win elections and have influence over policy, so the outcome of institutional selection is primarily explained by the underlying distribution of resources and power.<sup>74</sup>

Cooperative theories emphasize how constitutional designers select institutions based on the collective benefits that would result from them, such as economic development, durable democracy, effective government, or political legitimacy. This view is obviously shared by accounts of constitutional choice as a process driven by impartial motivations and

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71. Negretto, *supra* note 8, at 50.

72. *Id.*

73. See James M. Buchanan, *The Domain of Constitutional Economics*, 1 CONST. POL. ECON. 1, 7–8 (1990) (distinguishing between conflictual models, in which competition for resources is salient, and cooperative theories, which emphasize voluntary exchanges among individuals).

74. See JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT 4 (1992) (summarizing separate theoretical models that emphasize collective benefits of social institutions to a community generally and advantages of institutional design to certain political and social groups).

theories about the effects of alternative institutions on good governance.<sup>75</sup> Cooperative models, however, are dominant in the economic analysis of constitutions, which assumes rational, self-interested actors.<sup>76</sup> A well-established tradition in public-choice theory, for instance, sees constitutions as governance structures that help citizens and political elites to mitigate obstacles to collective action, commit to cooperative agreements, and realize gains from trade.<sup>77</sup> This view of constitutions is also shared by a number of important political scientists working within this tradition.<sup>78</sup>

Distributional models, by contrast, postulate that constitution makers form preferences for constitutional rules based on whether these rules would allow them to obtain an advantage in political competition.<sup>79</sup> In this view, constitutional choice is bound to be a conflictive process in which resources and bargaining power are crucial for determining institutional selection.<sup>80</sup> Political scientists tend to favor distributional over efficiency-based explanations because the former are more able to portray the politics of institutional change—the struggle for distributive shares that institutional designers often associate with alternative designs.<sup>81</sup>

At first glance, distributional theories look more promising than cooperative models as general explanations of constitutional choice. There are indeed constitutional provisions, such as those that proclaim and protect basic civic rights, that benefit all members of society and have no visible

75. See MARTIN DIAMOND, *THE FOUNDING OF THE DEMOCRATIC REPUBLIC* 8–9 (1981) (“We argue that the [U.S.] Constitution is not undemocratic and was not a retreat from democracy. Rather, it is a thoroughgoing effort to *constitute democracy*. We view the American system as seeking to reconcile the advantages of democracy with the sobering qualities of republicanism.”).

76. See GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY* 65 (1985) (“*Homo economicus*, the rational, self-oriented maximizer of contemporary economic theory, is, we believe, the appropriate model of human behavior for use in evaluating the workings of different institutional orders.”).

77. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 23 (1962) (arguing that constitutions should be regarded as contracts that enable individuals to leave the state of nature and to create a political order that makes possible the provision of public goods and the protection of individuals’ interests); DENNIS C. MUELLER, *CONSTITUTIONAL DEMOCRACY* 63–64 (1996) (following Buchanan’s idea of constitutions as contracts to realize gains from trade).

78. See, e.g., Matthew Soberg Shugart, *The Inverse Relationship Between Party Strength and Executive Strength: A Theory of Politicians’ Constitutional Choices*, 28 *BRIT. J. POL. SCI.* 1, 7–8 (1998) (arguing that legislators allocate policy-making powers to make possible the efficient provision of public goods); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 *J.L. ECON. & ORG.* 1, 28 (1995) (explaining that “the critical *economic* role for *political* institutions [is] to provide the appropriate foundations for economic policy-making and a secure system of economic and political rights”).

79. See *supra* note 74 and accompanying text.

80. See generally KNIGHT, *supra* note 74, at 126–51 (outlining factors contributing to institutional change and decisions confronting political and social actors that affect such change).

81. See Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 *J.L. ECON. & ORG.* 213, 213–14 (1990) (discussing the prevalence of institutional theories that focus on cooperative outcomes but noting that focus on political “winners and losers” is as important theoretically).

distributional consequences for institutional designers. The adoption of these rules can thus be seen as an efficient and cooperative outcome over which designers can universally agree. Members of a reform coalition may also share a preference for a constitution that includes some broad institutional features. But cooperative theories of constitutional choice tend to draw too sharp a line of demarcation between preferences for constitutional rules and preferences for distributional outcomes under those rules. Choosing a constitution is seen as selecting a cooperative structure without knowing what distributional outcomes would result once this structure is implemented.<sup>82</sup> In most situations, however, the objective of creating a new institution is not efficiency per se; rather, the objective is making a Pareto improvement in which distributional conflicts are central.<sup>83</sup>

These distributional conflicts are inevitable when institutional designers select institutions that have well-known effects on their capacity to win office and have influence over political decisions. Such is the case of key provisions of the constitution that regulate elections and decision-making procedures. Election rules determine how many actors can compete with some probability of success and who may win or lose given the expected popular vote in an election.<sup>84</sup> Decision-making rules, in turn, determine how many actors need to agree to make collective decisions, who has the power to make proposals, and who has the power to accept or reject them.<sup>85</sup> Since professional politicians cannot disregard the outcomes that these rules are likely to produce, their choice is affected by the partisan interests and relative power of institutional designers. Empirical works on constitutional change have provided a considerable amount of evidence in support of this perspective in explaining variations in electoral reform, distribution-of-powers reform, and judicial reform.<sup>86</sup>

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82. See BRENNAN & BUCHANAN, *supra* note 76, at 30 (“Faced with genuine uncertainty about how his position will be affected by the operation of a particular rule, the individual is led by his self-interest calculus to concentrate on choice options that eliminate or minimize prospects for potentially disastrous results.”).

83. See GEORGE TSEBELIS, *NESTED GAMES: RATIONAL CHOICE IN COMPARATIVE POLITICS* 105 (1990) (arguing that a new political institution can embody any of a range of Pareto-efficient outcomes, and that choosing between those outcomes is a distributional issue).

84. See Negretto, *supra* note 4, at 123 (“[Electoral] rules determine the number of viable candidates and parties competing for office.”).

85. *Id.*

86. The list of recent works associated with this perspective is long and growing. For works concerning electoral reform, see Josep M. Colomer, *It's Parties that Choose Electoral Systems (or, Duverger's Laws Upside Down)*, 53 *POL. STUD.* 1 (2005); Barbara Geddes, *Initiation of New Democratic Institutions in Eastern Europe and Latin America*, in *INSTITUTIONAL DESIGN IN NEW DEMOCRACIES: EASTERN EUROPE AND LATIN AMERICA* 15 (Arend Lijphart & Carlos H. Waisman eds., 1996); Negretto, *supra* note 24, at 426–29; and Laura Wills-Otero, *Electoral Systems in Latin America: Explaining the Adoption of Proportional Representation Systems During the Twentieth Century*, *LATIN AM. POL. & SOC'Y*, Fall 2009, at 33. For recent works concerning the distribution of powers between presidents and assemblies, see Timothy Frye, *A Politics of Institutional Choice: Post-Communist Presidencies*, 30 *COMP. POL. STUD.* 523 (1997); Arend Lijphart, *Democratization and Constitutional Choices in Czecho-Slovakia, Hungary and Poland: 1989–91*, 4 *J. THEORETICAL*

Yet, distributional theories cannot provide a comprehensive account of constitutional choice. Constitution makers are not completely free to choose the general orientation of reforms or the range of alternatives that they will consider at a given historical juncture. This range of alternatives is determined by the performance of preexisting constitutional rules in making possible the realization of a cooperative outcome. In addition, political actors are not always able to initiate constitutional changes to maximize their short-term partisan interests. Sometimes they are forced to react to exogenous shocks or endogenous processes that make maintenance of the existing constitution no longer viable or convenient.<sup>87</sup> In this situation, strategic politicians may have to weigh distributional goals with more systemic considerations about the impact of institutional selection on the effectiveness and quality of the political regime.

The problem of distributional and cooperative theories is logically similar in that both stem from a one-dimensional view of constitutions as either governance structures or power structures. But the nature of constitutions is complex. Constitutions work as coordinating devices that regulate long-term interactions among political actors. They provide structure to political competition, define the procedures by which politicians are able to provide public goods demanded by voters, and secure the acquiescence of the governed to the state.<sup>88</sup> At the same time, constitutions produce distributive outcomes, which benefit some actors more than others.<sup>89</sup> This dual nature of constitutions should affect the goals that politicians pursue in the selection of constitutional designs.

I propose an explanation of constitutional choice that accounts for this dual logic of institutional selection. According to this theory, constitutional choice is endogenous to the performance of preexisting constitutional structures and to the partisan interests and relative power of reformers. Given the dual nature of constitutions as cooperative arrangements and power structures, institutional designers always have some shared interest in the efficient performance of institutions and a partisan interest in the political advantage that institutions provide. These two logics of institutional selection are often compatible because they tend to work at different levels of constitutional design.

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POL. 207 (1992); and Negretto, *supra* note 4. For works concerning judicial reform, see TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* (2003); Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, *LATIN AM. POL. & SOC'Y*, Spring 2005, at 87; and Julio Ríos-Figueroa & Andrea Pozas-Loyo, *Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America*, 42 *COMP. POL.* 293 (2010).

87. Negretto, *supra* note 8, at 100.

88. *Id.* at 113; see also Walter F. Murphy, *Designing a Constitution: Of Architects and Builders*, 87 *TEXAS L. REV.* 1303 (2009) (identifying questions that confront constitutional framers and explaining the process of creating an active citizenry).

89. Negretto, *supra* note 8, at 113.

At the level of broad organizational principles, political actors share an efficiency concern in the adoption of a constitution that would make possible the realization of a cooperative outcome, such as political order, government stability, effective decision making, or citizen inclusion and participation.<sup>90</sup> The type of cooperative outcome that constitution makers seek to achieve varies over time depending on the challenges that political actors face at particular historical junctures. The design of a constitution capable of realizing these outcomes usually elicits general agreement. At the level of specific alternatives of design, however, institutional designers have a partisan interest in the adoption of institutions that provide them and their supporting groups with a political advantage.<sup>91</sup> This concern over issues of distribution and redistribution (who gets what, when, and how) induces disagreement and conflict, which make power resources crucial in determining the final outcome.

The existence of different levels of constitutional design has been recognized by previous studies on constitution making.<sup>92</sup> Less discussed, however, is how these levels interact. The attainment of a particular cooperative outcome through constitutional design justifies the need for reform and determines its general guidelines.<sup>93</sup> These guidelines shape the repertoire of feasible institutional alternatives, which include precedent institutions, available foreign models, and theories of design.<sup>94</sup> Cooperative outcomes, however, are invariably vague, and there is more than one alternative of constitutional design for realizing them.<sup>95</sup> This menu of options provides strategic politicians with ample room to propose and pick those alternatives within the repertoire that are closer to their partisan interests. The manipulation of alternatives also explains why the consensus generated by the collective goals of design tends to evaporate as soon as constitution makers start discussing the specific alternatives that are proposed to realize those goals.<sup>96</sup>

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90. *Id.* at 101.

91. *Id.* at 13.

92. *See, e.g.,* CALVIN C. JILLSON, CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787, at 14–17 (1988) (identifying a primary level of design in which regime types are selected and a secondary level where rules that order behavior within institutions are framed).

93. Negretto, *supra* note 8, at 102.

94. *See* Kurt Weyland, *Institutional Change in Latin America: External Models and Their Unintended Consequences*, J. POL. LATIN AM. (Ger.), 2009, at 37, 42–43 (discussing theories of design); *id.* at 47 (discussing foreign models).

95. Negretto, *supra* note 8, at 102.

96. *Id.* The relationship between the general, cooperative outcomes that constitutions should produce and the distributional outcomes associated with specific alternatives is similar to the relationship between valence and position issues in electoral competition. *See* Donald E. Stokes, *Spatial Models of Party Competition*, 57 AM. POL. SCI. REV. 368, 373 (1963) (defining “valence-issues” as issues uniformly liked (as economic growth) or disliked (as corruption) among the electorate, and “position-issues” as issues where the opinions of voters are divided). A valence

Given partisan conflict over institutional selection, the power resources of reformers are always crucial to explaining comparative variations in constitutional choice. Individual cases may differ, however, in the extent to which partisan interests and power are sufficient to explain a particular outcome. The theory of constitutional choice just proposed suggests that these differences depend on the events that trigger constitutional change and on the thickness of the veil of ignorance that institutional designers face at the time of choice with respect to the effects of institutions on their future political positions.<sup>97</sup>

If constitutions matter as structures of governance, cooperative goals and efficiency concerns about institutional performance should become more salient and constraining when constitutional change responds to an institutional crisis than when it simply follows a balance-of-power shift among political actors. An institutional crisis, often preceded by the regime's failure to provide basic public goods and to satisfy citizens' demands for reform, compels institutional designers to weigh partisan interests against efficiency considerations and to focus on the adoption of reforms that are widely believed to improve constitutional performance under the circumstances.<sup>98</sup> The impact of partisan interests and power on constitutional choice may also be weaker when constitution makers select institutions under high levels of electoral uncertainty.<sup>99</sup> This occurs when patterns of competition suddenly shift at the time of reform and the selection of institutions is distant in time from the implementation stage.<sup>100</sup> In these situations, which resemble the general uncertainty about institutional outcomes that cooperative theories of constitutional choice presuppose, institutional designers tend to select institutions that, within the menu of alternatives, are likely to distribute the benefits of reform in a more equal way among all of the actors involved.<sup>101</sup>

This theory reconciles two seemingly contradictory theories of institutional design and makes sense of the interaction between historical constraints and strategic behavior in the selection of institutions. A two-level explanation of constitutional choice also accounts for recent trends of design in Latin America. The initial calls for reform and their particular orientation often originated out of the need to improve the ability of institutions to provide public goods that voters demand. Specific alternatives of design,

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issue becomes a position issue once a specific policy is proposed to achieve a desired outcome or prevent an undesirable one. *Id.* at 374.

97. *See supra* note 95 and accompanying text.

98. *See* Negretto, *supra* note 8, at 128–29 (recognizing that, in response to crises involving the capacities of the state and popular upheaval, framers seek to “improv[e] the effectiveness or quality of the political regime”).

99. *See id.* at 130–31 (recognizing that efficiency concerns become more salient during times of electoral uncertainty).

100. *Id.* at 118.

101. *Id.*

however, have been proposed and selected according to the electoral expectations and relative power of reformers at the time of choice.

### III. Explaining Shifting Constitutional Designs in Latin America

In many Latin American countries, the transition to democracy fostered a retrospective assessment among both academics and politicians about what features of preexisting constitutional structures were responsible for a history of dictatorship, political conflict, and human rights abuses. As democratic regimes stabilized, debates about constitutional design began to focus more on the capacity of existing institutions to meet new challenges, such as promoting economic growth, maintaining government stability, providing public security, and achieving better representation of citizens' interests.<sup>102</sup>

Evaluations of this kind are crucial for explaining why institutional designers in Latin America have considered reforms to preexisting institutions and why some general options of design entered the menu of choices. Institutional designers have often agreed on the need to introduce reforms that would improve the performance of the democratic regime in making the realization of a cooperative outcome possible. Yet partisan conflicts have typically emerged about what alternative is best to achieve that goal. Some examples of recent constitutional reforms in Latin America illustrate the argument.

In the area of electoral reform, the introduction of proportionality in the system to elect deputies initially became attractive in countries where the winner-take-all effect of majoritarian formulas had in the past resulted in violence and military intervention.<sup>103</sup> Institutional designers, however, have disagreed about which formulas were best to replace plurality or majority elections, depending on the current and expected electoral support for their parties. While large parties tended to favor mixed or PR formulas in districts of small magnitude, small or declining parties have supported more proportional systems.<sup>104</sup> In more recent decades, the proposal to adopt runoff formulas of presidential election became part of debates about electoral reform due to the post-election conflicts and political instability that often resulted from using plurality rule in multiparty presidential races.<sup>105</sup> Larger parties, however, have tended to prefer replacing plurality with intermediate

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102. See Negretto, *supra* note 2, at 51 (arguing that constitutional rigidity is not appropriate in a context of social, political, and economic instability).

103. Negretto, *supra* note 8, at 53.

104. Geddes, *supra* note 86, at 30; see also Wills-Otero, *supra* note 86, at 47–48, 51 fig.3, 52 fig.4, 54 n.16 (noting an inverse relationship between the size of the largest political party in a country and the proportionality in its electoral system).

105. See Matthew Soberg Shugart & Rein Taagepera, *Plurality Versus Majority Election of Presidents: A Proposal for a "Double Complement Rule,"* 27 COMP. POL. STUD. 323, 324 (1994) (arguing that the need to prevent "the election of a rather radical president by a narrow plurality of the vote" has been a reason to opt for nonplurality formulas of presidential election).

formulas, such as qualified plurality, while small and electorally declining parties have usually favored majority runoff.<sup>106</sup>

In the area of decision making, in the early 1980s, many countries considered reform proposals to overcome the political instability, interbranch conflict, human rights abuses, and political corruption often associated with a presidential regime that concentrated too much power in the executive branch.<sup>107</sup> In a few cases, this assessment led to serious debate about the possibility of adopting a parliamentary or mixed-regime system; in most cases, however, it led to consideration of restrictions to the appointment, emergency, and government powers of presidents. But even when this reform agenda became widely accepted among political actors, the most radical proposals for redistributing power in favor of congress and the judiciary were typically supported by opposition parties and parties without governing experience.<sup>108</sup> In the opposite direction, the idea of strengthening the legislative powers of presidents emerged as an alternative design to provide governments with instruments of legislation in contexts of economic crisis where legislators did not have the incentives or the capacity to provide policy reforms.<sup>109</sup> The most power-concentrating reforms in this area, however, were usually favored by presidents and their supporting groups.<sup>110</sup>

In other words, in the presence of distributive outcomes, strategic political actors always tend to propose or support alternatives of reform that, within the menu of options, are closer to their partisan interests. This process induces disagreement and conflict, thus making power resources crucial in determining the final outcome. From this perspective, the identities of the actors participating in constitution making, and their interests and resources, are essential components in the comparative analysis of constitutional choice. Table 1 shows the composition of reform coalitions before and after 1978, based on a database that includes all elected assemblies that have replaced the constitution or amended it in the area of election or decision-making rules between 1900 and 2008.

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106. Negretto, *supra* note 24, at 425; *see also* Negretto, *supra* note 26, at 113–15 (showing how in Argentina, qualified plurality emerged as a compromise between the largest party's proposal to adopt plurality and the main opposition party's proposal to adopt majority runoff).

107. *See generally* Carlos Santiago Nino, *Ideas and Attempts at Reforming the Presidentialist System of Government in Latin America*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT* 128 (Arend Lijphart ed., 1992) (summarizing an initial movement toward increased presidential powers followed by reforms that strengthened legislatures).

108. *Cf.* Negretto, *supra* note 8, at 249 (reporting that constitutional reforms designed to strengthen the judiciary and congress in Argentina in 1994 were supported by the opposition party); *id.* at 387 (describing the 1997 reforms to the constitution of Ecuador and noting that "small parties without previous government experience . . . were usually the firmest opponents to reducing congressional powers").

109. *See, e.g., id.* at 380–81, 393 tbl.4 (describing several proposed reforms to the constitution of Ecuador, including a proposal to enhance the president's legislative powers, as motivated by the widespread perception of congress as a corrupt and meddling institution).

110. *Id.* at 371.

Table 1. Features of Reform Coalitions, 1900–2008

Period	Constitutional Revisions	One-Party Coalition	Multiparty Coalition
1900–1977	28	16 (.57)	12 (.43)
1978–2008	39	6 (.15)	33 (.85)
Total	67	22	45

Source: Gabriel L. Negretto, *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America* (2010) (unpublished manuscript) (on file with author).

Before 1978, 57% of elected assemblies that replaced or amended constitutions were under the control of a single party.<sup>111</sup> By contrast, this situation occurred in only 15% of such assemblies between 1978 and 2008.<sup>112</sup> This means that in more than 80% of cases in recent decades, reform coalitions have included at least two parties. Multiparty constituent bodies differ based on the partisan interests and levels of bargaining power of the actors included in the reform coalition. Other things being equal, however, the logic of choice of unilateral and multilateral constituent assemblies is expected to be markedly different.<sup>113</sup> This difference contributes to an explanation of the institutions adopted in Latin America since 1978.

When only one actor, usually an incumbent party, has control over constitutional design, it can adopt institutions that best reflect its interests simply by voting them into being. No deliberation or bargaining with other forces is necessary. In this situation, constitutional design would tend to concentrate electoral power in the party by means of restrictive electoral rules and government power in the president by means of weak congressional or judicial oversight. This was the case, for instance, for the reforms in Peru in 1993, Venezuela in 1999, and Ecuador in 2008, which extended the terms of presidents in office or increased their government powers, or both.<sup>114</sup>

By contrast, the process of institutional selection is more complex and fluid when more than one party is necessary to pass constitutional changes. If we assume that all actors share the same strategic interests or have a strictly equal veto power to prevent the preferences of opponents from being

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111. *Id.* at 207.

112. *Id.*

113. See Negretto, *supra* note 4, at 136 (positing that weaker parties tend to seek inclusivity in electoral rules); Ríos-Figueroa & Pozas-Loyo, *supra* note 86, at 293, 298–300 (distinguishing between unilateral and multilateral constitution-making processes based on issues that confront framers); Negretto, *supra* note 8, at 153 (noting that multilateral assemblies tend to opt for weaker presidential powers relating to emergency situations and interbranch conflict).

114. See Negretto, *supra* note 8, at 147 (reporting that the reforms increased the permissiveness of presidential reelection in all three countries); *id.* at 46–47 (noting that the reforms in Peru in 1993 and Venezuela in 1999 reduced congressional control over the president's cabinet).

adopted, then one could expect multilateral constituent bodies to enact internally consistent constitutional designs, usually emphasizing power sharing.<sup>115</sup> In most democratic settings, however, multiparty reform coalitions include actors with potentially conflicting interests and different levels of bargaining power.<sup>116</sup> For instance, in the vast majority of cases in Latin America in which more than one party has been needed to pass constitutional reforms, the party of the incumbent or future president was not only part of the coalition, but also its most influential member.<sup>117</sup>

In this situation, it is likely that within the range of alternatives, coalition parties that are electorally weak and do not expect to control the presidency in the near future would propose electoral rules that promote party pluralism and rotation in office, greater congressional controls over the executive, and the strengthening of judicial and oversight institutions. On the other hand, the incumbent or future president and her party are likely to propose more restrictive electoral rules, fewer controls over the executive, and the strengthening of presidential powers, particularly agenda-setting powers, to have influence over policy making in a fragmented congress. Precise predictions cannot be made because bargaining has multiple equilibrium outcomes.<sup>118</sup> But since no party has incentive to accept a compromise that does not improve its situation compared to the status quo,<sup>119</sup> the collective choice of a multiparty constituent body is likely to combine different forms of power-sharing and power-concentrating institutions. Multiparty constituent bodies, for instance, tend to opt for more inclusive electoral rules and stronger legislative powers for the president.<sup>120</sup> Table 2 summarizes these effects in simple bivariate regressions.<sup>121</sup>

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115. See Ríos-Figueroa & Pozas-Loyo, *supra* note 86, at 293 (showing that institutions that prevent the arbitrary use of power including “autonomous judicial councils, strong constitutional adjudication organs, and autonomous prosecutorial institutions are more likely to be created by multilateral constitution-making processes”).

116. Negretto, *supra* note 8, at 126.

117. *Id.* at 127.

118. See Negretto, *supra* note 4, at 135 (noting that multiparty reform coalitions often adopt seemingly opposite institutions within the same bargaining package).

119. See *id.* at 125 (“If these concessions improve their condition compared to the status quo, opposition parties will accept a compromise.”).

120. *Id.* at 125–26, 131 tbl.1, 133 tbl.2.

121. Results do not change, however, if we control for the diffusion effects of institutions adopted in neighbor countries, inertial effects of preexisting institutions, or features of the social and economic context.

Table 2. Reform Coalitions and Constitutional Choice in Latin America, 1900–2008

Independent Variable	Dependent variables	
	Presidential election rule <sup>b</sup>	Legislative powers of president <sup>c</sup>
Size of reform coalition <sup>a</sup>	+ <sup>d</sup> (0.01) <sup>e</sup>	+ <sup>d</sup> (0.05) <sup>e</sup>
<i>n</i>	67	67

Source: Gabriel Negretto, *Political Parties and Institutional Design: Explaining Constitutional Choice in Latin America*, 39 BRIT. J. POL. SCI. 117 (2009).

<sup>a</sup>Minimum number of parties necessary to pass constitutional changes according to the decision rule in the constituent body.

<sup>b</sup>Ordinal variable ranging from plurality (1) to majority rule (3) of presidential election, with qualified plurality as intermediate value (2).

<sup>c</sup>Continuous variable ranging from 1 to 100 based on principal component analysis.

<sup>d</sup>Direction of effect.

<sup>e</sup>Statistical significance level.

Although the partisan interests and relative power of reformers always determine variations in constitutional choice, the extent to which these factors alone are sufficient to explain particular outcomes is not equal across cases. As I have argued, constitution makers are more likely to consider the constitution as a whole and moderate their demands for the sake of improving institutional performance when reforms occur in response to an institutional crisis than when reforms follow a balance-of-power shift among political actors.<sup>122</sup> Constitution makers are also more likely to coordinate on the selection of institutions that might benefit all of the actors involved when the level of electoral uncertainty at the time of choice is high and they cannot use their present positions to form expectations about the future.<sup>123</sup> This means that in order to provide a more detailed explanation of particular outcomes in constitutional choice, we need to complement the study of reform coalitions with a process-tracing analysis of the sequence of events that cause constitutional reform and of the patterns of partisan competition that shape the expectations of the actors about their future positions.

This qualitative analysis explains observable differences between cases where reforms emerged in response to a crisis of institutional performance and cases of reforms that followed a shift in the partisan context. The need to improve the performance of preexisting constitutional structures in enabling governments to provide public goods and securing the representation of

122. See *supra* notes 97–101 and accompanying text.

123. See *supra* notes 98–99 and accompanying text.

citizens' interests is always used as a justification for reform, even in cases where the presence of distributional goals is most evident.<sup>124</sup> The appeal to cooperative goals, however, only exerts a constraining effect on the selection of particular alternatives of reform when constitutional change responds to an institutional crisis that puts into question the future viability of the political regime.<sup>125</sup> In these cases, a concern for the survival of the political system may limit the ability of some actors to propose or adopt the institutions that best reflect their short-term partisan interests.<sup>126</sup>

When constitutional reforms emerge in response to an institutional crisis, the nature of the crisis and its perceived root contribute to an explanation of the adoption of particular institutions. A deep-rooted distrust of parties among voters, for instance, has led political elites (including leaders of centralized parties) to adopt personalized voting systems in Venezuela in 1993, Bolivia in 1995, and Ecuador in 1998.<sup>127</sup> The failure of the Colombian state to contain violence in the late 1980s—in spite of the strong powers of the president to do so—induced institutional designers in that country (including the incumbent president and his party) to propose strengthening the powers of congress and the judiciary in 1991.<sup>128</sup> The frequency of conflicts between minority presidents and opposition congresses in Ecuador led institutional designers (including members of opposition parties at the time) to support the strengthening of all forms of presidential power in 1998 as a strategy to remedy ungovernability.<sup>129</sup>

The level of electoral uncertainty also affects the extent to which constitution makers are able to pursue distributional goals in institutional selection. This effect is most evident when one party has exclusive control over constitutional design but is uncertain about the possibility of maintaining this position in the future. In this situation, members of a dominant party may have incentives to adopt power-sharing institutions, such as more inclusive electoral rules or greater congressional and judicial controls over the executive.<sup>130</sup> But electoral uncertainty also affects the choices and level of coordination that can be achieved in multiparty reform coalitions. For instance, the unusual degree of coordination around the adoption of power-sharing institutions in Colombia in 1991 resulted not only from the institutional crisis that triggered the process but also from the unexpected results of

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124. *Cf. supra* note 77 and accompanying text.

125. *See supra* note 101 and accompanying text.

126. *See supra* note 86 and accompanying text.

127. Negretto, *supra* note 16, at 94.

128. *See generally* Negretto, *supra* note 8, at 299–343 (examining the reform process in Colombia).

129. *See generally id.* at 351–93 (discussing the reform in Ecuador).

130. *See, e.g.,* Finkel, *supra* note 86, at 109 (noting that Mexican reforms demonstrate that a one-party-dominant state may institute independent and powerful judicial institutions if the ruling party is uncertain of maintaining its dominant position in the future).

the constituent assembly election, which increased the level of uncertainty held by constitution makers about their future positions.<sup>131</sup>

Governance and politics are thus key elements for understanding both general trends and variations in constitutional design. Although these two concepts are quite general, they help explain recent constitutional transformations in Latin America. The seemingly contradictory combination of power-concentrating and power-sharing institutions in both election and decision-making rules reflects the diverse governance problems faced by new democracies in Latin America and the contrasting interests of the actors whose agreement was necessary to pass reforms.

#### IV. Conclusion

Cooperative and distributional theories often compete for explanations of institutional change and design. By themselves, however, these theories are unable to provide a complete account of constitutional choice. Constitutions have a dual nature; they function as structures of governance and as structures of power. For this reason, institutional designers have both efficiency concerns about the impact of constitutional choice on the effectiveness and quality of the democratic regime, and partisan concerns about the impact of constitutional choice on their personal and group interests. This means that explaining content and variation in constitutional choice demands an analysis of the performance of preexisting constitutional structures and of the partisan interests and relative power of reformers.

I have argued that these two factors explain shifting constitutional designs in Latin America. The constitutional structures that Latin American countries inherited from the nineteenth century have often failed to adapt to the dynamics of multiparty competition, provide political stability, satisfy voters' demands for better representation, or provide public goods in the context of a weak state and an unstable economy. Restrictive electoral rules have failed to produce acceptable results in multiparty competitions. Concentration of government power in the executive branch has weakened congressional and judicial oversight, rendered the protection of constitutional rights ineffective, and restricted political participation. The traditional checks-and-balances model of presidents with strong reactive legislative powers but weak proactive powers has proved ineffective for enabling swift decisions in the context of cyclical economic crises. These governance problems have justified the need to reform constitutions in directions that do not seem mutually consistent, such as making electoral rules more inclusive and strengthening the oversight powers of congress and the judiciary, while increasing the legislative powers of presidents.

Governance problems, however, can be addressed through different reforms. Albeit in varying degrees, this indeterminacy provides strategic

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131. Negretto, *supra* note 8, at 314–17.

politicians with room to propose or support those design options that are closer to their interests. This leads to competition and conflict, which make the relative power of reformers crucial for explaining comparative variations in constitutional choice. From this perspective, transformations in the partisan context and in the nature of reform coalitions are essential to account for constitutional choices in Latin America since 1978. In a few cases, constitutional reforms have been imposed by a dominant party, which explains the adoption of institutions that restrict party competition or increase the concentration of power in the executive branch. Most reform coalitions since 1978, however, have included at least two parties. These coalitions often adopt institutions that diffuse power because, in a multilateral assembly, the stronger actor is unable to impose its preferred institutions. Nevertheless, multiparty coalitions include actors with conflicting institutional preferences and different degrees of influence over institutional selection. In these cases, constitutional choice is likely to lead to a hybrid design that combines power-sharing and power-concentrating rules, such as we observe in many recent constitutional reforms in Latin America.

From the point of view of “constitutional engineering,” it is not apparent whether this design has the capacity to improve the performance and quality of new democracies. A more inclusive and participatory electoral system may allow for better representation of citizens’ interests while providing presidents with an incentive to form coalitions and negotiate policies. Party pluralism, however, may diminish government capacities without necessarily improving representation, particularly when parties—as is often the case in Latin America—have weak programmatic links with voters.<sup>132</sup> A president capable of inducing legislative change may secure the provision of national policies when legislators have neither the means nor the motives to do so. At the same time, however, a president invested with strong legislative powers may increase executive–legislative conflict and provide more opportunities for the influence of organized interests on collective decisions.

Regardless of their effects, however, one can explain the institutions selected in Latin America since 1978 by adopting the perspective of those who participate in the approval of reforms. In general, it makes sense to think that politicians have both a shared interest in adopting efficient institutions and an exclusive interest in having institutions under which they can obtain a political advantage. If this is correct, then there is no reason to expect constitutions to have a consistent design, particularly where institutional performance is deficient, the distribution of partisan power is constantly changing, and reforms are usually adopted by means of a compromise among a plurality of actors with opposing interests.

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132. See HERBERT KITSCHOLT ET AL., *LATIN AMERICAN PARTY SYSTEMS* 160 (2010) (arguing that programmatic structuration of electoral competition is relatively weak in Latin America).