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## Introduction

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, *On Representative Government*

Most political scientists consider constitutions and their various designs to be crucial variables for explaining vital political and economic outcomes, such as the stability and quality of democracy, economic policy and economic performance, and the rate of policy change across political regimes. It is for this reason that constitutions have become implicitly or explicitly central to some of the most important research areas in comparative politics. Surprisingly, however, relatively few works have attempted to explain the origins of different constitutional designs from a comparative perspective.

This omission would be justifiable if formal constitutional designs were able to endure. When constitutions remain in force over long periods of time and are rarely subject to revisions that alter their central institutions, it would seem reasonable to consider constitutions only or primarily as given sets of rules. In such a scenario, which describes the life of constitutions in many established democracies, exploring the origins of constitutions would be of interest to historians and historically minded social scientists but not necessarily to students of contemporary political institutions.

Constitutions and constitutional provisions are not, however, always stable. In countries experiencing regime transitions and in most new democracies around the world, constitutions are often replaced or subject to revisions that transform fundamental rules of the political regime. In this context, social scientists may hypothesize that constitutional designs are independent causal

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factors in a model that observes whether changes in a particular constitutional provision also lead to a change in the outcome of interest. However, when constitutional rules are in flux, a research agenda on constitutions must include not only a study of constitutional effects and development but also an analysis of constitutional origins. Such an analysis facilitates the distinction between cases in which constitutions work as independent variables and those in which they are endogenous to the processes they are presumed to explain. It also contributes to an understanding of the conditions that make constitutions and constitutional designs persist in the face of a changing environment and of the conditions under which they unleash processes that lead to their own demise.

Contemporary Latin America has been a fertile ground for experimentation in constitutional change and therefore offers an ideal setting to examine the origins of constitutional rules from a comparative perspective. Since 1978, most countries in the region have replaced or amended their constitutions, often drastically. During this process, constitution makers have altered the formulas for electing presidents and legislators; electoral cycles; term limits; presidential powers; the relationship between national and local governments; and the role of the judiciary, the central bank, and oversight institutions. One 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.

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. These reforms are intended to diffuse power and place limits on the partisan or government powers of presidents. Paradoxically, other recent reforms have moved in the opposite direction. From 1978 to 1993, most constitutions maintained relatively restrictive rules on presidential reelection. Since then, however, there has been a slight but steady increase in the number of constitutions and amendments that made the rules of presidential reelection more permissive. During the past three decades, constitutional designers in Latin America have also increased the legislative powers of presidents, in particular their powers to promote legislative change. How do we explain this amalgam of seemingly inconsistent institutions?

Cooperative and distributional theories often compete for explanations of institutional change and design. I propose a theory of constitutional choice that reconciles the contrasting assumptions of these perspectives. I argue 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 trends of constitutional design that have prevailed in Latin America since 1978 reflect the diverse governance problems faced by new democracies and the heterogeneous interests of the actors who have had influence over institutional selection. To test this explanation, this book analyzes

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both variations in constitutional choice and particular cases of constitution making under different conditions of institutional selection. This introductory chapter discusses the importance of examining the origins of formal political institutions and presents the basic argument of the book.

THE IMPORTANCE OF INSTITUTIONAL ORIGINS  
AND CHANGE

The importance of institutions in political life becomes apparent when we imagine what the world would become in their absence or when we observe how different designs are associated with variations in some outcome of interest. This is the way in which the study of institutions has been introduced in contemporary political science, and it explains why the understanding of institutional effects has taken analytic precedence over explanations of institutional origins. But if institutions and their particular designs matter, as most political scientists believe, it is also crucial to know why institutions take the forms that they do and why designs vary so much across countries and over time.

Scholars interested in long-term processes of institutional development have sometimes criticized research agendas that put too much emphasis on the origins of institutions. In their perspective, explaining institutions by focusing on causal factors that are temporally proximate to their creation provides only a partial account; institutions outlive the forces that brought them into being. Institutional designers often have short-term horizons, institutional effects may not be anticipated, and a discontinuity exists between the actors who made choices in the past and those in the present who interact under the resulting institutional arrangements. For these reasons, social scientists who study institutions in historical perspective have argued that it is the analysis of long-term institutional developments that offers the most meaningful insights into the role of institutions – insights that are lost in narratives of institutional origins, particularly when the emphasis is on the idea of choice (Pierson 2000; Thelen 2003).

The problem with this argument, however, is that the analysis of long-term processes of institutional development and institutional legacies makes sense only if we assume that institutions endure and persist. But we may be unable to observe the long-term consequences of some types of institutions, simply because politicians modify them recurrently. In addition, it may be the case that institutions are better able to endure in some environments than in others. The question of institutional origins and change thus logically precedes the question of institutional legacies.

At the macro level, foundational constitutional choices may seem to remain unaltered over time. Most countries in Latin America, for instance, have maintained the presidential blueprint adopted in the nineteenth century. But many institutions that have the capacity to transform the quality and performance of presidential regimes have changed in substantive ways over relatively short periods of time. Such is the case of electoral rules, presidential powers,

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decentralization schemes, and the organizational forms and powers of the judiciary and oversight institutions. In other words, what looks like the same constitutional structure at the macro level may turn out to be a completely different set of institutions once we consider the accumulation of short-term changes at the level of secondary rules that affect the daily operation of a constitutional regime.

Political actors invariably create new institutions with an eye to the outcomes that they are expected to produce, which is not equivalent, of course, to saying that institutions always work as they were intended to work by their designers. The actual effect of institutions depends on the conditions under which they operate; therefore, institutions can be selected with the expectation that they might lead to an outcome different from that observed once the institution has been adopted. In some cases, this mismatch may result from miscalculation, whereas in others it may derive from events that were unforeseen or unforeseeable at the time of the institution's creation. Whatever the case, the divergence between outcomes expected *ex ante* and outcomes observed *ex post* is not proof of the superiority of the analysis of institutional development over institutional choice. They simply serve different purposes in the study of the life of institutions.

One may even wonder whether a strict analytical distinction between institutional origins and institutional development is always valid. The distinction makes sense when formal institutions are stable, because one can then concentrate on the effects and development of institutions in isolation from their origins. When formal institutions are unstable, however, the relationship between these two stages is more fluid and dynamic. In this context, just as the institutions selected at one point may constrain the future actions of political actors, the effects that institutions produce also explain the preferences of political actors for either the maintenance or change of these institutions. A more complete and richer research agenda on institutions should thus link the creation of institutions with their maintenance and change.

Some authors have argued persuasively that the historical and strategic perspectives on institutions should complement each other in the understanding of substantive political problems (Katznelson and Weingast 2007, 1–24). This potential convergence is nowhere clearer than in the study of institutional origins and change. No institution is created *ex nihilo*; new institutions always retain remnants of their past selves. Within the constraints of preexisting structures and trajectories, however, there is always room for choice, and strategic conflicts over institutional selection are crucial to explaining why some particular alternatives and not others available at the time replaced existing institutions.

Regardless of their methodological approach, students of political institutions share the assumption that institutions structure political and social processes. But the capacity of institutions to give structure to political and social life should be considered a variable, not a constant (Levitsky and Murillo 2009). When institutions are subject to frequent change, it is not clear that they work systematically as external constraints on the preferences of individual or

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collective actors. A deeper understanding of institutional origins may help determine in which cases institutions actually play a causal role in explaining important outcomes. It may also shed light on the conditions under which institutions adapt to changing environments through minor revisions in contrast to the conditions under which basic institutional structures are replaced in the face of environmental changes.

Constitutional change is a particularly important instance of the broader phenomenon of institutional change. Given their role as a higher law, both the nature and design of constitutions should work toward their self-preservation. Yet the stability of constitutions and constitutional designs varies widely across time and space. Constitutions work as governance structures that enable coordination among political actors for the realization of cooperative outcomes. But they are also instruments of power that politicians use to obtain political advantages and satisfy their short-term partisan interests. Given their complexity, constitutions provide a unique vantage point from which to explore the sources of institutional resilience and to examine the intersection between historical constraints and strategic choice in institutional change and maintenance.

## THE CREATION OF FORMAL CONSTITUTIONAL RULES

Written constitutions emerge out of an explicit, temporally limited process of deliberation, bargaining, and voting that takes place in an ordinary congress operating under special procedures or in a constituent assembly. Although their content may vary, written constitutions always regulate the basic structure of the state and the political regime, which includes the channels of access to principal government positions, the allocation of powers among different branches and levels of government, and fundamental individual rights. Most constitutions also contain rules establishing procedures for their own amendment and the conditions under which constitutional provisions can be suspended. These regulations are often included in a single document called the *constitution* and are subject to an amendment procedure that is more stringent than that which applies in the case of ordinary laws. However, some formal rules essential to the working of a constitutional regime (such as basic election rules) can be found in legislation outside the document and may or may not be subject to a special amendment procedure.

To be sure, there is more to the constitution than formal, textual provisions. A constitutional regime is also determined by the interpretations that constitutional courts make of constitutional provisions and the unwritten conventions that institutional actors accept as part of the constitution (Levinson 1995; Ferejohn, Rakove, and Riley 2001, 15–18). Yet save for minor technical revisions, the creation and amendment of written constitutions are momentous events in political life. Politicians generally invest an enormous amount of time and resources in defining even seemingly insignificant details of constitutional design. There are several reasons why this is so.

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In the first place, as Weber (1978, 217–226) has observed, legality is central to the modern state. By defining the procedures that authorities of the state are supposed to observe in making and implementing binding collective decisions, constitutions create a normative standard about what counts as legitimate state action. An open transgression of an explicit constitutional provision may generate political costs, especially (albeit not only) in a democratic regime. Most elected presidents who want to remain in power do not simply hold on to office, even if they have enough popular support. If the constitution does not allow their continuity, they typically attempt to change it to extend their term in office or make their reelection possible. And just as those in power wish to have legal support for their actions, opposition forces usually attempt to create explicit constraints on government action in order to increase the costs of transgressing these constraints.

Although formal constitutional provisions may need interpretation by constitutional courts, the importance of judicial interpretations as a guide to the actual working of a political regime often depends on the constitution itself. Some constitutional provisions are ambiguous or incomplete by design. When constitution makers are unable or unwilling to agree on an explicit authorization or limit to government action, they may leave the matter undefined, delegating its future interpretation to the courts. On the other hand, presidents and legislators often propose and implement formal constitutional changes precisely to confirm or reject previous judicial interpretations. In countries where constitutional court justices are frequently replaced and the force of precedent is weak, political actors may want to incorporate a judicial interpretation into the constitution to make this interpretation more stable. Where courts are more stable and their decisions are generally binding, political actors may want to replace or amend constitutional provisions to override a judicial decision they find undesirable.

Political actors also create and change formal constitutional rules with an eye to reinforcing or weakening preexisting unwritten constitutional conventions. We know that constitutions do not need to be written; in fact, they may consist entirely or mainly of unwritten conventions, as is the case of the United Kingdom's constitution. As Hardin (1989) has argued, however, constitutional texts are useful for hastening the establishment of some conventions rather than others and for directing them in certain particular ways. Like formal constitutional provisions, constitutional conventions can be ambiguous, and several conventions may be potentially contradictory, in which case it is necessary to decide which particular informal rule should be taken as valid. Writing down the exact interpretation of a convention or formalizing which convention should be followed facilitates coordination by stabilizing the expectations of political actors. This is perhaps the most powerful reason why most countries in the world have written constitutions.

#### MAKING SENSE OF CONSTITUTIONAL CHOICE

From the point of view of understanding the origins of constitutions, the central question is why constitution makers would select some particular set of institutions

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instead of others. Prevailing theories of institutional change and design do not provide clear guidance for 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. Distributional theories, usually preferred by political scientists, assume that institutional designers are exclusively concerned with the effects 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.

The problem with cooperative and distributional theories is logically similar in that both stem from a one-dimensional view of constitutions as either basic norms that make possible social cooperation or as instruments in the struggle for power among partisan actors. But the nature of constitutions is complex. Constitutions work as coordinating devices that regulate long-term political interactions. 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. At the same time, constitutions produce distributive outcomes, which benefit some actors more than others. The mixed nature of constitutions must perforce have an influence on the goals pursued by politicians in the selection of constitutional designs.

In this book, I propose a theory that accounts for the dual logic of constitutional choice and design. 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. Institutional designers always have some shared interest in the good performance of institutions and a partisan interest in the political advantage that institutions provide. These two logics of institutional choice tend to coexist at different levels of constitutional design.

At the level of general guiding principles of design, political actors usually agree in having a constitutional regime capable of realizing an overarching cooperative goal, such as political order, government stability, effective decision making, or citizen inclusion and participation. At the level of specific design options, however, constitution makers have a partisan interest in the adoption of institutions that provide them and their supporting groups with an advantage in the competition for power and influence in the state. This concern over redistributive issues induces disagreement and conflict, which make power resources crucial in determining the final outcome. I will explore this two-level explanation of constitutional choice in greater detail and show how it accounts for temporal and cross-national variations of design in Latin America.

Since 1978, governments and political parties in Latin America have introduced formal alterations, either by replacement or amendment, to almost every aspect of constitutions. The potential effects of these transformations, however, do not seem mutually reinforcing. Reforms implemented in the formulas to elect presidents and in the system to elect deputies have followed a pattern that goes from less to more inclusiveness, pluralism, and competition. Yet other areas of electoral reform, such



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as the adoption of more permissive rules of presidential reelection, have not moved consistently in the same direction. A similar phenomenon is found in the allocation of powers between presidents and assemblies, for which reforms aimed at redistributing power away from the presidency and toward the congress and the judiciary have been approved together with reforms aimed at concentrating legislative power in the hands of the president.

From the point of view of their general orientation, many of these reforms reflect the multiple challenges faced by new democracies in Latin America as they adapt to the dynamics of multiparty competition and respond to citizen demands for better representation and public goods. Inherited majoritarian electoral rules for both presidential and legislative elections have often failed to produce acceptable results in multiparty competitions. The traditional concentration of power in the executive has thwarted the effective protection of individual rights, restricted political participation, and weakened the independence of the judiciary and oversight institutions. The classic checks-and-balances model of presidents with strong reactive legislative powers but weak proactive powers proved ineffective for enabling governments to adopt swift policy decisions in a context of recurrent economic instability. All 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 simultaneously increasing the legislative powers of presidents.

Common governance challenges, however, do not explain when a particular reform would be adopted in a given country or why constitutional designs vary within general reform trends. A great deal of ambiguity always surrounds the question of precisely which particular design alternative is best to improve constitutional performance. Albeit in varying degrees, this indeterminacy provides local politicians with room to propose or support those design options that, within the menu of choices, are closest to their partisan interests. This strategic manipulation of the reform agenda makes the composition of reform coalitions a key factor in explaining both temporal and cross-national differences in constitutional choice.

A few constitutional reforms since 1978 have been enacted by a dominant incumbent party, which explains the occasional adoption of power-concentrating institutions. But most reforms have been passed by coalitions that included at least two parties. These coalitions have tended to increase the number of power-sharing arrangements in the political system, because in a multilateral assembly, weaker actors can use their veto power to prevent the preferences of stronger actors from being adopted. Multiparty coalitions, however, often include actors who not only have conflicting institutional preferences but also unequal bargaining power. 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 partner. In this situation, multiparty coalitions are likely to opt for hybrid designs combining power-sharing and



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power-concentrating institutions in different ways, as we observe in many reforms that have taken place in Latin America since the late 1970s.

Although the partisan interests and power of reformers always determine comparative variations in constitutional choice, individual cases should differ in the extent to which these factors alone are sufficient to explain particular outcomes of institutional selection. The theory of constitutional choice proposed in this book suggests that the relative weight of partisan calculations and bargaining power in individual cases differs depending on the events that trigger constitutional change and on the thickness of the veil of ignorance that institutional designers face with respect to the effects of institutions on their future political positions. Specifically, cooperative goals may weaken the influence of short-term partisan concerns about distributive outcomes when constitutional change occurs in response to a crisis of constitutional performance or when constitution makers select institutions while experiencing high levels of electoral uncertainty.

I look in detail at the diverse origins of constitutional change and conditions of institutional selection to account for specific outcomes of constitutional design. This diversity is well represented in recent constitution-making experiences in Latin America. During periods of regime instability, the most frequent cause of constitutional change in the region was regime transition. This has changed, however, since 1978. As democratic regimes became stable, the large majority of constitutional replacements and amendments emerged as a consequence of shifts in the partisan context or as a response to the failure of the political regime to produce stable governments, provide public goods, or retain citizen support. At the same time, in a highly volatile electoral context, the level of information that constitutional designers had about their future positions varied widely from case to case.

A theory that aims at explaining both comparative variations and particular outcomes of constitutional choice naturally calls for an approach using a multi-method empirical analysis. Analyzing the effect of reform coalitions on variations in constitutional choice demands a large-*N* statistical analysis. Determining how the origins of reforms and the level of information of designers moderate the impact of short-term partisan considerations and power in institutional selection requires qualitative case studies. My strategy of empirical analysis follows this line of reasoning, thus moving from the most general to the most specific aspects of constitutional choice.

## OUTLINE OF THE BOOK

The first part of the book analyzes the rate of constitutional change in Latin America and shows the patterns of design that have emerged as a result of this process during the twentieth century and the early years of the twenty-first century. A two-level theory of constitutional choice is presented, and the hypotheses derived from this theory to explain variations in constitutional choice are tested by means of regression analysis.

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Chapter 1 discusses the frequency of constitutional replacements and amendments in Latin America and describes the substantive changes implemented in electoral and decision-making rules. It shows that although constitutional designs have been unstable, reform trends emerge over time. These trends are not, however, mutually consistent within or across types of constitutional rules. The chapter analyzes seemingly contradictory decisions of constitutional design and prepares the ground for exploring the reasons why constitution makers may have selected a particular set of institutions.

Chapter 2 discusses the nature of constitution making and develops a theory of constitutional choice that accounts for the dual nature of constitutions as cooperative and as power structures. This theory explains how governance problems shape the general guidelines for reform, whereas strategic calculations and power resources affect the selection of specific design alternatives. It also emphasizes the importance of the events that trigger reform and the designers' level of electoral uncertainty for understanding the relative impact of short-term partisan interests and power on particular instances of constitution making. The chapter elaborates on the different hypotheses that emerge from this theory and proposes the use of a testing strategy that combines quantitative and qualitative methods of empirical analysis.

The effect of the distribution of power within reform coalitions on constitutional choice is tested in Chapter 3 using a novel cross-country database on constitutional change in Latin America from 1900 to 2008. After controlling for alternative explanations of institutional choice based on historical legacies, diffusion, social pluralism, and economic conditions, the results of several regression analyses are found to be consistent with the hypothesis that there is a significant difference in constitutional choice depending on whether the party that controls or is likely to control the presidency has unilateral power or requires the support of other parties to approve reforms. The analysis also shows that when more than one party is necessary to pass constitutional changes, constituent bodies make seemingly inconsistent choices, such as adopting more inclusive and pluralistic electoral rules and strengthening the legislative powers of presidents. The chapter concludes with a discussion on the need to complement the statistical analysis with a selection of cases in which there is variation in the type of events that trigger reforms and in the level of information designers have about their future electoral positions.

The second section of the book compares the choices made by constitutional designers under different conditions of institutional selection. The first two cases, Argentina in 1949 and 1994, represent episodes of constitutional change initiated as a strategy to consolidate and redistribute power in a context of relatively low uncertainty about the outcome of coming elections. The other two cases, Colombia in 1991 and Ecuador in 1998, illustrate processes of constitutional change initiated as a response to institutional crises with different levels of electoral uncertainty about the future position of institutional designers. The comparative case analysis supports the proposition that although the