SIDESTEPPING THE CONSTITUTION: EXECUTIVE AGGRANDIZEMENT IN LATIN AMERICA AND EAST CENTRAL EUROPE

WILL FREEMAN[1]

ABSTRACT

Executive aggrandizement, or the weakening of checks on executive power through legal channels, is on the rise. Taken to extremes, it insulates incumbents against losing elections and puts democracy at risk. What strategies facilitate executive aggrandizement? According to a prominent explanation, incumbents use constitutional replacement and amendment to eliminate checks on executive power. This article challenges this view. It argues that new constitutions and amendments are often less to blame than a set of institutional strategies—colonization, duplication, and evasion—which allow executives to sidestep checks without eliminating them and amass more power than their constitutions formally allow. The article then theorizes how countries recover from executive aggrandizement through an analysis of Ecuador, while cautioning that it may take much longer to rebuild constraints on executive power than to dismantle them.

KEYWORDS: *constitutional decline, executive aggrandizement, Ecuador, Venezuela, Hungary, Poland*

1. PhD Student in Political Science at Princeton University. For comments, I thank Nancy Bermeo, Jan-Werner Müller, Kim Lane Scheppele, András Jakab, Howard Schweber, Johanna Fröhlich, Ezra Suleiman, and Peter Giraudo.

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INTRODUCTION

Over the past two decades, a growing number of democratically elected leaders have engaged in executive aggrandizement, using the law to weaken checks and concentrate power (Bermeo 2016). Taken to an extreme, this process has led to constitutional decline: a situation in which incumbents progressively insulate themselves against the threat of losing office through elections. How exactly does the weakening of checks on executive authority take place? Most accounts argue that executives do away with checks by writing new "authoritarian" constitutions and amendments that vastly expand formal executive power. When the separation of power dies, the thinking goes, new constitutions are usually to blame.

This article challenges this explanation. In emblematic cases of executive aggrandizement including Hungary, Venezuela, and Ecuador, prime ministers and presidents have overseen the writing of new constitutions. But far from demolishing the separation of powers, these charters have established institutional arrangements broadly similar to those found in well-functioning democracies. Moreover, even after writing new constitutions, executives have continued to alter institutions in ways that would be unnecessary if new constitutions facilitated executive aggrandizement entirely on their own.

If rewriting or radically amending constitutions are not the only routes to executive aggrandizement, where do its roots lie? This article argues that in order to weaken checks on their authority, political executives[2] tend to deploy a set of institutional strategies before and after the writing of new constitutions that combine formal constitutional change, sub-constitutional legal reform, and informal practices. Operating together, these strategies allow executives to subtly subvert the limits built into constitutions of their own making and amass much more power than these constitutions explicitly permit.

The first part of the article conceptualizes three institutional strategies that executives most often rely on to disable checks and concentrate power: colonization, duplication, and evasion. Specifically, it illustrates how executives and their allies in Venezuela, Ecuador, Hungary and Poland have used the law to colonize independent institutions, duplicate institutions controlled by the opposition, and evade remaining checks by lodging new institutions within gaps in the law that shield them from oversight.

Once executives deploy colonization, duplication, and evasion to empower themselves, can anything be done to rebuild checks and balances? Several scholars argue that replacing the constitution once again may be the best course of action.

2. Throughout the paper, the term "executive" is used to refer to the political executive leadership, usually made up of the president or prime minister and his or her top ministers.

This article takes a different position. Because the institutional strategies that generate executive aggrandizement combine formal constitutional change and subconstitutional legal reform, rolling back their negative effects should not often require full constitutional replacement. Instead, reforms that restore constraints on the executive may be more feasible and less destabilizing if they occur within the constitutional frameworks new administrations inherit.

However, this is not to suggest the path back from executive aggrandizement is easy. The article concludes with a discussion of Ecuador, where the government of Lenín Moreno appears to have begun the process of rebuilding checks on executive power yet has so far made only limited progress. This case indicates that executive aggrandizement may outlive its architects, becoming an unfortunate fixture of everyday politics even after reformers take office.

I. EXECUTIVE AGGRANDIZEMENT AND CONSTITUTIONAL DECLINE

Writing in the early 1990s, Samuel Huntington (1991) observed that following the "third wave" of democratization, it was unclear whether democracy would sustain its global high-water mark or suffer a new cycle of breakdown. Nearly three decades later, neither prediction seems entirely accurate. On the one hand, a handful of countries including Venezuela, Turkey, and Russia have lurched towards outright authoritarianism. They may hold regular elections, but incumbents are virtually guaranteed to win. On the other hand, third wave democracies are breaking down less often, and for shorter periods of time, than their predecessors (Bermeo 2016, 17). Countries including Poland, Ecuador, and Colombia may constitute more typical cases, experiencing periodic but less dramatic losses in the quality of democracy without abandoning democratic politics altogether. In these countries, elections involve meaningful competition between incumbents and opposition, but the democratic norms and institutions underpinning them rarely function in entirely neutral ways.

To make sense of these dynamics, legal scholars have begun to theorize why and how democratic constitutional orders malfunction without experiencing full-fledged authoritarian breakdown. For the purposes of this article, this phenomenon is discussed in terms of "constitutional decline." Constitutional decline is defined here as the process by which incumbent officeholders alter the constitutional order to insulate themselves against the threat of losing office through elections without eliminating this possibility entirely (Huq and Ginsburg, this issue). Taken to an extreme, constitutional decline may culminate in the emergence of "electoral authoritarian" or "competitive authoritarian" regimes, but it can also stop short of these outcomes (Levitsky and Way 2010; Schedler 2013).

Before moving on, it is worth clarifying that by adopting the term "constitutional decline," this article does not assume that all cases of constitutional decline begin with well-functioning liberal democracies. As Jorge González-Jácome (2017) has pointed out, the literature on "authoritarian constitutionalism" tends to overlook the fact that officeholders routinely used constitutional tools to limit democracy throughout the twentieth-century, long before recent cases of democratic backsliding. Ironically, several contemporary cases of constitutional decline in Latin America can be traced back to governments elected to reform such defective democracies. As it is defined here, then, "constitutional decline," is just one way in which liberal democratic constitutional orders can go wrong.

Taking on board this definition of constitutional decline, two broad sets of theories have emerged to explain when and how it occurs. The first takes a micro-level approach, explaining constitutional decline as the result of would-be autocrats abusing a specific set of legal tools. For instance, David Landau has called attention to constitutional amendment and replacement as mechanisms incumbents exploit to "sweep away horizontal checks on their power" (2012, 216). Meanwhile, Omar Varol (2015) notes the use of sub-constitutional legal devices like libel, electoral, and criminal laws to threaten members of the opposition, and Javier Corrales (2015) emphasizes the discriminatory enforcement and non-enforcement of such laws. These micro-level studies make a crucial step forward by specifying the legal devices incumbents use to entrench themselves in office. However, they do less to explain when and how incumbents deploy these tools together as part of coherent, long-term strategies.

A second set of theories takes a macro-level approach to explaining constitutional decline. Tom Ginsburg and Aziz Huq (2018) outline a process of "constitutional retrogression": would-be autocrats undermine democratic institutions and the rule of law using constitutional amendment, the elimination of institutional checks, the centralization of executive power, the contraction of the public sphere, and the elimination of political competition. Steven Levitsky and Daniel Ziblatt (2018) have argued that as conflict between newly elected outsiders and opposition escalates, outsider presidents use constitutional change to capture "referee" institutions like electoral councils and high courts and rewrite the rules of the game to benefit themselves. Kim Lane Scheppele (2018) and Mark Tushnet (2015) have developed the concepts of "autocratic legalism" and "authoritarian constitutionalism," respectively, to more generally describe the instrumental use of the law to undermine the foundations of liberal democracy. These macro-level theories make an important contribution by capturing the process of constitutional decline in broad strokes. However, they do more to diagnose symptoms of constitutional

decline, like eliminated checks and captured institutions, than to explain how incumbents produce these outcomes.

Whether scholars emphasize the micro or the macro, they tend to agree on at least one point: almost all cases of constitutional decline feature what Nancy Bermeo has called "executive aggrandizement," or the weakening of checks on executive power through legal channels (2016, 10–11). Presidents and prime ministers are the protagonists of constitutional decline, and their first steps usually involve "loosening the bonds of constitutional constraint on executive power" (Scheppele 2018, 549). For this reason, a perceptive review of the literature on the crisis of liberal democracy argues the real issue is a "crisis of incremental executive aggrandizement" (Khaitan 2019, 344).[3] However, we still know relatively little about how the process of executive aggrandizement unfolds across cases.

Consequently, another important question remains unclear: to what extent do executives rely on replacing or amending constitutions to concentrate power as opposed to other forms of institutional change? For the most part, the literature just discussed treats the writing and amending of new constitutions as key steps in the process of executive aggrandizement (Landau 2013; Levitsky and Ziblatt 2018). Recent studies, however, have emphasized that executive aggrandizement can be "achieved by informal, incremental, legislative, or conventional means rather than through a comprehensive formal constitutional reform package" (Khaitan 2019, 352; Sadurski 2019).

This article builds on the second view, arguing that new constitutions and formal amendments often play relatively minor roles in facilitating executive aggrandizement. In countries where executive aggrandizement has undoubtedly taken place like Hungary, Venezuela, and Ecuador, new constitutions have expanded executive authority. Yet they have tended to do so within limits, while also formally mandating the separation of powers and establishing a variety of independent institutions. Consequently, it is difficult to trace the de facto might of several countries' powerful executives back to specific passages of their countries' constitutions.

For instance, while Venezuela's 1999 Constitution undoubtedly expanded presidential powers, these powers still remained well "within the regional and global mainstream" (Landau 2018, 165). Regarding Ecuador, Catherine Conaghan (2016, 112) notes, "the chapter of the new constitution that deals with the executive branch fails to tell the full story of how presidential power has grown via constitutional restructuring." As for Hungary, Kim Lane Scheppele (2013, 561) has argued that the "interacting parts" of the legal system, rather than the constitution's

3. See also Elkins 2019: 52 and Kennedy 2019: 68.

individual provisions, have entrenched Prime Minister Viktor Orbán and his Fidesz party allies in office.

In order to explain executive aggrandizement, it is necessary to conceptualize the broader institutional strategies executives use to disable checks before and after the writing of new constitutions. By "institutional strategies," I mean the "patterns of action that are concerned with managing the institutional structures" of the state (Lawrence 1999, 162). Such institutional strategies may involve formal changes to constitutional texts, but they can also include sub-constitutional legal reform and informal practices. Any given strategy may be applied to a range of institutions. In other words, there is not just one strategy suited to disabling an independent high court. The aim here is not to develop an exhaustive typology of the strategies executives use to loosen constitutional constraints. Instead, it is to identify a few of the strategies that appear most frequently across cases. The next section conceptualizes three such strategies and illustrates how they operate in practice.

II. COLONIZATION, DUPLICATION, EVASION

A. Colonization

Scholars have noted that executives amass power by packing independent institutions like high courts or electoral councils with political allies (Landau 2013, 213; Levitsky and Way 2010, 12). However, we lack a systematic understanding of how this process unfolds across cases. I adopt a term used by Jan-Werner Müller (2017), "colonization," to refer to the process by which executives populate nominally independent institutions with loyal agents. Typically, executives colonize independent state institutions in one of two ways. When targeting existing institutions, they pursue a two-step process. First, executives or their allies in the legislature change the laws governing the tenure and termination of institutional officeholders to manufacture a critical mass of vacancies; then, the executive or legislative majorities are granted sweeping powers to appoint replacements to fill these vacancies.

Sometimes, this method serves to assert executive control over the judiciary. The rise of Rafael Correa and his coalition, Alianza PAIS (AP), in Ecuador provides an example. In 2011, an AP-sponsored constitutional amendment, backed by a popular referendum, created a new body for judicial administration, the Council of the Judiciary. The Organic Code of the Judicial Function then empowered this body to remove judges on the vaguely defined grounds of "criminal intent evident negligence, or inexcusable error." The council relied on the new regulation to suspend or fire hundreds of lower court judges, manufacturing a critical mass of vacancies it quickly filled with new, government-aligned judges (Vivanco 2014).

A similar process occurred in Venezuela. Shortly after Hugo Chávez first won office, his allies set up a new judicial administration body that fired dozens of judges on technical grounds and enabled his allies to unilaterally choose their successors (Coppedge 2003, 183–87).

A decade later in Hungary, Viktor Orbán and his allies in Fidesz applied an apparently similar strategy to capture the country's Constitutional Court, although in contrast to Chávez and Correa they did not legitimate their actions using popular referenda. The Fidesz supermajority in parliament implemented a series of legal reforms to establish a new system for nominating judges that required the vote of a two-thirds of parliament, increased the number of judges from eleven to fifteen, and lowered judges' mandatory retirement age (Bánkuti et al., 2012, 254–55). Because at this moment several judges were about to retire, these reforms gave Fidesz MPs the opportunity to appoint seven new judges and gain a majority on the court in a matter of months (Bánkuti, Halmai, and Scheppele 2012, 238–39). Once again, colonization relied on a two-step process of first creating vacancies and then giving the executive's allies permission to fill them.

Colonization also enables executives to tighten their hold over the civil service: an important but frequently overlooked check on executive power. As Ginsburg and Huq point out, "internal tensions in bureaucracy's design" are particularly important for constraining executives and providing some degree of bureaucratic autonomy" (2018, 103–4). In Hungary and Poland, colonization spelled the end of this type of autonomy and the beginning of executive aggrandizement. Legislators from Fidesz and the Law and Justice Party (PiS) enacted legal reforms that gave institutions they controlled—the Ministry of Public Administration and the Social Service Council respectively—the final say over hiring and firing civil servants (Jankovic 2016, 58–59; Lakner 2017, 154–57). At the same time, legislation in both countries replaced previous safeguards against arbitrary firing of civil servants with new no-fault termination policies. By relaxing termination policies and tightening hiring policies, powerful executives and their allies in both countries were able to manufacture and fill hundreds of vacancies in public ministries and local governments practically overnight.

Executives sometimes pursue a more straightforward method of colonization; they eliminate existing institutions altogether, replace them with new ones that fill the same functions, and fill these outwardly similar successor institutions with their political allies. In Venezuela, Chávez and his coalition applied this variant of colonization to capture the Supreme Court. After Chávez convened a National Constituent Assembly in his first year in office, this body invoked its self-proclaimed "original powers" to dissolve the country's Supreme Court and replace it with a

new high court, the Supreme Tribunal of Justice, to which it appointed a new set of justices. This body then frequently ruled in favor of the government, and in 2017 it stripped the country's opposition-controlled legislature of its lawmaking powers (Landau 2018, 170–71).

Colonization does not necessarily require the replacement of all the officeholders within a given institution. Instead, engineering simple majorities in an institution's leadership council or assembly may suffice. Take the colonization of Hungary's electoral council. Shortly after gaining its supermajority in 2010, Orbán's parliamentary coalition passed a reform to the electoral law ending the terms of most of the council's sitting members and changing the institution's appointment procedure. After the reform, opposition parties still controlled three of the council's seven seats, preserving the appearance that the opposition retained influence over its decisions (Bánkuti et al., 2012, 256). However, the simple majority of Fidesz partisans ensured it would systematically rule in favor of incumbents: the council permitted government-aligned private media to televise political ads during campaigns for the 2014 parliamentary elections (International Federation for Human Rights 2016, 23).

These examples demonstrate that colonization can be pursued through constitutional replacement, sub-constitutional legal reforms, or the adjustment of administrative rules. They also demonstrate that this strategy follows a similar logic from case to case in disabling checks. However, when it is carried out only once and in isolation from other institutional strategies, colonization is rarely sufficient for generating executive aggrandizement. This is because in the long term, even colonized institutions generate agency costs. Agency costs occur when state agents' specialized roles give them an informational advantage over their principals, which they can then use to pursue their own, independently formed goals (Ginsburg 2008, 59). Over time, the agents who executives install in colonized institutions may turn against them.

Accordingly, executives sometimes recolonize institutions to keep them from asserting newfound independence. For instance, in 2002, Venezuela's Supreme Tribunal of Justice split over whether to rule as unconstitutional a decision by the National Electoral Council (CNE) to invalidate a presidential recall referendum. Several members of the court argued for disobeying Chávez and refusing to invalidate the referendum. In response, Chávez's allies in the National Assembly increased the number of judges from twenty to thirty-two and gave themselves the power to elect judges by a simple majority vote, effectively recolonizing the court (Human Rights Watch 2008, 37–43). Still, colonization and recolonization are not the only methods executives use to concentrate power. They also deploy the more inconspicuous strategy of duplication.

B. Duplication

Power-concentrating executives sometimes confront independent institutions that are prohibitively costly to colonize, either because they are shielded by particularly robust legal barriers or filled with elected—instead of appointed—officials. Under these conditions, executives engage in a strategy of duplication by creating parallel bodies tasked with carrying out the same functions as the "original" institutions they aim to control. In her classic study of totalitarianism, Hannah Arendt explained that by duplicating institutions, leaders could shift "the actual center of power . . . without dissolving or even publicly exposing the groups that [had] thus been deprived of their power" (Arendt 1973, 395–96). When democratically elected executives duplicate institutions, they achieve the same effect. By shifting power to a parallel institution, they are able to quietly concentrate power without dissolving other branches of government, preserving the appearance that independent institutions continue to exist.[4]

Like colonization, the strategy of duplication usually proceeds in two steps and involves a combination of constitutional change and sub-constitutional legal reform. First, executives establish parallel bodies that duplicate the functions of existing, independent institutions; then, they implement reforms that reduce the prerogatives and resources of the originals while empowering their copies. Often, the targets are elected institutions like national legislatures and local governments. Executives could dissolve such institutions, but this can prove a costly path. Take the example of Peru's ex-president, Alberto Fujimori. After his administration carried out a self-coup and shut down Congress in 1992, he was able to quickly concentrate power in the executive, but his government soon faced international pressure and scrutiny, even from its allies (Levitsky and Way 2002, 24). By relying on duplication, power-concentrating executives are able to achieve a Fujimori-style concentration of power without attracting nearly as much unwanted attention.

The creation of parallel legislatures came as one of the first steps towards executive aggrandizement in Ecuador and Venezuela. After winning the presidency in 2006, Rafael Correa called and won a referendum on convening a new constituent assembly. The pro-Correa majority in the constituent assembly spent the next two years writing a new constitution, but along the way it also "arbitrarily assumed legislative powers," sending the Congress to recess and removing congressionally appointed officials, including the attorney general (Conaghan 2008, 56; De la Torre and Lemos 2016, 222). Opposition politician Osvaldo Hurtado pointed

4. For a related argument on mechanisms of institutional control, see Slater 2003: 87–91.

out that the assembly had "usurped the legislative functions of the National Congress" (Basabe-Serrano and Martinez 2014, 164). This is duplication: by creating a temporary parallel legislature, Correa circumvented his opponents in Congress without formally eliminating the institution. A strikingly similar tactic was deployed in Venezuela, where the 1999 Constituent Assembly took on several functions of the sitting Congress, appointing various public officials and rewriting the country's electoral law (Coppedge 2003, 179, 187): Chávez's successor, Nicolás Maduro, then applied duplication a second time. In 2017, he convened a new National Constituent Assembly. Nominally tasked with writing a new constitution, the second ANC instead effectively took over the role of the legislature (Landau 2018).

National legislatures are not the only elected bodies executive duplicate. They also use this strategy to reduce the power of opposition-controlled local governments. Correa and Chávez both relied on parallel, executive-controlled local authorities to discredit popular opposition mayors. After Correa first took office, the opposition mayor of Guayaquil, Jaime Nebot, helped organized a 200,000 strong rally against recentralizing provisions in the new constitution and Correa's proposed economic agenda. In response, Correa created a new agency headquartered in the port city, the Ministry of the Littoral, to act as a "counterweight" to Nebot's administration (Conaghan 2008, 55). Likewise, after opposition politician Antonio Ledezma was elected supermayor of Caracas in 2008, Chávez's allies in the National Assembly passed a law creating a "parallel power for the capital": a new administrative region with leadership appointed by the executive and its own budget (Lalander 2016, 179).

In Venezuela and Hungary, the duplication of local government was later replicated on a national scale. Between 2006 and 2009, the pro-Chávez bloc in Venezuela's National Assembly passed a series of laws creating a nationwide network of "local parallel institutions": executive-funded neighborhood organizations called Communal Councils (Lalander 2016, 171). While the Communal Councils received legal authority and an infusion of funding to provide local public services, additional legal reforms placed new limits on the authority of municipal governments, "reduc[ing] the scope of public functions in the hands of members of the opposition" (OAS 2009, 442). A strikingly similar duplication of local government unfolded under Viktor Orbán. Through a set of legislative acts in 2010 and 2011, Fidesz MPs established country and district government offices in parallel to existing local governments, with leadership directly appointed by the prime minister (Hajnal and Rosta 2019). According to an OECD report, Fidesz then "drastically reduced subnational government responsibilities," transferring authority over social services and local administration to the government offices while slashing local governments' funding (OECD 2016).

As these examples suggest, duplication is an effective strategy for capturing elected bodies. But it can also serve to disarm unelected institutions shielded by strong constitutional protections. Poland's governing PiS party applied this strategy to control regulation of public media. When the party gained a parliamentary majority in 2015, public media was not an easy target for capture. Article 213 of Poland's 1997 Constitution established the National Broadcasting Council (NBC) tasked with safeguarding the public interest regarding radio broadcasting and television and the right to information. Unable to easily colonize or eliminate this constitutional organ, PiS legislators passed two legal reforms that allowed them to duplicate it: first, a package of amendments in 2015 known as "the small media law," which reduced the NBC's authority over hiring and firing of public media staff; and second, a temporary "bridge" law in June 2016 that established a new regulatory body, the National Media Council. This body, appointed by the PiS majority in parliament and charged with identical tasks to the NBC, began acting as a parallel regulatory agency (Human Rights Watch 2017, 17–18). In the space of just a few months, the National Media Council fired or pressured out over two hundred public media journalists and appointed a former PiS legislator to direct state television (Klimkiewicz 2017, 208). Then, in December 2016, Poland's Constitutional Tribunal delivered a ruling criticizing the changes. The court stated, "There may not be a situation where an organ of the state that is established by statute deprives a constitutional organ of the state of its capacity to exercise its powers and perform its tasks" (Trybunal Konstytucyjny 2016). This, however, is exactly the outcome duplication is meant to achieve.

Once autocratic executives disable other parts of the state, they may still face resistance from institutions in civil society, such as organized social movements and universities. Because openly repressing civil society organizations is a clear red flag of authoritarianism, autocratic executives often rely on duplication to control these organizations as well. Of the cases discussed here, Ecuador has perhaps the strongest tradition of organized social movements. Between 1997 and 2005, two organizations—the Confederation of Indigenous Nationalities of Ecuador (CONAIE) and the National Teachers' Union (UNE)—played prominent roles in protests that toppled three presidents. Although these organizations largely backed Correa's first run for office, they joined the opposition after 2008. In response, the government duplicated the UNE by creating the Network of Teachers for Revolutionary Education (RED) and reactivated a defunct "parallel indigenous organization": the Federation of Ecuadorian Indians (FEI) (De la Torre 2013, 39; Herrera Llive 2017, 105).

Meanwhile, the administration took a series of steps to weaken the original organizations; using the reformed criminal code, it prosecuted CONAIE and UNE

leaders on terrorism charges and put new regulations in place that made it harder for the UNE to meet and collect dues (De la Torre and Lemos 2016, 229; Conaghan 2017, 513). Neither of the original organizations disappeared during Correa's time in office, but they were substantially weakened. By 2015, the number of dues-paying members in RED had surpassed the number of teachers in the independent UNE by over twenty thousand (Conaghan 2017, 519). Hungary's government has taken similar steps to control the country's academic institutions. In 2018, Orbán's Fidesz allies passed legislation duplicating the financially independent Academy of Arts and Science, which historically managed the country's network of research institutions. This legislation set up a new body, the Eötvös Loránd Research Network, with a leadership selection process heavily influenced by the prime minister. Without formally dissolving the Academy of Arts and Sciences, pro-Orbán legislators then stripped it of its assets and transferred them to the new institution. Duplication is an effective strategy for concentrating power within constitutional systems designed to disperse it. Yet to completely escape the bonds of constitutional constraints, executives sometimes turn to a third strategy.

C. Evasion

Institutions in a functioning constitutional system have oversight mechanisms: if their principals overstep their prerogatives or abuse their power, other institutions are designated to hold them accountable. Evasion occurs when executives break this chain of accountability. They do so by relying on vaguely written laws that create new institutions but fail to assign them specific prerogatives or oversight mechanisms. The result is a series of gaps in the law, or oversight voids, which executives can then exploit to exercise unchecked power. Because evasion is a particularly useful tactic for radically remaking the institutional landscape, it often appears during the initial phases of executive aggrandizement when newly elected leaders need to quickly overpower many countervailing institutions.

Chávez and Correa both made use of evasion early on. Shortly after taking office, they established de facto temporary legislatures, known as "Little Congresses," and embedded them within oversight voids. Chávez's allies in the National Constituent Assembly created such a void by including a vague set of transitory provisions in the draft of the constitution that they submitted to popular referendum (Brewer-Carías 2010, 69). These provisions did not clarify how exactly officeholders elected and appointed under the old constitution would be phased out and replaced. After citizens approved the new constitution in 1999, representatives in the ANC argued that the unclear transitory provisions had created constitutional "vacuums" that only

they could decide how to fill (Brewer-Carías 2001, 357). Next, the representatives adopted a decree to "develop and complement the Transitory Provisions of the New Constitution" (Brewer-Carías 2010, 70–72, 82–83). The decree dissolved the sitting Congress and replaced it with an unelected legislative body, the "Little Congress," which included fifteen ANC members and fifteen other representatives selected by the ANC (Combellas 2010, 159).

The Little Congress then unilaterally reshaped the constituted powers before the new constitution went into effect, removing opposition mayors and one governor from office and appointing new members to the Supreme Tribunal of Justice and the National Electoral Council (Coppedge 2003, 190; Corrales and Penfold 2012, 20–21). According to Venezuelan jurist Ricardo Combellas, the temporary legislature became a device for "flagrantly evading the principles of the recently approved constitution," allowing Chávez and his allies to fill state offices with "citizens loyal to the revolution" rather than adhering to the "transparent and participatory channels for selecting public officials established in the new constitution" (Combellas 2010, 159).

Chávez's strategy of evasion did not go without legal challenge. However, in a March 2000 ruling, the recently appointed Supreme Tribunal of Justice upheld the constitutionality of the Little Congress actions. The wording of the ruling captures the logic of evasion; because "the transitory provisions left open vacuums regarding the stages of transition to the new constitutional regime," the Tribunal decided that the ANC's Little Congress was stuck in "juridical limbo" and thus "subject to supra-constitutional norms only" (Brewer-Carías 2010, 80–83). Venezuela's Little Congress evaded all potential oversight mechanisms built into the new constitution and paved the way for further executive aggrandizement.

Ecuador's 2008 Constitution also created oversight voids that allowed executive-aligned institutions to amass more power than the country's constitution formally allowed. Ecuador's transitory provisions similarly created a temporary "Little Congress," formally called the Legislative and Auditing Committee. The provisions establishing this institution were somewhat more specific than Venezuela's, requiring the Little Congress to include representatives in proportion to parties' seats in the ANC (Mijeski and Beck 2011, 123). The provisions gave the Little Congress the vaguely specified task of "perform[ing] the duties of the National Assembly" and elaborating laws to ease the implementation of the new constitution (Pachano 2010, 298). Exploiting its freedom from institutional constraints, the Little Congress became an effective tool for evading inconvenient provisions in the new constitution that might have otherwise constrained the presidency. For instance, the body passed a controversial law to permit mining in indigenous territories despite Article 407 of the new constitution banning extractive activities in protected areas

(Mijeski and Beck 2011, 123) and gave Correa the ability to set monetary policy directly, ending the autonomy of Ecuador's Central Bank (Flores-Macías 2012, 37).

The other crucial oversight void embedded in Ecuador's 2008 Constitution concerned the newly created Constitutional Court. In 2007, Correa's legislative allies had used questionable procedures to appoint several judges to the court's successor institution, the Constitutional Tribunal. Although the 2008 charter established a process for appointments to the new court designed to guarantee judicial independence, its transitory provisions left open a "constitutional void" regarding the transfer of power between the existing tribunal and the new high court (Fröhlich and Pigozzi 2018, 77–78). This enabled the sitting Constitutional Tribunal judges, mostly Correa allies, to circumvent the formally prescribed procedure for appointments to the court and instead proclaim themselves the new justices of the Constitutional Court. Accordingly, while Ecuador's 2008 charter set up a de jure independent Constitutional Court, this "transitional period," which extended to 2012, rendered the court de facto subservient to the executive.

Applied together, colonization, duplication, and evasion allow executives to amass much more power than their constitutions formally permit. An important implication follows: supposedly problematic constitutions in Venezuela, Ecuador, and Hungary may not irreversibly lock in executive aggrandizement, as is commonly believed. Instead, executive aggrandizement and constitutional decline may occur just as much in spite of new constitutions as because of them. There has been much more study of constitutional decline than constitutional recovery, defined here as the process by which countries rebuild checks and balances and reestablish institutions independent from the executive. The next section makes an initial attempt to theorize this process. Specifically, it weighs two alternatives for countries experiencing the aftermath of executive aggrandizement: constitutional replacement and less extensive constitutional reforms.

III. UNDOING EXECUTIVE AGGRANDIZEMENT

After they leave office, power-concentrating executives tend to "leave behind long trails of laws, court rulings, and bureaucratic practices" (Conaghan 2017, 521). While there is little explicit theorizing about how to cope with the legal vestiges of executive aggrandizement, an earlier debate may offer starting points. Constitutional scholars have long sought to establish whether replacing or merely reforming constitutions already in place better served twentieth-century cases of democratization. Bruce Ackerman (1994) has argued that new democracies must break with the constitutional orders they inherit or risk a loss of legitimacy. Brazil

followed this path during its 1987–88 democratic transition. The old guard of the country's military regime and the opposition convened a constitutional convention and completely remade the institutional landscape (Elkins et al., 2009, 16).

By contrast, Andrew Arato (1995) insists there are advantages to preserving legal continuity. Continuity provides all actors with a sense of security and signals that future governments will be subject to the law. For instance, as the Institutional Revolutionary Party (PRI) left office in Mexico, old regime elites and opposition parties agreed on legal reforms that achieved a democratic "reforging" of the constitutional order without writing a new charter (Valadés 2007). More recently, Elkins et al. (2009) have put forward another argument for reform; constitutional replacement is politically costly. It raises the stakes for all actors involved and requires them to compromise on a wide range of issues. Keeping the existing constitution in place can provide a form of "political insurance" against radical institutional or policy shifts, easing the transition (Elkins et al., 2009, 198).

Analyses of twentieth-century transitions are helpful to consider, but they tend to concern transitions in which democratic governments replaced military juntas or single party dictatorships. Today's reformers instead take over from executives who have relied on colonization, duplication, and evasion to concentrate power. Moreover, reformers today may be less likely to receive the robust international backing that made twentieth-century experiments in post-authoritarian constitution building successful (Jakab 2018). Under these conditions, there are three reasons constitutional reform may be a more feasible route to restoring independent institutions than constitutional replacement.

First, the constitutions that powerful executives leave behind are relatively conducive to democratic governance. Although these constitutions are far from perfect, the institutional arrangements they put in place have more in common with well-functioning democracies than closed autocracies. For instance, constitutions like Peru's, Venezuela's, and Ecuador's—all established by power-concentrating executives—mandate the separation of powers and establish a wide range of independent institutions. For that reason, executives sometimes face resistance from state institutions even after colonizing them. After Correa and Chávez respectively captured their ombudsman's and public prosecutor's offices, for instance, these institutions protested further executive power grabs as violations of the constitution (Conaghan 2017, 516; Landau 2018, 171). The formal rules that make up these constitutions do not, on their own, turn democratic executives into autocrats. Reforming ordinary laws and passing limited amendments may suffice to restore checks on their power.

A second rationale for reform over replacement has to do with constitutions' popular legitimacy. When reformers take over from autocratic executives,

they are likely to inherit constitutions that were established with a relatively high degree of popular support. Take the example of Venezuela. Even though Chávez's political allies eventually monopolized the constitution-writing process, by the late 1990s almost all major political factions in the country agreed that a new charter of some form was necessary. Soon after the new constitution came into effect, even citizens who were ambivalent toward Chávez accepted the constitution as legitimate.

This became particularly apparent in April 2002, when ultraconservative opposition leader Pedro Carmona and a small military faction briefly overthrew Chávez and suspended the constitution. Many of Carmona's early supporters abandoned him, and mass demonstrations erupted to defend the constitution. Chávez quickly regained power (Corrales and Penfold 2012, 23). Eventually, even most of the opposition began to view the constitution as legitimate. After Chávez attempted to amend its provision on presidential reelection, "the Bolivarian constitution of 1999 evolved into a platform shared by opposition forces" (Lalander 2016, 174). Not all cases of executive aggrandizement involve significant popular support for new constitutions. In Hungary, the Fidesz government kept its plans to rewrite the constitution secret and never received a clear mandate to remake the country's institutions (Scheppele 2018, 550). Still, if new governments simply replace the charters they inherit, they run the risk of alienating citizens who remain loyal to leaders like Chávez, Correa, and Orbán years after they leave office.

There is also a third advantage of constitutional reform. Drafting an entirely new charter requires a deeply divided set of actors to compromise on a large set of issues. For countries recovering from executive aggrandizement and constitutional decline, this may not be a realistic expectation. When executives concentrate power as in Venezuela, Ecuador, or Hungary, oppositions usually fragment into various factions (Gandhi 2008). It may be unrealistic to expect these factions to form agreements among themselves about the contours of an entirely new constitution, let alone with members of the outgoing government. However, as Gabriel Negretto has noted, amendments and reforms of the ordinary law set a lower bar for compromise—one that even a divided opposition and incumbents may be able to reach (2012, 758).

This is not to suggest that reform is risk-free. For one, new administrations that choose reform over replacement may lose an important opportunity to make a symbolic, publicly visible break with the past. In rigid constitutional systems that put up high barriers to change, replacement may be a tempting option (Elkins et al., 2009, 76). In Ecuador, rigid constitutions have historically created strong

incentives for incoming administrations to write entirely new charters. Following spells of executive aggrandizement, if reformers gain control of only the executive and a simple majority or plurality of seats in the legislature, they may face resistance from parts of the state still controlled by the ex-incumbent's loyalists.

Despite these limitations, in the aftermath of executive aggrandizement, reform—rather than replacement—is arguably the best path. Yet, as recent developments in Ecuador demonstrate, even sustained reform efforts are unlikely to do away with executive aggrandizement overnight. Since 2017, the country has made progress toward constitutional recovery, or the rebuilding of checks and balances, under Correa's successor, Lenín Moreno. However, a subdued form of executive aggrandizement appears to linger on and threatens to become an unfortunate fixture of Ecuador's everyday politics.

That Correa left office at all is surprising. He deftly applied colonization, duplication, and evasion to control independent institutions and maintained approval ratings far higher than his predecessors for most of the duration of his two terms (De la Torre 2018, 80). However, after 2015, his public support began to wane. As the price of Ecuador's primary export, oil, dropped and opposition protests grew, he abandoned his plans to run for a fourth term in the country's 2017 presidential elections. Instead, he chose his longtime political allies, Lenín Moreno and Jorge Glas, to run for president and vice president, respectively, and they won the race (De la Torre 2018, 78).

Shortly after taking office, however, Moreno began to openly challenge Correa. First, he convened a national dialogue with opposition leaders of the left and right, amnestied activists jailed under Correa, and made public statements encouraging citizens to criticize the government (Labarthe and Saint-Upéry 2017, 30–32). Next, Moreno called a seven-question constitutional referendum to reverse institutional changes made under his predecessor. Voters approved measures to restore presidential term limits and name a temporary Council of Citizen Participation and Social Control (CCPSC): an institution established by the 2008 Constitution to appoint members of the National Electoral Council (CNE), Judicial Council, and Public Defender's Office. As a result of these steps, Moreno's government has earned a reputation for reform. Freedom House and Human Rights Watch have respectively noted its "steps to reduce the dominance of the executive" and its progress towards "repairing damage suffered by democratic institutions" (Freedom House 2019; Human Rights Watch 2019).

Observers remain divided over whether changes to the legal order have gone far enough. Enrique Ayala Mora claims only a new constituent assembly can restore the country's democratic institutions. He argues that the 2008 Constitution

is fundamentally "antidemocratic"; its organic structure gives excessive power to the president and undermines democratic representation by creating powerful, unelected bodies like the CCPSC (Ayala Mora 2018, 16–34). Because the constitution itself does not provide a means of eliminating such institutions, Ayala Mora insists on a new constituent assembly centered around "participation and debate" (2018, 165). Other observers, however, have argued incremental reforms will suffice. Conaghan claims "piecemeal legislative action" may be the "best way to deal with the legacies of Correa's normativity" (Conaghan 2017, 521). Similarly, Ecuadorian jurist Richard Ortiz Ortiz insists that recent reforms have sufficed to start a "process of transition" within Ecuador's democratic institutions (Ortiz Ortiz 2018, 558).

Given that Moreno took office in 2017, it may be too soon to tell what reform without replacement has been able to accomplish. At the very least, reforms seem to have restored some checks on executive power and a degree of independence for other institutions. The February 2018 referendum gave the temporary CCPSC a mandate to evaluate the conduct of officeholders in several accountability institutions (De la Torre 2018). The transitional CCPSC then used its authority to break the monopoly Correa's supporters held over the state by removing and replacing the sitting ombudsman and attorney general for alleged wrongdoing and filling vacant seats on the Judicial Council.

Sub-constitutional legal reform has also helped scale back executive aggrandizement. Shortly after Moreno took office, his faction of AP repealed Decree 16—a law that gave the executive the authority to dissolve civil society organizations deemed a threat to the state—and replaced it with a new statute that eliminated this power (Wolff 2018, 296). In addition, pro-reform legislators enacted major changes to Ecuador's media law. They eliminated SUPERCOM, a regulatory body Correa colonized with his allies and used to monitor media, issue punitive fines, and investigate critical journalists. Since then, independent civil society groups weakened under Correa like the influential independent teacher's union, UNE, are showing signs of revival, while watchdog groups have noted increasing media freedom (Freedom House 2019).

Still, Ecuador remains far from constitutional recovery. Executive aggrandizement may have diminished from its peak under Correa. However, there are troubling signs that it lingers on in a subdued form. One concern relates to the judiciary. Moreno's allies in the transitional CCPSC overstepped the unclear mandate they received from the 2018 referendum. Later that year, they removed all of Ecuador's Constitutional Court justices—most of whom were Correa allies—and replaced them with new justices after a three-month vacancy period. They also

replaced members of the CNE. Both moves attracted criticism based on rule-of-law standards.

Then, after the transitional CCPSC was replaced by an elected version of this body in 2019, Correa supporters regained influence within the institution. The new CCPSC subsequently attempted to reverse several of the decisions regarding state officeholders made over the preceding year. Reformist judges on the Constitutional Court condemned this move, and pro-Moreno legislators in turn voted to remove the Correa allies from the elected CCPSC in July (Celi 2019). In response, Correa's supporters have alleged that Moreno's pro-reform bloc is manipulating the law to its own ends. Meanwhile, another faction has concluded that the flaw is with the institution itself, starting a campaign to abolish the CCPSC via referendum.

Recently, institutional disputes have been overshadowed by mass protest. In October 2019, protests opposing plans to reduce fuel subsidies spiraled into nation-wide unrest. After a weeklong stalemate, Moreno's government reached an agreement with protestors to retain fuel subsidies and establish a commission to investigate human rights abuses committed by state security forces during the demonstrations. These events confirm that although Ecuador may have made initial steps towards constitutional recovery, for now, it remains trapped in a cycle of "democratic careening" characterized by "intense conflict between partisan actors deploying competing visions of democratic accountability" (Slater 2013, 731). Indeed, it may take much longer to rebuild constraints on executives than it takes to initially tear them down (Elkins 2019, 57).

If Ecuador yields lessons for other countries attempting to reverse constitutional decline, they are not altogether comforting ones. On the one hand, constitutional and sub-constitutional legal reform may allow new governments to rehabilitate independent institutions and reconstruct horizontal checks. But nothing guarantees this will be a quick or unidirectional process. Regarding Ecuador's recent reforms, Carlos de la Torre has written that "Moreno's attempt might fail precisely because, like his predecessor, he is using laws instrumentally" (De la Torre 2019). His warning points to a troubling paradox: when new administrations take office after episodes of executive aggrandizement, they may find themselves incentivized to use legal strategies similar to those of their predecessors. As a result, it may be difficult to distinguish between the start of constitutional recovery and a new round of executive aggrandizement. To more systematically explore how countries cope with the aftermath of executive aggrandizement, future work should examine additional cases. The best case scenario for Ecuador may be that through iterated interaction, both sides recognize that institutionalizing more robust checks is in their long-term interest.

IV. CONCLUSION

In 2007, then–vice president of Venezuela Jorge Rodríguez made a paradoxical statement: the aim of his administration, he stated, was to establish "a dictatorship of true democracy" (Corrales and Penfold 2012, 34). It is difficult to parcel out exactly what he meant. But developments in a growing number of democracies show that executives can establish near-dictatorial concentrations of power from within democratic constitutions. This article has attempted to shed light on some of their strategies. It has argued that although power-concentrating executives often replace their countries' constitutions, the new constitutions they write are not the only problem. Instead, executives deploy institutional strategies that combine formal constitutional change, sub-constitutional legal reform, and informal practices to subvert even those constraints built into constitutions of their own making.

After conceptualizing three such strategies—colonization, duplication, and evasion—this article theorized how countries might recover from executive aggrandizement. If the experience of Ecuador is any guide, the outlook is not hopeless. As constitutions themselves are rarely sufficient to generate executive aggrandizement, reformers may be able to make progress with amendments and piecemeal reforms to ordinary laws. However, we have little reason to believe executive aggrandizement disappears as soon as new administrations take office. While this article makes an initial attempt at theorizing the mechanisms by which executive aggrandizement arises and breaks down, it leaves several important questions unaddressed. Future studies should conceptualize additional strategies that executives use to concentrate power, systematically explain variation in the use of these strategies, and explore the conditions under which executive aggrandizement does and does not disappear after alternation in office.

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