Constitutional Change and Transformation in Latin America

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Introduction: Facts and Fictions in Latin American Constitutionalism

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Latin America is usually depicted as a region whose democracies are fragile, where political and economic instability has long spurred institutional breakdowns, and where constitutions are replaced at an unusually rapid pace. In the popular imagination, the region’s hallmarks include coups, dictatorships, guerilla movements, persistent authoritarian legacies, deep social inequality and corruption infiltrating all branches of government, but the most well-known may be the regularity of constitutional change. As Peter Smith has observed, ‘there were 155 regime changes over the 101-year period from 1900 through 2000 – a rate of 1.53 per year’. Consider some examples. The Dominican Republic has had 34 constitutions. Venezuela has had 26 constitutions so far, and Ecuador is not too far behind: the 2008 Constitution was its twentieth. Since their independence, Latin American countries have written, in total, 197 constitutions, most of them from 1900 onwards, although this pace has waned in the last decades (from 1978 to 2017, there have been 18 new constitutions in the region). The constitutional amendment rate is also high, though it does not differ much from most established...
democracies if we exclude Brazil and Mexico,\(^6\) home to two of the most amended constitutions worldwide.\(^7\)

The dynamics of constitutional change in the region have been shaped by conflicts among political elites. Zachary Elkins, Tom Ginsburg and James Melton argue that nineteenth century Latin America ‘experienced this roller coaster, with constitutions marking the rise and fall of groups on opposite sides of issues such as the degree of centralisation, the structure of executive-legislative relations, or ideology.’\(^8\) Gabriel Negretto observes that notwithstanding the increasing constitutional stability by means of greater adoption of ‘inclusive institutions, more flexible amendment procedures, and strong mechanisms for constitutional adjudication, it is likely that constitutional crises will continue to provide incentives for the constant renegotiation of constitutional agreements.’\(^9\) These analyses of strategic behaviour predominate in assessing how constitutions endure, change, and perform.\(^10\)

Latin America raises important questions in constitutional change. Constitutional politics in the region have historically presented challenges to institutionalisation. Extraconstitutional means of change are not uncommon, nor is recourse to abusive or informal procedures.\(^11\) The region invites questions about how constitutions can and should cope with internal conflict, trauma, stress, inequality and extreme poverty in the midst of fragile institution-building. Centuries of experience in constitutionalism offer fertile ground for research and learning.

Comparative constitutional scholars outside of the region, however, have not yet fully discovered Latin America. Political scientists, historians and economists have long seen the region as one of the most appealing sites of study. They have inquired into the historical determinants of regime breakdowns, the forces and processes of democratisation, the difficulty of building inclusive democracies, and the enormous problems of poverty and inequality. One particular problem continues to recur: the trade-offs between consolidating democracy and distributing economic prosperity in a region where resources are scarce and not often shared. This itself is a cause for instability. No wonder populism is common

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\(^9\) Negretto, nn 5, 750.


in Latin America: it calls for higher resource redistribution and inclusive policies, but brings with it increased risk of democratic collapse.

Existing analyses of the region are quite fascinating but they pay too little attention to constitutional design and performance. Existing analyses moreover tend to elide over important differences among the countries of the region. What is more, the conventional approach to Latin American constitutions features a pessimist forecast, as though Latin America, marked by high levels of social inequality, characterised by political clientelism, and defined by legal mutability, is doomed to failure. Latin America thus becomes the paradigm for identifying the other America that has not thrived and whose history has been, unlike the North, a succession of both external and self-inflicted injuries that, even with recent democratic achievements, is always at the verge of falling apart.

Latin America can bring a distinct narrative to public law and in particular to the study of constitutional change. The volatile though increasingly democratic political environments in the region highlight how political agents and institutions find ways to adapt to difficult realities, sometimes by circumventing constitutional rules. Concepts such as abusive constitutionalism, stealth authoritarianism, constitutional dismemberment, democratic decay and others offer, in Latin America, a plethora of examples. Most Latin American countries now operate mature democratic institutions and they have developed constitutional strategies to contain sparks of instability, namely supreme and constitutional courts, flexible systems of formal change and mechanisms to encourage popular engagement. There remains a long way to go to become fully formed democracies but it is no longer appropriate to take for granted the traditionally pessimistic narratives about the region.

I. Latin American Style of Constitutional Change?

A. Presidentialism

Constitutional change in Latin America is often linked to the presidential system of government. Observers have commonly pointed to presidentialism in the region as the proximate cause of recurring crises, which has in turn led to a high rate of constitutional replacement and amendment. Yet more than a cause of instability, presidentialism in contemporary Latin American democracies may turn out to be an important engine for legitimating constitutional reforms and introducing
a measure of popular will into how constitutions change. Of course, there is a thin line between calls for participatory constitutionalism and populist appeals.

Although many Latin American constitutions today feature an executive power-concentrating design, they have developed means and mechanisms to manage the dangers of presidentialism, including an expanded role for courts, a culture of constitutional amendment that sees change not as an extraordinary phenomenon, and distinct strategies by political actors to moderate change so as to avoid having to resort to constitutional replacement as a first option. There are politically expedient reasons for some of these developments but they are useful all the same for constraining the excesses of presidentialism. Empowering constitutional and supreme courts, normally seen as guardians of the constitution, can serve as a ‘convenient refuge for politicians to avoid or delay unwanted political outcomes’. A more positive attitude toward constitutional amendment may reflect a desire to have the option to rein in some of the rights provisions in contemporary constitutional texts. And informal constitutional change keeps the constitutions current, although the ease of informal change comes at the cost of keeping untouched those institutions and structures that can be altered only by formal procedures.

B. Constitutional Replacement

This leads us to question whether there exists a unique Latin American style for constitutional change. The new democratic context of rising supreme courts, increasing constitutional flexibility for formal change, and the possibility of informal institutions do not on their own distinguish the region from other parts of the globe. Yet there might be some common ground that brings together the various Latin American constitutional systems despite the evident methodological challenges of cross-cultural analyses. The high rate of constitutional replacement and amendment, which has always been one of the most prominent hallmarks of Latin American constitutionalism, is a good place to start. The question presents itself: is there a Latin American style to constitutional replacement?

Constitutional replacements have waned in the last decades, particularly after the wave of new constitutions since the transitions to democracy in the late 1970s onwards. Even so, from the 1990s onwards, constitutional replacement occurred in several Latin American countries: Bolivia (2009), Colombia (1991), the Dominican Republic (1994, 2002–03, 2010, 2015), Ecuador (1998, 2008),

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17 See LA Barbosa, História Constitucional Brasileira: Mudança Constitucional, Autoritarismo E Democracia No Brasil Pós-1964 (Biblioteca Digital da Câmara dos Deputados, 2012) 252 (revealing how Brazilian political actors have long attempted to ease the constitutional amendment rules ‘to correct the excesses of a Constitution that grants too many rights’).
Paraguay (1992), Peru (1993), and Venezuela (1999). Other countries have lived distinct but related phenomena: instead of replacement, their constitutions have endured a substantive overhaul of some of its main parts, as in Argentina (1994), Chile (2005), and Mexico (2011).

The number of constitutional replacements, though still high, however, does not lead by itself to a definition of a Latin American style for constitutional change. Despite some constitutional replacements in one country or another, Latin America is simply following a worldwide trend: the more stable the country is, the less it experiences constitutional replacements. Even though most countries in the region are geographically and historically connected and have endured many similar constitutional challenges and changes, the differences in the way Latin American countries have dealt with constitutional replacement reveal no single overriding pattern. An investigation into some of these experiences across the region appears to confirm this conclusion.

Consider Chile, long a stable country. In the nineteenth century, its 1833 Constitution was one of the most enduring on the continent. In the twentieth century, the Constitution continued to endure with very few major changes, most notably the replacement of its 1925 Constitution in 1980, during Augusto Pinochet’s dictatorship. Despite the transition to democratic civil government in 1990 and the many amendments since then, the 1980 Constitution remains in force today.

Chile is largely praised as a country whose transition to democracy was one of the most successful in Latin America, but much of this success rests with an informal institution based on a ‘two-coalition competition’ between the centre-left (the Concertación) and centre-right (the Alianza por Chile). This informal institution has fostered a trade-off between democratisation and stability, keeping some of the longstanding benefits among political actors virtually untouched, though there has been gradual progress towards democratisation over the years. Despite the recent movement to launch a constituent process to replace the 1980 Constitution, this ‘two-coalition competition’ framework is a serious obstacle to this end. Chances are that Chile may still keep seeing its originally authoritarian constitution for a long time and instead make use of its amendment procedure – as it has done so far – as a simpler way out to ‘adapt’ its content to the new times.

19 Ibid.
21 Nolte and Schilling-Vacaflor, nn 6, 9.
It is worth stressing that the Chilean Constitution does not include any provision for its own replacement.

When Chile is compared with other contemporary dictatorships in the region, it is difficult to outline a similar pattern of constitutional replacement. Argentina, despite its many revisions, is home to the oldest Latin American constitution in force. Its 1853 Constitution has endured all sorts of crises and regime breakdowns. Dictatorships – not to mention its many coups d’État in the twentieth century (1930, 1943, 1955, 1962, 1966, and 1976) – have spawned supra-constitutional legislation or constitutional amendments, molding the Constitution to their ends.24 Once democracy was reinstated in 1983, the 1853 Constitution, which was, in fact, suspended by means of the authoritarian supra-constitutional legislation of the previous regime, regained its strength in a typical case of ‘restoration constitution-making’.25 Since a major reform in 1994, the Constitution has remained formally intact. Yet the way Argentinians treat constitutional change stands out in Latin America. Their amendment procedure, which is open to an entire revision of the Constitution, demands a constitutional convention. Article 30 of the 1853 Constitution states that ‘the Constitution may be amended in its entirety or in any of its parts. The need for its amendment must be declared by the Congress by a vote of at least two-thirds of its members, but the amendment shall not be accomplished except by a Convention called for such a purpose’.26 The requirement of a constitutional convention naturally makes for a much more rigid the procedure for constitutional amendment.

Uruguay is also an interesting case for discussion. While its 1830 Constitution was also one of the longest enduring constitutions in Latin America at 86 years, the twentieth century was marked by many crises and constitutional replacements. After the replacement of the 1830 Constitution in 1918, Uruguay had a sequence of short-lived constitutions: 1934, 1942, 1952 and 1967, the latter still in force today. As happened in Argentina, the 1967 Constitution, during the 1973–85 dictatorship, was constrained by typical supra-constitutional legislation, then titled ‘institutional acts’.27 The military government that ruled Uruguay from 1973 to 1985 even attempted to establish a new authoritarian constitutional document in 1980. But in an interesting movement that managed to fuse authoritarianism with popular participation, this proposal was subject

25 W Partlett, ‘Restoration Constitution-Making’ (2015) 9 ICL Journal 527 (defining ‘restoration constitution-making’ as ‘a process of constitutional change that is governed by the partial or full restoration of a pre-existing constitution as well as its associated laws and institutions’).
26 Constitución of Argentina of 1853, Art 30.
to a referendum and was ultimately rejected by the people; this is what precipitated the country’s transition to democracy. After the end of the dictatorship in 1985, those authoritarian provisions were abolished, and the 1967 Constitution was effectively reinstated, and then amended in 1989, 1994, 1996, and 2004. Like the Argentinian Constitution, the Uruguayan Constitution sets out procedures for amendment and replacement, but, unlike its neighbour, it features even more participatory procedures. One of the possibilities for fully or partially amending the Constitution does not require the participation of Congress: ‘Upon the initiative of ten percent of the citizens inscribed in the National Civil Register, by presenting a detailed proposal which shall be referred to the President of the General Assembly, to be submitted for popular decision at the next election.’ Uruguay has become regarded as the most advanced Latin American country in developing solid liberal democratic institutions and fostering the rule of law. It is largely perceived as the least corrupt and most democratic country in the region.

Brazil adds more complexity to defining a single Latin American style for constitutional replacement. Brazil has had seven constitutions in its history. Each coincides with a regime breakdowns. In the nineteenth century, Brazil had both an imperial (1824) and a republican (1889) constitution. Brazil’s twentieth century was marked by a series of regime breakdowns, and the constitutions pretty much reflected the continuous transitions from dictatorships to democratic moments, and vice versa. The 1934 Constitution, drafted during the provisional government led by Getúlio Vargas from 1930 to 1934, resulted from the need to adapt the constitutional framework to the interests of ascendant industrial elites and the new middle class. It was the product of the Revolution of 1930 and the Constitutionalist Revolution of 1932, and it brought an end to the so-called ‘Old Republic’ where rural elites from the states of São Paulo and Minas Gerais controlled the government. It also paved the way for the rise of Getúlio Vargas’s authoritarian rule and the drafting of the 1937 Constitution. In 1945, Getúlio Vargas’ authoritarian government ended and was ultimately replaced by the 1946 Constitution. This Constitution did not last long, though. The advent of the civil-military dictatorship in March 1964 resulted in the 1967 authoritarian constitution, later revised in 1969.

After the transition to democracy in 1985, a largely participatory process of constitution-making gained momentum during the Constituent Assembly of 1987/1988, the result of which was the most democratic constitution ever in Brazilian history. The 1988 Constitution, which remains in force today, has been celebrated as the mark of a rising democratic nation. History has proven that Brazilians interpret constitutional transitions as the natural outcome of regime transitions. No wonder that constitutions have not historically laid down.

28 See ibid, 390.
29 Constitution of Uruguay of 1966, Art 331(a).
a particular procedure for replacement, unlike most of the Latin American constitutions. Brazil has since been a relatively stable country, even though, more recently, a severe political crisis resulted in the impeachment of then President Dilma Rousseff.

Argentina, Brazil, Chile, and Uruguay are intimately connected by history, geography and social and economic developments. They all have endured contemporary dictatorships and their transitions to democracy took place at around the same time in the 1980s and 1990s. Yet they are significantly distinct in many important respects. Chile has shown no immediate correlation between regime breakdown and constitutional replacement, a contrast with Brazil. Argentina has not replaced its 1853 Constitution despite the many crises it has endured over the years. The Constitution has been revised many times, sometimes significantly, but its constitutional structure and some of its content differ substantially from the constitutions of its neighbours. Uruguay, like Argentina, also reinstated its constitution once the dictatorship came to an end, but unlike Argentina the political system has complied with the Constitution in a way that has fostered a much greater degree of political stability. We could point to many more differences among these four constitutions. The question, to us, is obvious: on what basis can we identify a ‘Latin American style’ for constitutional change when it appears that there is not one single style but rather various styles, often pointing in opposite directions?

Other countries in Latin America add still more variables to this equation. Mexico, with its 1917 Constitution, is a clear example of how a hegemonic party – the Institutional Revolutionary Party (PRI) – has played a significant role in changing the Constitution through amendments but did not see the need to replace it. The Dominican Republic is an outlier when it comes to constitutional replacement, though Ecuador, Venezuela, Bolivia, and Peru come right behind it. Nevertheless, even the sequence of replacements in these countries does not necessarily entail effective change, since there is a high similarity between their new constitutions and those that preceded them. In Central America, the last wave of constitutional replacements took place in the 1980s: Honduras (1982), El Salvador (1983), Guatemala (1985), and Nicaragua (1987). When we add Costa Rica (1949), Panamá (1972), and Cuba (1976) to the list, it becomes clear that constitutional replacements are a rarer phenomenon than normally depicted.

In South America, then, most countries have not replaced their constitutions for more than 20 years. Only recently has the advent of the so-called ‘New Latin American Constitutionalism’ – which embraces left-leaning politics of social integration but also an even greater centralisation of the executive branch – heralded

30 See Nolte and Schilling-Vacallor, nn 6, 6 (listing Brazil, Chile, the Dominican Republic, El Salvador, Peru and Honduras as the Latin American constitutions with no provision for total revision or replacement).
31 See Elkins et al, nn 8, 57.
a new wave of constitutional replacement in Bolivia (2009), Ecuador (2008) and Venezuela (1999). This ‘New Latin American Constitutionalism’ even exposes remarkable differences among Venezuela, Ecuador and Bolivia.\textsuperscript{32}

The search for a Latin American style for constitutional replacement may be possible but only at a high level of abstraction in light of the many variants in constitutional design and history. But at a lower level of specificity, it would be difficult to identify a regional style in constitutional replacement because there are several distinct types of constitutional practices that have taken root in the region. As Whitehead puts it, ‘there is a ‘kaleidoscopic’ pattern of alternative democratic models and experiments underway in today’s Latin America.’\textsuperscript{33}

C. Constitutional Amendment

The same conclusion may hold for constitutional amendment in the region. The rate of constitutional amendments has been on the rise.\textsuperscript{34} But why? Amendment may be perceived as a profitable means of averting more radical changes, like constitutional replacements. And as democracy gains strength, regime breakdowns become rarer and amendments are used as the natural mechanism for constitutional change alongside judicial interpretation.

The larger point, for our purposes of answering the question whether there is a Latin American style of constitutional amendment, is that there seems to be no cross-country pattern in how amendment frameworks are codified in constitutions or in how Latin American countries have made use of amendments as a ‘typical’ mechanism for constitutional change.

Some countries, like Brazil and Mexico, have a high rate of constitutional amendment that places them clearly as outliers not only in Latin America but in the world. The 1988 Brazilian Constitution is one of the longest across the globe, has its origins in a strong culture of popular participation, and is characterised by its quite detailed public policies. From 1988 to 2017, the Brazilian Constitution was amended 97 times for an average of 3.34 per year. Most of these amendments were minor changes, not ones that affected the core of the Constitution.\textsuperscript{35} Brazil has learned to use constitutional amendments as a normal procedure that does

\textsuperscript{32} See Fernando José Gonçalves Acunha, ‘Continuity and Change in Latin America: The Ever-Present Authoritarianism and the Democratic Capacities of the New Latin American Constitutions’ in this volume; Alberto Noguera Fernández, ‘What do We Mean When We Talk about ‘Critical Constitutionalism?’ Some Reflections on the New Latin American Constitutions’ in Schilling-Vacaflor and Nolte, nn 6, 116.

\textsuperscript{33} Laurence Whitehead, ‘Latin American Constitutionalism: Historical Development and Distinctive Trends’ in Schilling-Vacaflor and Nolte, nn 6, 134.

\textsuperscript{34} See Nolte and Schilling-Vacaflor, nn 6, 7 (reporting that ‘the annual rate of amendments has increased in most of the countries of the region in the decade 2000–2009 compared to the 1990’s’).

not entail a disruption of the constitutional system. Political elites might have taken the country in this direction as a gradual strategic move to manage the Constitution according to their own interests, as Leonardo Barbosa argues in this volume. Federalism also plays an important role insofar as the country's subnational constitutions and their governments do not provide much of a check on national amendments, as Breno Baía Magalhães suggests in his contribution to this collection.

In contrast, the Mexican Constitution – amended more than 700 times since its creation in 1917 – is a reformist constitution that has been dramatically transformed over the years, and particularly in the decades following the country's democratisation. As Francisca Pou-Giménez and Andrea Pozas-Loyo argue in this book, constitutional amendment and democratisation have gone hand in hand, though for them hyper-reformism has been an obstacle to democratic consolidation. Mariana Velasco Rivera observes in her own contribution to this volume that hyper-reformism has been used as a 'tool for hegemonic preservation', with the rising number of amendments in the last 16 years signalling a strategy of multi-party accommodation and concession.

It is hard to find a common narrative in constitutional amendment that joins together Brazil and Mexico. The only common ground may be that political actors in both countries use the means of constitutional change strategically to serve their own ends, yet this would not be unique to Latin America.

Consider Chile once again. Political compromise has been the country's hallmark for institutional stability. Constitution amendments have been adopted to gradually overcome the authoritarian legacies of its 1980 Constitution. This adaptive behaviour has been a more suitable vehicle for constitutional change than replacing the Constitution, and in any case it is consistent with the practices of 'two-coalition competition' that have predominated in the country since democratisation. Although this has made constitutional change more manageable and it has warded off the instability of radical change, the consequence has been to keep the country under the rule of a constitution drafted during Pinochet's authoritarian years.

Other countries, such as El Salvador, Honduras, Colombia and Costa Rica, have amended their constitutions practically every year or so. Still others have taken other routes to channel such strategies. Argentina has never amended its 1853 constitution since the 1994 revision; Paraguay amended its 1992 Constitution in 2011, after a referendum to allow Paraguayans who live abroad to participate in national elections. Various causes may explain these different behaviours when it comes to constitutional amendment. But whatever the explanation, the result is to undermine if not defeat the claim that there exists a Latin American style

36 Yet, recently, Brazil has approved a constitutional amendment that limits public spending for the next 20 years, strongly affecting the exercise of social rights. Richard Albert, eg, has described this reform as a case of 'constitutional dismemberment'. See Albert, nn 14, 36.

37 Enmienda Constitucional nº 1, 8 November 2011.
for constitutional amendment. Although most countries in the region trace their origins to common sources, the developments across the region have driven actors to the use of mechanisms of formal change in different ways, suggesting that there are more differences than commonalities among the countries of Latin America when it comes to constitutional amendment.

D. Informal Constitutional Change

As for informal mechanisms of constitutional change, namely through judicial interpretation of a constitution, there are no simple connections among the Latin American countries that would allow us to define a Latin American style for this form of constitutional change either.

Judicial review has been central to the development of constitutions in the region. The Chilean experience is an interesting case of how a strong legislative branch 'can provide the courts with the necessary political backing to assert themselves against [the president]'\textsuperscript{38} Colombia, which features possibly the most well-known Latin American high court, is the paradigm of judicial review aiming at implementing transformative constitutionalism after years of 'institutional decay and crisis of the political order'.\textsuperscript{39} Brazil, whose Supreme Court is still very much underexplored in comparative constitutional law,\textsuperscript{40} is quite possibly the strongest court in the world, though it does reveal evidence of dysfunction.\textsuperscript{41} And in Costa Rica, the creation of the Constitutional Chamber in 1989 has grown from hearing 380 cases to 18,000 cases per year – often decided within the same year – offering the people a responsive forum for their grievances.

Interesting doctrines have emerged from the region. From the Colombian Constitutional Court's substitution of the constitution doctrine, which Juan F Gonzales Bertomeu describes in his chapter for this volume, or the adoption of the unconstitutional constitutional amendments doctrine in Brazil, which Eneida Desiree Salgado and Carolina Alves das Chagas critique in this volume, certain courts in the region have made a name for themselves. The judgments of high courts in the region could be fascinating case studies for what Ran Hirschl has called the 'judicialization of mega-politics'.\textsuperscript{42} Yet one important country lags behind in the region: Mexico. The Institutional Revolutionary Party's (PRI) more

\textsuperscript{39} Manuel José Cepeda Espinosa and David Landau, Colombian Constitutional Law: Leading Cases 1, 2 (Oxford University Press, 2017).
\textsuperscript{42} See Hirschl, n 16.
than seven decades (1929–89) of hegemonic power has deeply affected the behaviour of the Supreme Court, which has long acted as an immediate collaborator of the government. Despite the major constitutional reform of 1994, which expanded the scope of judicial review through a direct and centralised action of unconstitutionality, a more relatively independent and active Court emerged only after 2000, when the PRI lost its hegemony in the executive and legislative branches.43 Interestingly enough, there is a temporal coincidence between the rise of the Court and the increasing rate of constitutional amendments, which suggests a direct relation between pluralist fragmentation and the use of mechanisms of constitutional change.

And yet there are connections among Latin American high courts. One prominent example is the widespread adoption of concrete judicial review, the increasing adoption of abstract judicial review, and the peculiarity of a mixed concrete and abstract system of judicial review in the region. However, even this development entails different paths and outcomes, and distinct models have been implemented.44

Latin American high courts do indeed share some important similarities. Yet we cannot claim that they share the same degree of influence in their respective jurisdictions nor that they have similarly strong or weak protections for basic rights, nor even that they take the same or similar approaches for settling inter-branch conflicts. There is therefore no overriding Latin American style of informal constitutional change through courts. In fact we have witnessed courts taking at times more active and at others more passive approaches to the resolution of disputes. There appears to be more difference than similarity in the practices of informal constitutional change in the region.

II. Studying Change and Transformation in Latin America

This book is an effort to interpret and situate constitutional change in Latin America. All of the chapters begin from the same three propositions: that Latin American constitutions must be understood in all their nuances, that it is long past time to move beyond the conventional wisdom that there exists a one-size-fits-all ‘Latin American constitutionalism,’ and that Latin American constitutions must be brought into conversation with the rest of the world.

The volume begins with a Foreword by Luís Roberto Barroso, a justice of the Supreme Court of Brazil. A giant in the country and the larger region,

Justice Barroso has been at the forefront of the development and interpretation of Brazil’s 1988 Constitution. The book is then divided into three main Parts.

Part I is entitled *Popular and Populist Constitutional Democracy*. The authors consider the role of the people and constituent power in constitutional change.

In *Constitution-Making (without Constituent) Power: On the Conceptual Limits of the Power to Replace or Revise the Constitution*, Carlos Bernal makes a case against the widespread conception of the constitution-making power as constituent power. He argues that a conceptual analysis of the power to replace or revise the Constitution shows that this understanding is incorrect. Instead, he advances a socio-ontological conception of the power to replace or revise a written constitution, as a limited deontic power of citizens’ political proxy-agents, who are collectively intentionally recognised as having the status of constitution makers for performing the function of institutionalising constitutionalism. This conception illuminates a clearer approach to understand the constitution-making power, and to evaluate the legitimacy of its exercises.

In *Continuity and Change in Latin America: The Ever-Present Authoritarianism and the Democratic Capacities of the New Latin American Constitutions*, Fernando José Gonçalves Acunha argues that although constitutionalism in Latin America is seen as a succession of detrimental changes to stability, this is a misperception of Latin American constitutional history. The development of its constitutionalism is characterised by a paradoxical combination of an enduring concentration of power with constant constitutional changes. This chapter seeks to explain this connection through an exposition of the institutional arrangements that have helped elites keep their grip on power and the effects of various constitutional modifications conceived as means to respond to social demands, though with limited impact in distribution of power. From the perspective of the new constitutions, which promise reconfiguration of power, the challenge seems daunting, since a renewed threat is posed by contemporary authoritarianism even in countries whose constitutions are committed with an institutional change. In this chapter, he studies those threats as a contribution to the development of the capacities of modern constitutional design to resist concentration of powers and other undemocratic settlements.

The next chapter – *Constitutional Moments and Constitutional Thresholds in Brazil: Mass Protests and the ‘Performative Meaning’ of Constitutionalism* – is authored by Juliano Zaiden Benvindo. This chapter explores the nuances in how institutional constraints and constitutional thresholds, such as amendment procedural rules, behave in moments of crisis in a country like Brazil, which is neither in an environment such as those stable Western industrialised constitutional democracies, nor in the same social context of some of its neighbours in Latin America. He explores how recent Brazilian constitutional history might have yielded a ‘performative meaning’ that paved the way for some democratic gains over the years. By placing special emphasis on the recent developments of Brazilian constitutional history, this chapter concludes that Brazil has provided mechanisms to empower interactions among distinct institutions and individuals, to strengthen
institutional constraints and constitutional thresholds, and in particular to enhance pluralism.

In the final chapter in this Part, Yaniv Roznai argues in Constitutional Unamendability in Latin America Gone Wrong? that constitutional unamendability has become a characteristic feature of Latin American constitutions, with implications for constitutional design, judicial interpretation and the resilience of democracy. Roznai focuses on a central tension in unamendability: on the one hand, it holds promise for helping to protect democratic values but on the other hand it is susceptible to misuse.

In Part II, the book shifts focus to the informal mechanisms of constitutional change. Titled Judicial Review of Constitutional Amendment, its chapters assess the role of the judiciary in facilitating and inhibiting constitutional change in Latin American states.

In The Colombian Constitutional Court’s Doctrine on the Substitution of the Constitution, Juan F Gonzales-Bertomeu explains that the defence of substantive limits on constitutional change has taken two roads. One has been to claim that certain constitutional provisions cannot ever be changed. A second has been to claim that, ex ante, any provision can be amended, though the constitution’s essential structure cannot; a ‘normal’ process of constitutional change cannot ‘substitute’ the Constitution. The notion of substitution has been invoked by judges in politically salient decisions by the Colombian Constitutional Court – the most recent important one in May 2017 in a case involving the government (FARC agreement) – and this chapter brings to bear critical analysis to it. The Court has presented the ‘substitution’ doctrine on procedural grounds. Yet the doctrine deals with substantive questions about the nature and content of the Constitution, the limits of constituent power, and judicial review in a democracy. Given the Court’s current use of the doctrine and the renewed discussions of constituent power in the region, these are timely inquiries.

In We the People, They the Media: Judicial Review of Constitutional Amendments and Public Opinion in Colombia, Vicente Benitez-R analyses the influence of public opinion on the Colombian Constitutional Court’s decisions pertaining the judicial review of salient constitutional amendments. He seeks to demonstrate that when there has been a shift in the people’s and the media’s perceptions on the Court or on its decisions, there has also been a change in the Court’s approach to the judicial review of constitutional amendments. More specifically, when the Court is perceived as an impartial institution its constitutional credibility increases and this situation probably promotes judicial creativity and boldness, as well as the enforcement of its rulings. He argues the contrary: that where the Court is not deemed as a credible player, the Court has embraced a self-censored stance when interpreting the Constitution and, moreover, political actors have complied with some reluctance with its judgments.

In the following chapter, ‘Resistance by Interpretation’: Supreme Court Justices as Counter-Reformers to Constitutional Changes in Brazil in the 90s, Diego Werneck Arguelhes and Mariana Mota Prado explore the idea that a court of law,
empowered to strike down or review legislation, may use the power of judicial review to advance its preferences and reverse institutional changes. The novelty in their analysis lies in its focus on the judicial review of reforms of the powers of the court deciding the case – reforms on which the members of the court had revealed their views and preferences during the lawmaking process. In such a scenario, the court can be seen as a self-interested actor who is using legal interpretation as a tool to disguise and promote its own preferences. They argue that when the judges who now interpret the Constitution had previously expressed their views in the democratic process (as political actors) on how the Constitution should have been written, scholars have a smoking gun. Specifically, their analysis builds on a case during the Brazilian democratic transition, where Supreme Court judges employed judicial interpretation to actively resist reforms that had been explicitly enshrined in the new Constitution of 1988.

In The Judicial Review of Constitutional Amendments in Brazil and the Super-Countermajoritarian Role of the Brazilian Supreme Court: The Case of the ‘ADI 5017’, Eneida Desiree Salgado and Carolina Alves de Chagas focus on formal constitutional changes in court. More specifically, they note that in many cases the rigidity of the constitutional reform process has led to the increased participation of the judiciary. Countries such as India, Colombia, Turkey and in this chapter, Brazil, are known for this behaviour. In their chapter, the authors argue that what may be seen as an obstacle for the creation of unconstitutional amendments can be seen as an appropriation by the judiciary of prerogatives that are not their a priori role – that is, making changes in the constitutional text. They argue that the constitutional text should be respected since it has a normative force. To deny the normative character of the Constitution, they say, is to see it as an occasional compromise by political groups, which could be substituted at any time. On their view, courts should assure the integrity of the constitutional text and refrain from going beyond its boundaries.

The final chapter in this Part is authored by Sergio Verdugo. In The Role of the Chilean Constitutional Court in Times of Change, Verdugo justifies the lack of a judicial doctrine restricting constitutional reform with substantive limits – as opposed to procedural limits – in Chile. He examines the recent Chilean constitutional history and the few relevant Constitutional Court decisions, to argue that lacking such a judicial doctrine was desirable because it allowed constitutional amenders to gradually and incrementally democratise the Chilean Constitution. Nevertheless, he adds, there may be good reasons for restricting future constitutional reforms if those reforms aim to reverse the democratic achievements of the post-authoritarian era.

The volume closes with Part III entitled Constitutional Reform and Stability. These chapters examine the impact of constitutional change and amendment on political stability, and they also evaluate the role of the court as an engine for reform.

In The Paradox of Mexican Constitutional Hyper-Reformism: Enabling Peaceful Transition while Blocking Democratic Consolidation, Francisca Pou-Giménez
and Andrea Pozas-Loyo argue that, after delivering gains for quite a long time, Mexican reformism is reaching a point of exhaustion. The country, they claim, is currently trapped in a pattern they call 'hyper-reformism', which is a particular species of reformism that has become self-sustaining and that is now closely associated to the obstacles the country faces to install a recognisable version of the rule of law and to achieve democratic consolidation. In their chapter, they demonstrate how constitutional amendment once supported the gradual completion of the largely peaceful process of democratic transition but that hyper-reformism is today closely associated with many of the difficulties the country confronts in consolidating democracy under the rule of law. Their analysis contributes to a fundamental debate on the advantages and disadvantages of constitutional longevity.

The next chapter, by Mariana Velasco Rivera, considers *The Political Sources of Constitutional Amendment (Non)Difficulty in Mexico*. She argues that, traditionally, constitutional law scholars have considered that amendment difficulty can be read off the text. That is to say one may have an idea of how easily and often a constitution would be amended by reading the constitutional entrenchment rules only. Moreover, constitutional amendments are often considered both as means by which popular sovereignty and self-government are most effectively exercised as well as the mechanism that distinguishes higher and ordinary law. She argues that these assumptions are insufficient to understand formal constitutional change. In fact, she says, they have obscured the study of other, and perhaps more important, factors that play an essential role in determining amendment difficulty. Her chapter analyses Mexico’s constitutional amendment dynamics in the last century as a case study showing that amendment difficulty is politically constructed rather than institutionally determined. Amendment difficulty, she shows, is the result of the interplay between constitutional culture and party politics rather than the result of the design of the amendment mechanism. All along Mexican history, constitutional amendment has played a prominent role for political entrenchment; thus, despite providing a stringent amendment process, the Constitution has frequently been amended. She insists that this situation should not be considered problematic ex ante in that it may suggest the presence of a healthy democracy and a living constitution. She concludes, however, that a closer look at amendment processes in Mexico in the last three decades suggests trends that seem to be responding to oligarchic rather than democratic values.

In *Subnational Constitutionalism and Constitutional Change in Brazil: The Impact of Federalism in Constitutional Stability*, Breno Baía Magalhães argues that the absence of constitutional values in subnational constitutions may be one of the reasons why the Brazilian constitution is so often amended. He suggests that without either the capacity of a polity to make independent decisions or the power of a regional political community to engage on equal footing in disputes with the federal government, the national constitution becomes the main forum for the discussion of political and social changes.
In *Legislative Process and Constitutional Change in Brazil: On the Pathologies of the Procedure for Amending the 1988 Constitution*, Leonardo Augusto de Andrade Barbosa analyses constitutional amendment in Brazil. In the last 27 years, he explains, the Brazilian Constitution has been amended nearly 100 times. Contrary to conventional belief, this chapter suggests that blaming the burgeoning of constitutional amendments solely on the breadth of the constitutional text is misleading. Instead, he suggests that in order to understand the rhythm of formal constitutional change in Brazil, we must also factor into consideration the gradual process through which the rules governing the amendment procedure – originally designed to make it difficult – were ‘softened’ (and sometimes circumvented) – by both legislative practice and judicial interpretation. Those changes amount to pathologies in the process of constitutional reform because they seriously hinder the transparency of the procedures through which the Constitution is amended, creating potential gaps in accountability and responsiveness. The apparent collapse of constitutional politics into the everyday political struggle in Brazil, the chapter suggests, is not an inescapable result of the all-encompassing breadth of the Brazilian Constitution. It is also a consequence of legislative and judicial practices that make the Constitution increasingly more available to normal politics. Hence, those aiming at developing a better understanding of formal constitutional change in Brazil should pay closer attention to the legislative process involved in the enactment of the constitutional amendments.

The last chapter in this Part and in this volume is entitled *Transformative Constitutionalism and Extreme Inequality: A Problematic Relationship*, authored by Magdalena Correa Henao. She begins her argument by showing, quite clearly, that constitutions in Latin America make extreme inequality a central concern. She surveys constitutions across the entire region, with a particular focus on Bolivia, Brazil, Colombia, Ecuador and Peru, and demonstrates the strength of these constitutional commitments to combating inequality. She also examines the tools these constitutions give constitutional actors to ameliorate these conditions. She subsequently explores how well constitutional actors have lived up to their constitutionally-mandated commitment to combat inequality, and she offers a comparative analysis of the institutional capacity of courts and legislatures to make good on the promises their constitutions make.

### III. The Prospects for Latin American Comparative Constitutional Law

If indeed there exists a Latin American style for constitutional change, it is less pronounced than commonly depicted. Latin American constitutionalism therefore raises a challenge for comparative constitutional law: scholars must examine distinct constitutions in all of their specificities and nuances rather than bundling
all of them together as though they were one and the same. Scholarship in comparative constitutional law should take care not to overstate conclusions about the region. It should instead seek to understand and appreciate the richness of the constitutional histories across the region. This volume is a first step in the direction of showing that the ‘other America’ is well worth studying. We hope the chapters in this volume will contribute to bringing new eyes and perspectives on the region, and that comparative constitutional law will ultimately discover that there is not a single Latin American constitutionalism but rather many different and quite fascinating Latin American constitutionalisms.